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A treatise on the statute of frauds.



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A

TREATISE

ON THE

STATUTE OF FRAUDS.

BY
H. G. WOOD,

AUTHOR OF "FIRE INSURANCE," "LANDLORD AND TENANT,"
"SLANDER," ETC., ETC.



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PREFACE.

THERE is probably no field of the law in which judicial legislation has been more vigorously indulged than in the construction and application of the Statute of Frauds, and none in which there is more needless conflict than has arisen upon the construction of this celebrated statute, which, to the common mind, seems so plain as to be incapable of misconstruction or doubt. But the amount of litigation arising under it has grown into enormous proportions, and the number of cases which have been before the appellate courts for decision can be counted by the thousands; and now, after the lapse of nearly two centuries, many of the questions arising under it are not definitely settled, and the conflict of doctrine upon some portions of it is remarkable. If any argument is needed to show the advantage of the elastic principles of the common law, as applied to the business relations of mankind, over the arbitrary provisions of a statute, it seems to me that the experiences developed by this statute afford it.

When I started out in this field of the law, it was with the purpose simply to give the profession a revised and Americanized edition of Mr. Agnew's excellent work upon this topic; but I soon found that my own work would so largely exceed that of the author that it would be unjust to him, as well as to myself, to pursue that course; therefore, I concluded that it would be better to write an original work, using such portions of Mr. Agnew's work as are applicable to the state of the law in this country.

Where the conflict of doctrine in the various States is real, and incapable of being reconciled, I have stated the rules adopted in the different States; and, where there is merely an apparent but no real conflict, I have endeavored to point out the real doctrine, and to show that no substantial difference exists.

I have endeavored to present the different phases of the topic

fully, and to make the work as practical as possible, by giving apt illustrations of the rules from the cases.

I have given the gist of several hundred cases, English and American, in the notes and text; and in the prosecution of my work have aimed to make it a *useful* book to those having occasion to use it, rather than a symmetrical or interesting one.

In the index, under the most vexed heads of the subject, I have called attention to the leading cases, the gist of which is given in the work, with a view to calling attention directly to those cases whose doctrine is the most approved upon the question involved. I make this explanation because a similar course pursued by me in the index to my work upon "The Statute of Limitations" was criticized somewhat sharply, and said to be meaningless and illogical; but, from the very large number of letters received by me from members of the profession in different sections of the country commending this course, I yield to the convenience of the profession, rather than to the really logical method of preparing an index.

Hoping this work will lighten somewhat the labors of the profession in investigating questions arising under these statutes, I submit it to their criticism.

H. G. WOOD.

Boston, April 4, 1884.

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STATUTE OF FRAUDS.

STATUTE OF FRAUDS.

29 CAR. II. c. 3.

SECTION 1. All leases, estates, interests of freehold, or terms of years, or any uncertain interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seizin only, or by parol, and not put into writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making the same to the contrary notwithstanding.

SEC. 2. All leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts, at least, of the full improved value of the thing demised.

STATUTE OF FRAUDS.

CHAPTER I.

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19. Entry under Void Lease, Effect of.
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21. Rule in *Doidge v. Bowers*.
22. How Tenancy from Year to Year may be Created.
23. Implied Tenancy from Year to Year.
24. Rebuttal of Presumption.
25. Void Lease may Enure as Agreement to Lease.
26. Specific Performance.
27. Terms of Occupancy Regulated by Parol Lease.
28. Rule in *Tooker v. Smith*.
29. Covenants in Farming Lease.
30. Covenant to Paint.
31. Proviso of Re-entry.
32. Rent Paid in Advance.
33. Parol Lease may be Special in its Term.
34. Collateral Agreements.
35. Determination of Term under Void Lease.
36. Tenancy Determined at End of, without Notice.

SECTION 1. What is an Uncertain Interest in Lands.—The words “all leases, estates, interests of freehold, or terms of years, or any uncertain interest, etc.,” extend only to *interests which are uncertain as to duration*.¹ Collecting the meaning of the first by aid of the language and terms of the second section, and the exceptions therein contained, it seems that the leases so meant to be vacated by the first section, must be understood as leases of the like kind with those in the second section, but which convey a larger interest to the party than for the sum therein named, and such also as are made under a rent reserved thereupon.²

In Georgia,³ Maryland,⁴ and South Carolina,⁵ the statute, so far as it is applicable to the sale or demise of lands, is identical with that of 29 Car. II. Cap. 3, as stated *supra*. But in all the other States and Territories of this country, while the principle upon which this statute rests is adopted, yet substantive differences exist, both as to its language and in its application, and the amount of rent to be paid does not have any effect in determining the validity of the lease. In Alabama, Arkansas, California, Colorado, Connecticut, Dakota, Delaware, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New York, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming, parol leases for a longer term than one year are invalid, while in Florida two years, and in Indiana and New Jersey three years is the term limited, while in Maine, Massachusetts, Missouri, New Hampshire, Pennsylvania, and Vermont parol leases have no effect to create other than

¹ *Wood v. Lake*, Say, 3. The first section seems to be co-extensive with the fourth, and consequently every interest which is within the fourth section is equally within the first, unless it comes within the saving of the second. Sugd. V. & P. 14th ed. 122.

² *Crosby v. Wadsworth*, 6 East, 602, *per* LORD ELLENBOROUGH. If an estate of whatever value should be conveyed to a purchaser by livery of seizin without writing, the act would avoid the estate, although the purchaser has paid his money. An actual lease for any given number of years,

whether with or without rent, or any interest uncertain in point of duration, must, it would seem, equally fall within the provision of the first section, and cannot be sustained unless it comes within the saving in the second. Sugd. V. & P. 14th ed. 122; *Crosby v. Wadsworth*, *ante*; *Lord Bolton v. Tomlin*, 5 Ad. & El. 856. See also *Cooch v. Goodman*, 2 Q. B., for the extent of the second section, in connection with the first.

³ See Appendix, “Georgia.”

⁴ See Appendix, “Maryland.”

⁵ See Appendix, “South Carolina.”

estates at will, and practically this is the case in North Carolina and Ohio.

SEC. 2. Effect of Statute as to Lessor's Remedies.—The effect of the statute, so far as it applies to parol leases not exceeding the period named therein, is that the leases are valid, and that whatever remedy can be had upon them in their character of leases may be resorted to; but in England, under the fourth section, it has been held that no right is conferred to sue the lessee for damages for not taking possession. Thus, in *Edge v. Stafford*,¹ it was held that a parol agreement to take furnished lodgings for "two or three years" amounted to a lease, and gave the lessor a right to whatever remedy he could have in the character of a lease; but that inasmuch as the contract was for "an interest in lands" within the fourth section, the tenant was not liable in an action for not taking possession. But the current of authority in this country, so far as this question has been under review, is opposed to this rule, and it is held that the right to rent under a parol lease for the statutory period, is good from its inception, and will support an action for rent from that period, *whether the lessee goes into possession or not*.² But this must be understood as the rule in those instances only where the lease takes effect from the time when it was made, or in those States where it is held, as is the case in New York,³ Colorado,⁴ and Indiana,⁵ that a parol lease to commence *in futuro* vests a present interest in the term.

SEC. 3. Easements can only be Created by Deed.—An easement, like all other incorporeal hereditament affecting land, can only be created or transferred by deed. All such hereditaments lie in grant and not in livery, and pass by mere delivery of the deed.⁶ Thus, in *Hewlins v. Shippam*,⁷ the

¹ 1 C. & J. 391.

² *Huffman v. Stark*, 31 Ind. 474; *Young v. Dake*, 5 N. Y. 463; *White v. Maynard*, 111 Mass. 250. So also see *Coe v. Clay*, 5 Bing. 440; *Jenks v. Edwards*, 11 Exchq. 775, and *Wright v. Stewart*, 5 Ad. & El. 856.

³ *Young v. Dake*, *ante*.

⁴ *Sears v. Smith*, 3 Col. 287.

⁵ *Huffman v. Stark*, *ante*.

⁶ *Wood v. Leadbitter*, 13 M. & W. 842; 14 L. J. Ex. 161; *per ALDERSON, B.*, overruling on this point, *Wood v. Lake*, Say, 3; *Webb v. Paternoster*, Palm. 71; 2 Roll. 152; Poph. 151; *Winter v. Brocklewell*, 8 East, 308; *Taylor v. Waters*, 2 Marsh, 551; 7 Taunt. 384; *Wood v. Manly*, 3 Per. & D. 5; 11 Ad. & El. 34.

⁷ 5 B. & C. 221. In *Collins Co. v.*

action was for stopping up a drain leading from the plaintiff's premises, through the defendant's yard; the plaintiff was non-suited, on the ground that the right to have the drain pass through the defendant's yard was an interest in the defendant's land, and under the statute, there being nothing in writing to create the right, but its foundation resting in parol, was a right at will only; and the Court of King's Bench held that the non-suit was right.¹ In *Crocker v. Cowper*² the facts were similar to those in *Hewlins v. Shippam*, except that upon the construction of the license it appeared to have been made for a term of years; but that distinction was not taken, and the court said that, "with regard to the question of license, the case of *Hewlins v. Shippam* is decisive to show that an easement like this cannot be conferred except by deed."³ In *Wood v. Leadbitter*⁴ the whole of the authorities on the subject were most fully discussed. There the action was trespass for assault and false imprisonment. The facts were as follows:—Lord Eglington was steward of the Doncaster races: tickets of admission to the grand stand were issued with his sanction, and sold for a guinea each, entitling the holders to come into the stand and the enclosure round it during the races; the plaintiff bought one of the tickets, and was in the enclosure during the races; the defendant, by the order of Lord Eglington,

Marcy, 25 Conn. 239, a license to erect upon the land of another a permanent addition to a building, of a substantial character, was held to amount to a grant of an interest in lands, within the statute of frauds; and in *Hall v. Boyd*, 14 Ga. 1, it was held that a parol license to build a bridge on another's land does not confer a right to rebuild. Easements are created only by deed. *Fuhr v. Dean*, 26 Mo. 116; or presumed grant by long user. *Stearns v. Janes*, 12 Allen (Mass.) 582; *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Carlisle v. Cooper*, 19 N. Y. Eq. 372; *Luce v. Carley*, 24 Wend. (N. Y.) 451; *Watkins v. Peck*, 13 N. H. 360; *Mannier v. Myers*, 4 B. Mon. (Ky.) 514; *Stokes v. Appomattox Co.* 3 Leigh (Va.) 318; *Smith v. Bennett*, 1 Jones (N. C.) L. 372; *Biddle v. Ash*, 2 Ashm. (Penn.) 211; *Esling v. Wil-*

liams, 10 Penn. St. 126; or by an implied grant as a right necessarily incident to the thing granted. *Braksley v. Sharp*, 9 N. J. Eq. 9; 10 id. 206; *Lampman v. Schilks*, 21 N. Y. 505; *Kenyon v. Nichols*, 1 R. I. 412; *Phillips v. Phillips*, 48 Penn. St. 178; and in no case can such rights be created by, or exist in, parol. *Huff v. McCauley*, 53 Penn. St. 206.

¹ See the judgment of *BAYLEY, J.*, and see *Bryan v. Whistler*, 8 B. & C. 288; 2 Man. & Ry. 318; *Bradley v. Gill*, 1 Lut. 69; *Barlow v. Rhodes*, 1 Cr. & M. 439; *Mason v. Hill*, 5 B. & Ald. 1; 2 Nev. & M. 747.

² 1 C. M. & R. 418.

³ And see *Bridges v. Blanchard*, 1 Ad. & El. 536; *Wallis v. Harrison*, 4 M. & W. 538; *Williams v. Morris*, 8 M. & W. 488.

⁴ 13 M. & W. 838; 14 L. J. Ex. 161.

desired the plaintiff to leave the enclosure, and on his refusing to do so, ejected him, but did not return the guinea. It was held that this was an easement which could only have been created by deed. A somewhat similar doctrine was adopted in a Massachusetts case,¹ in which it was held that the sale of a ticket of admission to a concert only amounts to a revocable license to the purchaser to enter the building in which it is given, and to attend the performance; and if revoked before the performance has commenced, and before he has taken the seat to which the ticket entitles him, and he remains therein after notice of the revocation, and refuses to depart upon request, he becomes a trespasser and may be removed by the use of so much force as is necessary for that purpose, and that his only remedy therefor is by action upon his contract.²

SEC. 4. Sporting Licenses.—A license to shoot or fish for a term amounts to a demise of an incorporeal hereditament and can only be created by deed.³ But a license to do an act

¹ *Burton v. Scherff*, 1 Allen (Mass.) 133.

² In *Smith v. American Institute*, 7 Daly (N. Y. C. P.) 526, it was held that an exhibitor at a fair, who has paid a license-fee for space in the exhibition building, is liable to be ejected, together with her goods, if she persists in advertising the goods exhibited by an indecent circular; where it is expressly provided, as a condition of admission, that the managers reserve the right to refuse admission to any exhibitor whom they may consider an improper person, and also exclude any articles they may deem objectionable. Indeed, where a license is given upon a condition, there can be no question but that the licensee must conform to the condition, in order to make the license operative as a protection against liability for acts done in pursuance of it. *Dempsey v. Kipp*, 62 Barb. (N. Y.) 311; and there can be no question but that certain conditions may be implied which have the same force as express conditions would have.

³ *Bird v. Higginson*, 6 Ad. & El. 824; *Thomas v. Fredricks*, 10 Q. B. 775;

Bayley v. M. of Conyngham, 15 Ir. C. L. R. 406; *Perry v. Fitzhowe*, 8 Q. B. 757; *Hill v. Lord*, 48 Me. 83. In *Webber v. Lee*, 45 L. P. n. s. 591, an action was brought to recover damages for the breach of an agreement to share a shooting, and to pay £100 and one fourth of the expenses. The defence denied the agreement, and alleged that there was no memorandum in writing within the meaning of the statute of frauds. At the trial it appeared that the plaintiff was the lessee of 500 acres of shooting, and he advertised for a gentleman to share the shooting and the shooting-lodge with him. The advertisement, after describing the shooting, went on to say that the "lessee requires a genial sporting companion to join him on equal terms, paying £200 for his half-share of shooting, and receiving half of total of game killed." The plaintiff afterward wrote to the defendant a letter in the following terms: "I now write to say that if you think a half-share would be more than you could manage, I should be very pleased to give you half of the share I retain for myself, i.e. £100

on the land of another, *if not an easement, or involving an interest in real estate*, may be given by parol,¹ and under this rule, it has been held that a license to insert beams in the wall of a house, is not an interest in lands which must be in writing,² and the same has also been held as to a parol license to float spars and timber on a stream;³ and in all instances it may be said that a parol license to enter upon the premises of another for any purpose, *which has been executed*, affords a complete defence to the licensee against an action for doing such act, although, under the statute of frauds, it was void, and if executed *after* it had been revoked, would have made the licensee a trespasser.⁴

SEC. 5. Freehold Interest running with Inheritance. — A grant of a freehold interest running with the inheritance cannot bind a stranger to the grantor unless the grant was by deed.⁵ Thus, the owner of land sold the standing wood thereon, with a license to the purchaser to enter upon the land and remove it within a certain time. But, before the license was acted upon, he conveyed the premises to a third person who knew of the license, and it was held that the license was revoked by the conveyance, and could not be enforced against the purchaser of the land, notwithstanding his knowledge of the facts,⁶ the rule being that a parol

from the 1st September to the 1st February, shooting with equal liberty with myself, and a quarter of the total game killed. . . . The shooting days could be arranged to suit our convenience." It was afterwards agreed between the plaintiff and defendant, by word of mouth, that the defendant should take half of the plaintiff's share and one fourth of the game killed. Subsequently, the defendant refused to carry out this agreement. The jury found a verdict for the plaintiff for £40. But the verdict was set aside, the court holding that an agreement which entitles one party to it on the payment of money to go upon the land of the other party and exercise sporting rights and take away a proportion of the game killed to his own use, is more than a mere revocable license

to use the land, for it conveys an interest in the land coupled with a participation in the profits, and so is within the statute of frauds, and ought to be in writing; and that judgment must be for the defendant.

¹ Snowden v. Wilas, 19 Ind. 10.

² McLarney v. Pettigrew, 3 E. D. S. (N. Y. C. P.) 111.

³ Rhodes v. Otis, 33 Ala. 578.

⁴ Pratt v. Ogden, 34 N. Y. 20; Marston v. Gale, 24 N. H. 176; Walter v. Post, 6 Duer. (N. Y.) 363; Arrington v. Larrabee, 10 Cush. (Mass.) 512; Houston v. Laffee, 46 N. H. 505; Carlton v. Reddington, 21 id. 291; Owen v. Field, 12 Allen (Mass.) 457.

⁵ Perry v. Fishowe, 8 Q. B. 757; Lord v. Hill, 48 Me. 83.

⁶ Drake v. Wells, 11 Allen (Mass.) 141.

license to do an act upon another's land is revoked either by the death of the licensor or the conveyance of the premises by him,¹ and neither the knowledge by the executor of the licensor or his grantee, of the fact that such license had been given, will save it from the operation of this rule.²

SEC. 6. Parol License, when Revocable.—A mere parol license, not coupled with an interest in the land, is revocable at any time, although it has been executed, and the licensee has, in acting upon it, been put to expense. Thus, where the lord of the manor granted a license to build a cottage on the waste, and the license had been executed, and the cottage inhabited by the licensee, LORD ELLENBOROUGH said: "A license is not a grant, but may be recalled immediately, and so might this license the day after it was granted."³ So where the plaintiff, on the faith of a parol agreement, for valuable consideration made a channel for water on the defendant's land, but no conveyance of the land was made to the plaintiff; it was held that the defendant was entitled to revoke the license.⁴ In a Massachusetts case⁵ it was held that an oral license, given by the owner of land, to lay an aqueduct across his land, is revocable, and that, after its revocation, the owner of the land was justified in cutting it off, and that a court of equity would not restrain him from so doing. In Rhode Island⁶ a parol license to the owners and occupants of one farm, in perpetuity, to pass and repass with their servants, horses, carts, carriages, etc., in a way prescribed, over an adjoining farm, given by the owner of the latter farm, was held to be, at law, revocable at his pleasure, notwithstanding

¹ *Eggleston v. N. Y. & C. R. R. Co.*, 35 Barb. (N. Y.) 162; *Carter v. Harlan*, 6 Md. 20; *Whittaker v. Canthorne*, 3 Dev. (N. C.) L. 389.

² *Drake v. Wells*, ante.

³ *Rex v. The Inhabitants of Herndon-on-the-Hill*, 4 M. & Sel. 565. See also *Rex v. Inhabitants of Geddington*, 2 B. & C. 129; *Rex v. Inhabitants of Hagworthingham*, 1 B. & C. 634; *Rex v. Warblington*, 1 T. R. 241; *Rex v. Inhabitants of Standon*, 2 M. & Sel. 461; *Duinneen v. Rich*, 22 Wis. 550; *Hetfield v. Central R. R. Co.*, 29 N. J. L. 571; *Jamieson v. Milleman*, 3

Duer. (N. Y.) 255; *Kimball v. Yates*, 14 Ill. 464; *Clute v. Carr*, 20 Wis. 531; *Turner v. Stanton*, 42 Mich. 506; *Druse v. Wheeler*, 22 Mich. 439.

⁴ *Fentiman v. Smith*, 4 East, 107. And see *Cocker v. Cowper*, 1 C. M. & R. 418; *Hewlins v. Shippam*, 5 B. & C. 221; 7 D. & R. 783; *Bryan v. Whistler*, 8 B. & C. 288; 2 M. & R. 318; *Adams v. Andrews*, 15 Q. B. 284; *Taplin v. Florence*, 10 C. B. 744.

⁵ *Owens v. Field*, 12 Allen (Mass.) 457.

⁶ *Foster v. Browning*, 4 R. I. 47.

ing the licensee had, upon the faith of it, made expenditures of money and labor in building the prescribed way. Nor is a license rendered irrevocable by the circumstance that it is in writing and under seal¹ or predicated upon a consideration.² Thus, in the case last cited, the parties owned adjoining lots in the city of Syracuse. The defendant had a private drain connecting with the public sewer in another street. In consideration of seven dollars he gave the plaintiff a writing stating that the money was for the right to drain through his premises, and in pursuance of it the plaintiff built a plank drain connecting with the defendant's, and of the same size. After more than twenty years the plaintiff substituted a tile drain of greater capacity, which caused an overflow into the defendant's cellar. The defendant then cut the connection and refused the plaintiff access to the premises to repair the drain. The court held that an action would not lie against the defendant therefor, as the license granted by him was revocable at any time, notwithstanding it had been enjoyed for more than the prescriptive period, and was in writing predicated upon a consideration and executed.³ Of course, an occupancy under a license can never ripen into a title however long continued, because, as in the case of an ordinary tenancy, the occupancy is in subservience to and recognition of the title of the licensor,⁴ and such an occupancy has none of the elements requisite to create a prescriptive right.

SEC. 7. License coupled with Interest in Land Irrevocable.—

A parol license, coupled with an interest in the land, is,

¹ *Jackson v. Babcock*, 4 John. (N. Y.) 418; *Wiseman v. Lucksinger*, 84 N. Y. 31; 38 Am. Rep. 479.

² *Wiseman v. Lucksinger*, *ante*; *Hewlins v. Shippam*, 5 B. & C. 221. In *Johnson v. Skillman*, 29 Minn., 95; 43 Am. Rep. 192, it was held that, where a person had orally promised others that, if they would erect a good custom mill at a certain point on their own land, he would give them the privilege of flowing his land so long as they would maintain the mill; in pursuance of which, and induced partly by such promise, such persons at large expense erected said mill, the licensor

was not precluded from revoking such license, and that the case did not show such an agreement, as would warrant a court of equity in decreeing a specific performance in *Wheeler v. Reynolds*, 66 N. Y. 227; *Hazelton v. Putnam*, 3 Pin. (Wis.) 107; *Wiseman v. Lucksinger*, *ante*; *Bankart v. Tennant*, L. R. 10 Eq. 141.

³ *Babcock v. Utter*, 1 Abb. (N. Y.) App. Dec. 27; *St. Vincent Orphan Asylum v. Troy*, 76 N. Y. 108; 32 Am. Rep. 286.

⁴ *Wiseman v. Lucksinger*, *ante*; *St. Vincent's Orphan Asylum v. Troy*, *ante*.

however, irrevocable, when it has been executed and the right extinguished. Thus, in *Liggins v. Inge*,¹ the plaintiffs' father, who was entitled to a flow of water to his mill over the defendants' land, by a parol license, allowed the defendants to cut down and lower a bank, and erect a weir upon their own land, the effect of which was to divert the water required for the working of the plaintiffs' mill into another channel; it was held that the plaintiffs could not maintain an action against the defendants for continuing the weir.² But, where it is sought to couple with a license a parol grant of an interest in land, the attempted grant being void, the transaction remains a mere license. Thus, in *Wood v. Leadbitter*,³ ALDERSON, B., said: "It may be convenient to consider the nature of a license, and what are its legal incidents. And, for this purpose, we cannot do better than refer to LORD C. J. VAUGHAN'S elaborate judgment in the case of *Thomas v. Surrell*, as it appears in his reports. The question there was, as to the right of the Crown to dispense with certain statutes regulating the sale of wine, and to license the Vintners' Company to do certain acts, notwithstanding those statutes. In the course of his judgment the Chief Justice says:⁴ 'A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which, without it, had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood, or warming him, they are licenses; but it is consequent, necessarily to

¹ 7 Bing. 682; 5 M. & P. 712.

² And see *Winter v. Brocklewell*, 8 East, 308; *Blood v. Keller*, 11 Ir. C. L. R. 124; *Salter v. Woollams*, 2 Man.

& Gr. 657; *Davies v. Marshall*, 10 C. B. (N. S.) 697.

³ 13 M. & W. 844; 14 L. J. Ex. 161; the facts of which are stated *ante*.

⁴ Vaughn. 351.

those actions, that my property may be destroyed in the meat eaten, and in the wood burnt. So, as in some cases, by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property.' Now attending to this passage, in conjunction with the title 'License' in Brook's Abridgment, from which, and particularly from paragraph 15, it appears that a license is in its nature revocable, we have before us the whole principle of the law on this subject. A mere license is revocable: but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant to which it was incident. It may further be observed, that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol.¹ But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a valid grant, and it is therefore revocable. Thus, a license by A to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license be, as put by CHIEF JUSTICE VAUGHAN, a license not only to hunt, but also to take away the deer, when killed, to his own use, this is in truth a grant of the deer, with a license annexed to come on the land; and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it: he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a water-course, to flow on the land of the licensee. In such a case there is no valid grant of the water-course, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted

¹ See also *Wood v. Manley*, 11 Ad. & El. 34; *Feltham v. Cartwright*, 5 Bing. (N. C.) 569.

by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the water-course; and if it did, then the license would be irrevocable." A license is always revocable where the act licensed to be done is to be done upon the land of the licensor, and if granted by deed, would amount to an easement¹ for the reason that a freehold interest in lands can only be created or conveyed by deed, and an easement, as we have already seen, can only be created by deed or prescription.²

A license to dig for tin, and to dispose of the tin so obtained, was held to be irrevocable, on account of its carrying an interest in the ore.³ An executed license cannot be revoked as to the part executed, nor, where the license has been in part executed, so as to convert the interest of the licensee from an interest in lands into an interest in personal property, can the license be revoked so as to prevent the licensee from obtaining possession of such personal property. Thus, a license to enter upon the lands of the licensor and cut and carry away standing timber thereon, may be revoked at any time before any of the timber is cut.⁴ But if an entry is made under the license, and any portion of the timber cut, before the license is revoked, it cannot be revoked as to the timber cut, so as to prevent the licensee from entering, within a reasonable time, to take it away. Thus, where parties entered into an oral contract that the defendant should cut certain trees upon the plaintiff's land, peel them, and take the bark to his own use, and pay therefor a certain price per cord, and in pursuance of the contract the defendant entered upon the land, cut the trees and peeled them, it was held that the plaintiff could not revoke the license nor prevent the defendant from taking away the bark, and that his entry upon the land for the purpose of taking and carrying away the bark, *after he had been forbidden to do so*, was not a trespass, but a lawful and justifiable act.⁵ An authority coupled with an interest is irrevocable. That is

¹ *Morse v. Copeland*, 2 Gray (Mass.) 302.

² *Morse v. Copeland*, *ante*; *Cook v. Stearns*, 11 Mass. 533; *Cobb v. Fisher*, 121 Mass. 169; *Stevens v. Stevens*, 11 Met. (Mass.) 251.

³ *Doe v. Wood*, 2 B. & Ald. 738; and see *Northam v. Bowden*, 11 Exchq. 70; 24 L. J. Ex. 237.

⁴ *Drake v. Wells*, *ante*.

⁵ *Nettleton v. Sikes*, 8 Met. (Mass.) 134.

to say, where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable.¹

SEC. 8. Distinction between a License and a Lease.—No contract, whether by parol or in writing, can operate as a lease, even though words of demise are used therein, if it is evident that such was not the intention.² A lease for *any* term, whether long or short, is a contract for the *exclusive* possession of land,³ while *a contract which merely gives to another the right to use premises for a specific purpose, the owner of the premises, or the party giving the right, still retaining the*

¹ *Smart v. Sandars*, 5 C. B. 917; *Taplin v. Florence*, 10 C. B. 744; *Gausson v. Morton*, 10 B. & C. 731.

² *Taylor v. Caldwell*, 3 B. & S. 826. In *Cook v. Stearns*, 11 Mass. 533, PARKER, C.J., pointed out the distinction between a license and a lease as follows: "A license is technically an authority to do some one act, or series of acts, on the land of another *without passing any estate in the land*, such as a license to hunt in another's land, or to cut down a certain number of trees. These are held to be revocable while executing, unless a definite time is fixed, but irrevocable when executed. Such licenses to do a particular act, *but passing no estate*, may be pleaded without deed. But licenses which, in their nature, amount to granting an estate *for ever so short a time*, are not good without deed, and are considered as leases, and must be pleaded as such." The distinction is obvious. Licenses to do a particular act do not, in any degree, trench upon the policy of the law which requires that bargains respecting the title or interest in real estates shall be by deed or in writing. *They amount to nothing more than an excuse for the act which would otherwise be a trespass*. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest which ought not to

pass without writing, and is the very object provided for by our statute." Among the class of acts which cannot be licensed by parol, is the right to flood the land of another, either by drippings from the roof of a building or otherwise: *Tanner v. Valentine*, 75 Ill. 624; or to dig ditches upon another's land for the purposes of drainage or otherwise: *Hitchens v. Shaller*, 32 Mich. 496; but in *Hodgson v. Jeffries*, 52 Ind. 334, such a license, when executed, was held to be irrevocable. But see *Estes v. China*, 56 Me. 407, where a parol permit to connect with a public drain was held to be revocable. A parol license to use running water is not valid unless in writing: *Allen v. Fiske*, 42 Vt. 462; nor is a verbal permission to erect buildings upon another's land: *Druse v. Wheeler*, 22 Mich. 439; or to construct a road over another's premises: *Dempsey v. Kipp*, 62 Barb. (N. Y.) 311. In Ohio it has been held that a written license, without seal and unacknowledged, to enter upon and imbed water pipes in the land of another, with privilege to enter and repair them, creates no interest in nor encumbrance upon the land such as will disable the owner thereof from making a good and sufficient deed conveying a good title thereto. *Wilkins v. Irvine*, 33 Ohio St. 138.

³ *Reg v. Morrish*, 32 L. J. 245.

possession and control of the premises, confers no right in the land, and is not a lease, but only a license,¹ and for the reason that no interest in the land is conferred, is not within the statute of frauds, and may be given by parol. But, where the privilege granted is of such a character as to carry with it an interest in the land, it is a lease, and within the statute, and must be in writing executed as provided by the statute, or it has no validity,² except as to acts already done under it, and may be revoked at any time by the owner of the land.³ The

¹ *Taylor v. Caldwell, ante*; *Funk v. Haldeman*, 53 Penn. St. 229; *Stockbridge Iron Works v. Hudson Iron Co.*, 107 Mass. 290; *Coleman v. Foster*, 1 H. & W. 37; *Williams v. Jones*, 3 H. & C. 256; *Hill v. Tupper*, 2 id. 121; *Cornish v. Stubbs*, 39 L. J. C. P. 206, and is a personal privilege, and cannot be assigned or transferred to another. *Foot v. N. H. & C. R. R. Co.*, 23 Conn. 214; *Dark v. Johnston*, 55 Penn. St. 154; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Robison v. Uhl*, 6 Neb. 328; *Rickards v. Cunningham*, Neb. S. C. 1880; *Carter v. Harlan*, 6 Md. 29; *Cook v. Stearns*, 11 Mass. 113; *Amsinck v. Am. Ins. Co.*, 129 id. 185; *Prince v. Case*, 10 Conn. 375; *Seidensparger v. Spear*, 17 Me. 123; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Simpkins v. Rogers*, 15 Ill. 397, and is only binding as to third persons when it has been so far executed as to create an equity of which they had notice at the time of the conveyance to them. *Wilson v. Chalfant*, 15 Ohio, 247; *Ricker v. Kelly*, 1 Me. 117; *Renick v. Kearn*, 14 S. & R. (Penn.) 267.

² *Selden v. Del. & C. Canal Co.*, 29 N. Y. 634; *Brown v. Woodworth*, 5 Barb. (N. Y.) 550.

³ *Huff v. McCauley*, 53 Penn. St. 206; *Marston v. Gale*, 24 N. H. 176; *Kimball v. Yates*, 14 Ill. 464; *Dodge v. McClintock*, 47 N. H. 383; *Owen v. Field*, 12 Allen (Mass.) 457; *Houston v. Laffee*, 46 N. H. 505; *Carlton v. Redington*, 21 id. 291. But the rule relative to revocation is not uniform, and in some of the States it is held, that a license granted upon a con-

sideration is not revocable. *Wilson v. Chalfant*, 15 Ohio, 248; *Snowden v. Vilas*. While in others it is held, that the circumstance that a consideration is agreed upon does not render such a contract irrevocable when it gives an interest in lands. *Huff v. McCauley, ante*. Where valuable improvements have been made upon land under a license, as where a railroad has been built, buildings erected, etc., it is held, in Pennsylvania, not to be within the statute of frauds, and irrevocable. *Cumberland & C. R. R. Co. v. McLanahan*, 59 Penn. St. 33; *Davis v. Sander*, 10 Phila. (Penn.) 113. In New Jersey, after a license has been executed by the outlay of large sums of money or the erection of substantial improvements,—although such license is inoperative at law,—a court of equity will enjoin its revocation, even though the license is not express. The rule in that State may be stated as follows: When the enjoyment of improvements of a permanent nature, erected by a person upon his own land, depends upon a right affecting the land of another proprietor whose consent is necessary to the exercise of such right, if the giving of such consent is expressly proved, or necessarily implied from the circumstances, and the improvements were made in good faith, upon the strength thereof, equity will not permit advantage to be taken of the form of the consent,—although the same was not in accordance with the strict mode of the common law, or was within the statute of frauds,—but will, upon proper bill

distinction between a mere license and a lease is more forcibly illustrated by the circumstance, that a license given by a land-owner does not prevent him from giving a similar right to

filed, enjoin the licensor from accomplishing his fraud and protect the right of the licensee. *Raritan &c. Co. v. Veghte*, 21 N. J. Eq. 463. And the doctrine of estoppel in such cases is also applied in Ohio and where a land owner permitted a canal company to construct and use, as a highway, a canal through his lands, — although the use had been for but a few years, — it was held, that he was thereby estopped from enforcing his claim to the possession of the land. *Pierson v. Cincinnati &c. Canal Co.*, 2 Dis. (Ohio) 100. And the same rule is adopted in Georgia, and equity will treat the license as an agreement to convey the right, and will decree its specific performance where the licensee has made large expenditures in pursuance of it. *Cook v. Prigden*, 45 Ga. 331. In Illinois, where the owner of a lot of ground contemplated the erection of a frame building thereon, the owner of a brick house on the line of an adjacent lot proposed to him that if he would build of brick he might use the brick wall of the house for the purpose of attaching thereto the proposed new building, and the proposition was accepted, and the new house was built of brick, and attached to the wall of the other building, as suggested. It was held: 1. That the license to use and attach to the wall, after the expenditure of money in the erection of the new building, as induced by the permission, was irrevocable. 2. That the subsequent grantee of the party to whom the license was given succeeded to his equitable rights in respect thereto. 3. That the party granting the license being estopped from its revocation, the estoppel embraced privies as well as parties, and precluded all who claim under the person originally barred. 4. That the execution of the parol permission supplied the place of a writing, and took the case out of the statute of frauds. *Russell*

v. Hubbard, 59 Ill. 335. In Nevada, it is held that a parol license to erect a dam upon the licensor's land, for the purpose of running a mill, is held to become irrevocable when the licensee has expended money, by erecting the mill, etc., upon the faith of the license, and his continued enjoyment will be protected in equity. *Lee v. McLeod*, 12 Nev. 280. In Missouri, in *Boone v. Stover*, 66 Mo. 430, it was held that an instrument in writing, under seal, granting permission to mine on a certain lot, so long as the grantees do regular mining work on the lot, is a license and a grant of an incorporeal hereditament, which is not revocable except for breaches thereof by the grantee, and contains, in effect, a covenant on the part of the grantor that the grantee, in respect to his mining privileges, shall be free from the interruptions or claims of others, and such an instrument is not a lease, for the reason that it does not pass such an estate in possession on the land as would entitle the grantee to maintain ejectment. In an Indiana case, in a suit to recover real estate, the answer alleged that defendant, a railroad company, had expended large sums in building a track upon the land, under a parol license from plaintiff, with an agreement that the damages to the land would thereafter be settled, and that plaintiff had knowledge of what defendant had done, it was held, on demurrer, that the answer was sufficient, and that it was not necessary to allege to what officer or agent of the company such license was given. *Buchanan v. Logansport, Crawfordsville &c. Ry. Co.*, 71 Ind. 265. In these States as well as in others, where this principle is applied, a court of equity will enforce a parol license in all cases where it has been executed; so that, if it had been a contract for the sale of lands, it would be enforced on the ground of part performance.

others, *if it does not interfere with the exercise of the right conferred upon previous licensees*. Thus, in a New Jersey case,¹ it was held that a contract simply giving the right to take ore from a mine, no interest or estate being granted, merely conferred a license under which the licensee acquired no right to the ore until he separates it from the freehold, and that, unless so specially expressed, it did not confer an exclusive privilege; and the general rule may be said to be that a license to dig and take ore is never exclusive of the licensor unless expressed in such words as clearly show that such was the intention of the parties, and the same right may be given to other parties.² In the case last cited, such a license was held to be like a grant of common *sans nombre*, which never excludes the grantor from enjoying the common with his grantee. LORD ELLENBOROUGH, in a more modern case,³ gave his assent to this doctrine, and declared that "a liberty reserved of digging coals could not give the person reserving it the exclusive right to them. No case can be named," said he, "where one who has only a liberty for digging for coals in another's soil, has an exclusive right to the coals so as to enable him to maintain trover against the owner of the estate, for coals received by him." A similar doctrine was held in the United States Supreme Court.⁴ In that case, the license gave the licensee the right to dig and carry away *all* the iron ore to be found in certain designated lands. The court held that this did not amount to a grant of the ore, but merely authorized the licensee to take away so much as he might dig. The word "all" was held to show merely the extent of his license as to quantity, that is, that he was entitled to dig all the iron ore there was in the land, *and that he acquired no title to any of the ore, until he had separated it from the freehold*. This principle is illustrated in cases where a license to occupy buildings is given. Thus, in an English case,⁵ where a hall was to be let for four *nights* at £100 a day, for

¹ *Silshy v. Trotter*, 29 N. J. Eq. 228. See also *Carr v. Benson*, L. R. 3 Ch. App. 524.

² *Mountjoy's Case*, And. 307.

³ *Chetham v. Williamson*, 4 East, 469.

⁴ *Grubb v. Bayard*, 2 Wall, Jr. 826.

(U. S.) 81. See also to the same effect *Funk v. Haldeman*, 53 Penn. St. 229; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Carr v. Benson*, L. R. 3 Ch. App. 524.

⁵ *Taylor v. Caldwell*, 3 B. & S.

the purpose of giving four concerts, and day and night *fêtes*, it was held that this amounted to a mere license only, and was not a demise, because it was evident that the owner was not to part with the possession of the premises during the four days. In another case,¹ A paid B twelve shillings a week for permission to put his loom machines in a room in B's factory, and for ingress and egress for himself and workmen, for the purpose of inspecting and working the machines, and for the steam-power to run them, which was furnished by B; and it was held that this did not amount to a lease to A of any part of the room, and that the relation of landlord and tenant was not thereby created, but only that of licensor and licensee. Nor does the relation of landlord and tenant arise under a contract for board and lodging, even though a particular room is assigned to the lodger, as in such a case the general possession, care, and control of the building remains in the person who lets the lodger into possession.² But where the contract is such as to divest the landlord of all possession or right to the possession or control of certain specified rooms, it amounts to a lease and is within the statute.³ It has been held that a grant by a riparian proprietor to a person, of a right to take water from a natural stream, on which his land abuts, is a mere license in gross, and that the licensee has no such interest as will enable him to maintain an action against a wrong-doer.⁴ But, while this is true of a license which does not confer an interest in the

¹ *Handcock v. Austin*, 14 C. B. N. s. 429.

² *White v. Maynard*, 111 Mass. 250; and in this case an oral contract by the keeper of a boarding-house to provide a man and his wife with board for six months, and with three specified rooms, was held not to be a lease, or within the statute of frauds.

³ *Inman v. Stamp*, *ante*; *Edge v. Strafford*, *ante*.

⁴ *Stockport Water Works Co. v. Potter*, 3 H. & C. 300. In *Hill v. Tupper*, 2 id. 121, it was held that the grant by deed by a canal company to a person of the exclusive right to put pleasure boats on their canal, did not confer upon the grantor such an interest as would enable him to

maintain an action against a stranger who disturbed his right by putting and using pleasure boats upon the canal, and letting them for hire. See also *Bird v. Gt. Eastern R. R. Co.*, 19 C. B. N. s. 268, where a similar doctrine was held in reference to a license to hunt and shoot game on certain lands. But see *Freeman v. Underwood*, 66 Me. 229, where it was held that an instrument from the owner of land to a licensee, granting him all the timber, grass, and berries that may be found or grown upon the land for a term of years, and giving him possession for the purpose of managing and enjoying the property granted, is valid between the parties, and entitles the licensee to sue in his own name for

lands, yet, when the license is *coupled with an interest*, so that it is *assignable*, the rule is otherwise,¹ and such an interest cannot be conferred by parol,² and where it is attempted, it is void, and revocable at any time at the will of the licensor,³ and under this head are included a license to cut and carry away standing wood or timber;⁴ to erect partition fences;⁵ to pass over another's land with teams, etc., in perpetuity;⁶ to flow another's land by means of a dam or otherwise;⁷ or to erect a building on the licensor's land;⁸ but acts done in pursuance of such license are justified thereby, but not acts done after revocation, whether the revocation is by the act of the parties, or operation of law.⁹ But in some of the States it is held that a parol license may become operative by way of estoppel, so as to become irrevocable where it has been executed, and its execution involved a large expenditure of money, which was made with the knowledge or tacit assent of the licensor;¹⁰ while in others it is held that a parol

any of the productions of the land unlawfully taken therefrom during his term by strangers.

¹ Goff v. Obertuffer, 3 Phila. (Penn.) 71.

² Foot v. N. H. &c. R. R. Co., 23 Conn. 214; Collins Co. v. Marcy, 25 id. 238.

³ Tanner v. Valentine, 75 Ill. 624; Brown v. Wadsworth, 5 Barb. (N. Y.) 550; Selden v. Del. & Hud. Canal Co., 29 N. Y. 634; Stevens v. Stevens, 11 Met. (Mass.) 201.

⁴ Giles v. Simonds, 15 Gray (Mass.) 441; Drake v. Wells, 11 Allen (Mass.) 141; Dodge v. McClintock, 47 N. H. 383.

⁵ Haux v. Seat, 26 Mo. 178.

⁶ Foster v. Browning, 4 R. I. 47.

⁷ Hall v. Chaffee, 13 Vt. 150; Clute v. Carr, 20 Wis. 531; Foot v. R. R. Co., *ante*.

⁸ Arrington v. Larrabee, 10 Cush. (Mass.) 512; Collins Co. v. Marcy, *ante*.

⁹ Foot v. N. H. R. R. Co., *ante*; Cayuga R. R. Co. v. Niles, 13 Hun (N. Y.) 170. If, after a license is revoked, the licensee goes on and makes erections upon the land, such erections become a part of the land and belong to the owner thereof. Druse v. Wheeler, 26 Mich. 189. A license,

in effect, is an excuse for an act which would otherwise be a trespass. Owen v. Lewis, 46 Ind. 489. And acts done in pursuance thereof are considered the same as though done by the licensor, and enure to the benefit of the party holding a title under which the licensor took possession. Wing v. Hall, 47 Vt. 182. But in Indiana it is held that the license must be specially pleaded, and cannot be given in evidence under the general issue. Chase v. Long, 44 Ind. 427.

¹⁰ Lane v. Miller, 27 Ind. 534; Fuhr v. Dean, 26 Mo. 116; Snowden v. Wilson, 19 Ind. 10; Tanner v. Valentine, 75 Ill. 624. In Wilson v. Chalfant, 15 Ohio, 248, it was held that one who enters under a parol license, given for a consideration, and erects a fixture, may maintain trespass against the owner of the land if he interferes with it; but this doctrine is not generally recognized; and in Owen v. Field, 12 Allen (Mass.) 457, it was held that a license to lay an aqueduct across the licensor's lands might be revoked any time even after the aqueduct was laid, and that no liability attaches against the licensor for cutting it off, after its revocation.

license, which is executed, cannot be revoked without first reimbursing the licensee for all expenditures made in pursuance of such license;¹ and in others, if it is founded upon a consideration;² and in others, if it is coupled with an interest in *personal* property.³ But the rule established by the better class of cases, may be said to be, that a *parol license to do an act upon the land of another which amounts to an easement therein*, is void under the statute of frauds, and while affording a justification for acts done in pursuance thereof before it is revoked, may, at law, be revoked at the will of the licensor, without reimbursing the licensee for any expenditures made in executing it;⁴ and that the licensee, *after* the license is revoked, is liable to the licensor for all damages which result from a continuance of the thing licensed.⁵

SEC. 9. How far a License Protects. What may be done under.—In those cases where assent has been given to one by another to do a certain act upon his land, the natural and probable consequences of which are to produce a certain result, and the person to whom assent is given goes on and expends money on the strength of the assent and makes erections of a permanent character; while the assent does not give any interest in the land, and *at law* is revocable at any time, even though given for a consideration,⁶ yet, a court of equity, in a proper case, will enforce it as an agreement to give the right, and particularly where its revocation would operate as a fraud upon the licensee, or would be productive of great hardship, will restrain its revocation.⁷ But even at law, a license is a full defence for all acts done under it,

¹ Woodbury v. Parshley, 7 N. H. 237.

² Wilson v. Vilas, 19 Ind. 10; Wilson v. Chalfant, *ante*.

³ Long v. Buchanan, 27 Md. 502; Claffin v. Carpenter, 4 Met. (Mass.) 580; Nelson v. Nelson, 6 Gray (Mass.) 385.

⁴ Cook v. Stearns, 11 Mass. 533; Morse v. Copeland, 2 Gray (Mass.) 302; Stevens v. Stevens, 11 Met. (Mass.) 251.

⁵ Foot v. N. H. &c. R. R. Co., *ante*
In this case the defendant was held liable for injuries resulting from the

diversion of water upon his lands erected by the defendants under a license from the plaintiff's grantor, as the license was revoked by the conveyance and ceased to be operative from that time. See also Cobb v. Fisher, 121 Mass. 169, where the same rule was adopted under a similar state of facts.

⁶ Huff v. McCauley, 53 Penn. St. 206; Houston v. Laffee, 46 N. H. 505; Hetfield v. R. R. Co., 29 N. J. L. 571.

⁷ Veghte v. The Raritan &c. Co., 19 N. J. Eq. 142; Brown v. Bowen, 30 N. Y. 543; Wood on Nuisances, §47.

within the scope of the license before its revocation, but not after.¹ But the license must not be exceeded, and in order

¹ *Wolfe v. Frost*, 4 Sandf. (N. Y.) Ch. 72; *R. R. Co. v. McLaughlin*, 59 Penn. St. 23; *Cook v. Prigdon*, 45 Ga. 331; *Houston v. Laffee*, 46 N. H. 508; *Bridges v. Purcell*, 1 Dev. & B. (N. C.) 462; *Mumford v. Whitney*, 15 Wend. (N. Y.) 379. As to the effect of a license from one to do an act upon the land of another, at law the case of *Hetfield v. The Central R. R. Co.*, 29 N. J. L. 571, is in point. In that case, the charter of the defendant authorized them to enter upon and take the lands required for their road, but directed that they should not enter without the consent of the owner. The defendant entered upon the plaintiff's lands by his consent, but did not take any conveyance from him, in the manner required by law, in order to give them right or title. The court held that this consent did not dispense with the necessity of a deed or conveyance of the land or right, in the form required by law. That it was not a consent that was intended to confer a title, and was revocable. In *Wood v. Leadbitter*, 13 M. & W. 837, the question as to the effect of a license arose in an action of assault and battery. The evidence disclosed that the plaintiff purchased a ticket for the sum of one guinea, which entitled him to admission to the grand stand. That the Earl of Ellington was one of the stewards of the races, and that the tickets were issued by the stewards, but were not signed by Lord Ellington. That under this ticket the plaintiff entered the ground on one of the race days, when the defendant, who was a policeman, under the directions of Lord Ellington, who first ordered him to leave, upon his refusing to do so committed the assault complained of, using no more force than was necessary for that purpose. Upon the trial the judge directed the jury that, assuming the ticket to have been sold to the plaintiff under the sanction of Lord Ellington, it still was lawful for Lord Elling-

ton, without returning the guinea, to order the plaintiff to quit the enclosure, and that after a reasonable time had elapsed, if he failed to leave, then the plaintiff was not on the ground by the leave and license of Lord Ellington, and the defendant would be justified in removing him under his orders, and this ruling was sustained in Exchequer. In *Miller v. The Auburn &c. R. R. Co.*, 6 Hill (N. Y.) 61, which was a case somewhat similar to that of *Hetfield v. The Central R. R. Co.*, before referred to, the defendants erected their railroad with an embankment upon Garden Street in Auburn, interrupting the plaintiff's access to his premises, in 1839, and maintained it until 1842, when this suit was brought. The defendants offered to prove that the embankment was raised under a parol license from the plaintiff, but the proof was excluded by the court, and the case was heard in the supreme court upon the question of the admissibility of that evidence. COWEN, J., among other things, said: "If what the defendants in this case proposed to show was true, viz., that the plaintiff verbally authorized the making of the railway, while the authority remained, their acts were not wrongful. License is defined to be a power or authority. So long as the license was not countermanded, the defendants were acting in the plaintiff's own right." In this case the court uphold a license as a defence until it is revoked, and hold that it must be revoked before an action can be brought; but in *Veghte v. The Raritan Power Co.*, ante, the court held that the bringing of the action is a revocation of itself, and all that is necessary. But the former would seem to be the better rule, and the one generally adopted. The following authorities will be found applicable upon the question of the effect of a license: *Ex parte Coburn*, 1 Cow. (N. Y.) 570; *Cook v. Stearns*, 11 Mass. 533; *Ruggles v.*

to operate as a defence at law for an act done in pursuance of it, it must be shown that it covers the very act, for the recovery of damages for the doing of which action is brought, and if the license does not embrace the act to the full extent, liability will attach for all such excess. Thus, if an action is brought for an injury resulting from the flooding of land by a dam erected by the defendant, it is not enough to show that the plaintiff assented to or licensed the erection of the dam, *unless it appears that he could then have known or reasonably foreseen that his land would be injured by the dam in the manner complained of*.¹ If the dam itself is so erected as

Lesure, 24 Pick. (Mass.) 190; Prince v. Case, 10 Conn. 375; Rex v. Herndon-on-the-hill, 4 M. & S. 565; Fentiman v. Smith, 4 East, 107; Hewlins v. Shipman, 5 B. & C. 222; Bryan v. Whistler, 8 id. 288; Cocker v. Cowper, 1 C. M. & R. 418; Wallis v. Harrison, 4 M. & W. 538. It has been held in some of the cases that the effect of a license executed, as, for instance, to enter upon land to erect a house or dam, and followed by user, is to give the licensee a right to personal property upon the land of the grantor, and although revocable at will, yet the licensee can enter for its removal, although not to maintain or use the property there. That the license is irrevocable as to the right to remove the property. Barnes v. Barnes, 6 Vt. 388; Prince v. Case, *ante*; Van Ness v. Packard, 2 Pet. (U. S.) 143; Cary v. Ins. Co., 10 Pick. (Mass.) 540; Marcy v. Darling, 8 id. 283. There are a class of cases, however, particularly in Pennsylvania, where it is held that where acts have been done, in pursuance of a license and relying upon it, the license operates as an equitable estoppel, and the licensor will be estopped from revoking it, to the injury of the licensee, so long as the license is not exceeded. But that for all excess of use an action may be maintained. Bridge Co. v. Bragg, 11 N. H. 102; Lefevre v. Lefevre, 4 S. & R. (Penn.) 241; Ricker v. Kelly, 1 Me. 117; Hepburn v. McDowell, 17 S. & R. (Penn.) 383; Cook v.

Prigdon, 45 Ga. 331; 12 Am. R. 582; Houston v. Laffee, 46 N. H. 608. In Selden v. Del. & Hud. Canal Co., 29 N. Y. 634, where defendants entered upon the lands of plaintiff by parol license from him, and enlarged the same, it was held that the license operated as a defence to all that had been done under it, but would not justify a maintenance of the same after the license is revoked. The same was also held in Mumford v. Whitney, 15 Wend. (N. Y.) 380; Foot v. N. H. & C. Co., 23 Conn. 214; Eggleston v. N. Y. & H. R. R. Co., 35 Barb. (N. Y. Sup. Ct.) 162. In Woodard v. Seeley, 11 Ill. 157, it was held that a license by deed or parol is always revocable, unless coupled with an interest and executed, and that *then* it is irrevocable. In Kimball v. Yates, 14 Ill. 464, it was held that a parol license to cross a man's farm is revocable at any time, at the will of the licensor. See also Roberts v. Rose, L. R. 1 Exchq. 82.

¹ Bell v. Elliott, 5 Blackf. (Ind.) 113. In any event, if a license is given under a misapprehension of the effects of its exercise, it may at once be revoked. Brown v. Bowen, 30 N. Y. 519; Smith v. Scott, 1 Kerr (N. B.) 1; Allen v. Fiske, 42 Vt. 462; Eaton v. Winne, 20 Mich. 156; Hamilton v. Wudolf, 36 Md. 301; Dempsey v. Kipp, 62 Barb. (N. Y.) 311; Eustis v. Chiner, 56 Me. 407; Freeman v. Hadley, 33 N. J. L. 523; Giles v. Simonds, 15 Gray (Mass.) 401; Moyer v. Tappan,

to produce damage to the lands of supra-riparian owners, it is a nuisance, and parties injured thereby are not estopped from a recovery for injuries therefor upon the ground of acquiescence in its construction, *unless it could reasonably have been ascertained or foreseen at the time of its erection that it would produce the ill-results complained of.* In this respect it stands precisely upon the same ground as any other nuisance, and the rule in reference to acquiescence therein, and estoppel by reason of acquiescence, is that, where a person acquiesces in the erection or maintenance of anything that is a nuisance *per se*, or that he might reasonably have foreseen would become a nuisance, a court of equity will not interfere by injunction to relieve him from the effects thereof, but his remedy at law remains unless he has bound himself by grant or license sufficient in law to bar an action, or unless the party maintaining the nuisance has acquired a prescriptive right to maintain it. *The law presumes that when a man assents to the doing of an act, he only assents to its being so done as not to injure him.*¹ But, while a license must not be exceeded, yet it carries with it all the incidents necessary to its exercise.² Thus, a license to take stone from the licen-

23 Cal. 306; *Drake v. Wells*, 11 Allen (Mass.) 141; *Miller v. State*, 39 Ind. 267; *Druse v. Wheeler*, 22 Mich. 439; *Dodge v. McClintock*, 47 N. H. 383.

¹ *Bankhardt v. Houghton*, 27 Beav. 425, is a very full and acceptable authority upon this point, and, except that the case is a very long one, it would be given here. See also *McKnight v. Ratcliff*, 44 Penn. St. 159, where it was held that, though the plaintiffs, who were in the mining business, permitted the defendants in the same business to operate through their gangway, yet that this permission would not justify the defendants in filling up the plaintiff's shaft with water.

² A license to enter upon premises may sometimes be implied, as, when the owner or occupant of the premises has taken and keeps the property of another there, there is an implied license to the owner of the property to enter and take it. *Williams v.*

Morris, 8 M. & W. 488; *Patrick v. Colerick*, 3 id. 435; *Anthony v. Haney*, 8 Bing. 186. And it is apprehended that this rule prevails, wherever the property of one is upon the premises of another *without the fault* of the owner of the property, and under such circumstances that the owner of the premises has no claim or lien thereon, legal or equitable, the owner may, if he can do so peaceably, doing as little damage as possible, enter and take it away. *Stirling v. Warden*, 51 N. H. 217. In the case of *Richardson v. Anthony*, 12 Vt. 273, the defendant's cattle were found by him upon the plaintiff's land. How they came there was not shown, but it was admitted they had been in the plaintiff's possession a year, and the plaintiff forbade the defendant to enter his land to take them away. The defendant, against the protest of the plaintiff, entered upon the land and drove them away, the plaintiff offering no

sor's land, carries with it the right to enter with teams to draw them away, the right to be exercised carefully.¹ And

¹ *Clark v. Vt. Central R. R. Co.*, 28 Vt. 103. A licensee of land is liable to the licensor for all damages arising from such a use of the premises — *e.g.*, the yarding of sheep affected with "the scab" — as makes the soil communicate an infectious disease to the property of the licensor, the latter being ignorant of the danger thereof. *Eaton v. Winne*, 20 Mich. 156. It is well settled that the mere permission to pass over lands which are dangerous, either naturally or by reason of the use which is made of them, imposes no duty or obligation upon the owner of such lands, except to refrain from acts which are wilfully injurious or knowingly in the nature of a trap, and except, also, where there are hidden dangers, the

concealment of which would be in the nature of a fraud. He who enjoys the permission or passive license is only relieved from the responsibility of being a trespasser, and must assume all the ordinary risk attached to the nature of the place, or the business carried on there. *Vanderbeck v. Hendry*, 34 N. J. L. 467. A railroad left a large lot, traversed by sidings, open for the convenient access of the public in loading and unloading lumber. It also suffered the public to use its track to pass and repass from one side of the city to another. It was held that the license created the duty on the part of the company to use their track so as not to endanger personal safety. *Kay v. Pennsylvania R. R. Co.*, 65 Penn. St. 269.

physical resistance. The court held that the defendant was justified in his entry for that purpose, and that an action of trespass would not lie against him therefor. WILLIAMS, J., in delivering the opinion of the court, said: "The time during which the cattle remained in the plaintiff's possession is of no importance. The manner in which they came there would be. The right of the owner of personal property to enter on the premises of another to reclaim property, may depend upon the manner in which possession was obtained. It appears to be well established that if one man takes the goods of another, and puts them on his own land, the owner may enter and take them. . . . In the absence of any evidence as to how the heifers in question came into the enclosure of the plaintiff, when it may be as well presumed that they came there with his consent, and without any neglect on the part of the defendant, as the contrary, and when the evidence discloses that he detained them under a wrongful claim, we consider that the defendant was justified in entering the enclosure to take his

own property." BENNETT, J., dissented from the opinion of the court, but his dissent was predicated upon the ground that the cattle had remained so long in the plaintiff's possession as to invest him with a *quasi* property therein, of which he could not be divested in such a summary manner. But the opinion of the court has many authorities in its support, and is predicated upon principles of natural justice. In *Allen v. Feland*, 10 B. Mon. (Ky.) 306, it was held that where one has property upon the premises of another, he may, if he can do so peaceably, enter and take it. In *Stirling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80, the plaintiff had formerly been postmaster, and used a part of his house for a post-office. Another person having been appointed postmaster, the defendant by such new appointee was appointed deputy postmaster, and was directed by him to go to the plaintiff's house and bring away the property there belonging to the government. The plaintiff resisted the taking of the property, and the defendant reasonably repelled his assault and took away the proper-

a license to take wood from certain premises carries with it the right to enter to cut and draw it away;¹ and a license to cultivate land carries with it as an incident, the right to enter and remove the crops.² A license to "inhabit or enjoy" cer-

¹ *Clark v. Vt. &c. R. R. Co.*, 28 Vt. 103; *Driscoll v. Marshall*, 15 Gray (Mass.) 62.

² *Com v. Rigney*, 4 Allen (Mass.) 416; *Cornish v. Stubbs*, 39 L. J. C. P. 206.

ty. The court held that an action of trespass would not lie therefor. But see *Hupport v. Morrison*, 27 Miss. 365, where it was held that unless property belonging to one is in the wrongful possession of another, he will not be justified in going upon his premises to take it away, unless he can do so peaceably, and will not be justified even in repelling an assault made upon him by the owner of the estate, unless it is excessive. In *Gardner v. Rowland*, 2 Ired. (N. C.) 247, a similar doctrine was held, except that in that case the defendant was held liable because he let down the fence to drive his hogs out of the plaintiff's premises, instead of driving them through the gap in the fence through which they entered, or, to use the language of the court, "because he let down the fence, instead of driving them through a gap or gate, when there is one." In *Adams v. McKinney*, Addis. 258, it was held that if J S, who ought to keep up a fence between a close of his and a close of J N, suffer the same to be out of repair, and the beast of J N go through the fence into the close of J S, trespass does not lie, and J S may pursue his cattle and drive them back on to his own close, because the damage happens from the fault of J N. In *Merrill v. Goodwin*, 1 Root (Conn.) 209, the defendant entered upon the plaintiff's premises and cut a tree in which he had found a swarm of bees. It did not appear that the bees escaped from his hive, and the court held him a trespasser; but the court plainly intimated that, if the bees had escaped from the defendant's hive, he would have been justified in doing all that was necessary to reclaim his bees.

But, while bees so escaping from a hive may be reclaimed by the owner, if they can be identified, yet the owner of the bees cannot enter upon the premises of another and cut the tree in which they are, without subjecting himself to an action of trespass, and liability to the extent of the actual damages to the soil and tree. But if a third person cuts the tree, the owner of the bees may maintain trespass therefor. *Goff v. Kiltz*, 15 Wend. (N. Y.) 550. If they can be reclaimed without doing actual injury, as if they are on the fence or on a bush, *quere?* In *Barnes v. Barnes*, 6 Vt. 388, the defendant erected a house upon premises owned by the plaintiff under a license. This license was subsequently revoked, and the defendant, within a reasonable time after the revocation of the license, entered upon the premises and took down the house and removed the materials. The court held that the defendant was not liable in trespass therefor. But in such cases, where an erection is made under a license, the licensee must remove the house within a reasonable time after the license is revoked. In *Prince v. Case*, 10 Conn. 375, it appeared that the owner of land gave to a person a license to erect a dwelling-house upon his land, for his own use. The licensee subsequently conveyed the house to the plaintiff in error. After the death of the licensee, the grantor of the licensor brought ejectment against the grantee of the licensee, and recovered therein. After the lapse of more than a year after his recovery and possession in the action of ejectment, the grantor of the licensor took down the house, but did not remove

tain premises when the right is exclusive, amounts to a lease, and should be pleaded as such.¹ But this is not so where the license does not amount to an exclusive right, as a right

¹ *Hall v. Seabright*, 1 Mod. 14; *Anon.*, 3 Salk. 223. If a license is specially pleaded as a defence to an action of trespass, parol evidence of such license is admissible to bar the plaintiff's right, but where the general issue is pleaded, evidence of such license is only admissible in mitigation

of damages. *Hamilton v. Windolf*, 36 Md. 301. But it must be specially pleaded in trespass *quaere clausum* and cannot be given in evidence under the general issue. *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; *Crabs v. Fetick*, 7 Blackf. (Ind.) 373; *Pritchard v. Dodd*, 5 B. & Ald. 689.

the materials. In an action of trespass for taking down the house, it was held that no recovery could be had, as the owner of the house had had a reasonable time in which to remove it, and having failed to do so, the defendant was justified in taking it down. *Parker v. Redfield*, 10 Conn. 497; *Baldwin v. Breed*, 16 id. 63; *Branch v. Doane*, 17 id. 409; *Curtis v. Hoyt*, 19 id. 106. Such a license is personal, and ceases when the house is conveyed. *Hull v. Babcock*, 4 Johns. (N. Y.) 418; *The King v. Newton*, Bridg. 115; *Howes v. Hall*, 7 B. & C. 481. A house erected under a license is personal property, and remains the property of him who places it upon the land. *Ricker v. Kelley*, 1 Me. 117; *Wells v. Bannister*, 4 Mass. 514; *Curry v. Com. Ins. Co.*, 10 Pick. (Mass.) 540; *Marcy v. Darling*, 8 id. 283; *Ashman v. Williams*, 8 Pick. (Mass.) 402. In *Webb v. Paternoster*, Palm. 71, a license to place a stack of hay upon another's land was held not to be countermandable until after a reasonable time had elapsed. See *White v. Elwell*, 48 Me. 360. In *Winter v. Brockwell*, 8 East, 308, a license to erect a skylight was held not revocable after the skylight was erected, without placing the licensee *in statu quo*. See *Wood v. Lake*, Sayer, 3; *Liggins v. Inge*, 7 Bing. 682. But if a person wrongfully places his property upon the premises of another, he has no right to enter to remove it. Thus, in *Newbald v. Sadler*, 9 Barb. (N. Y.) 57, the defendant's servant

drove his team upon the plaintiff's premises, and upon his return found the fence put up, and the plaintiff forbade him from taking it down. The servant went and informed the defendant, and he entered the plaintiff's premises, and against the protests and actual resistance of the plaintiff, removed his team, assaulting the plaintiff in order to accomplish his purpose. In an action of assault and battery therefor, the defendant justified upon the ground that he entered the plaintiff's premises to remove his property, etc., and that he used no more force than was necessary to accomplish his purpose. The court held that he was not justified in making the assault, or even in the removal of his property under the circumstances disclosed by the pleadings and evidence. But in *Robson v. Jones*, 2 Bailey (S. C.) 4, it was held that where one has peaceably entered the premises of another, an action of trespass will not lie against him for forcing his way out by breaking a gate which has been closed and locked by the owner of the land, with a view to detaining the property of the person entering. But this must be understood as applying only to an entry made upon lands of another under a license, express or implied. If the original entry was unlawful, the breaking out would be unlawful, and liability would attach for all damages that resulted from the trespass. The mere fact that an entry is peaceable, does not render it lawful, if it was made without authority, express or implied,

to sow,¹ to stack hay,² or to hunt upon lands.³ A license, in order to be efficacious, must be granted by a person having authority to do so, as it can never extend beyond the interest which the licensor has.⁴

¹ *Hare v. Celey*, Cro. Eliz. 143.

² *Webb v. Paternoster*, Palm. 771; *Wood v. Lake*, Say. 3.

³ *Anon.*, 3 Salk. 223.

⁴ *Petty v. Evans*, 2 Brownl. 40;

Richardson v. Richardson, 9 Gray (Mass.) 213; *Gilbert on Tenure*, 333.

or without a justifiable cause. See also *Bro. Tresp.* pl. 186, and *White v. Wiltshire*, Cro. Jac. 555. The mere fact that a person's property is upon the premises of another, does not render an entry to take it away lawful. If the property is there by his own wrong, or if the title thereto is in dispute, or if he cannot take it away peaceably, he must resort to his remedy at law to recover it. *Roach v. Damson*, 2 *Humph.* (Tenn.) 425; *Chase v. Jefferson*, 1 *Houst.* (Del.) 257. In *Blake v. Jerome*, 14 *Johns.* (N. Y.) 406, the defendant entered the plaintiff's close against the will of the plaintiff, and took therefrom a mare and colt, which he claimed as his property, and to which the plaintiff also claimed title. The court held that under the circumstances of the case, the defendant was a trespasser. In *Hernance v. Vernay*, 6 *Johns.* (N. Y.) 4, the defendant sold certain premises, reserving by parol a certain bark-mill standing upon the premises. He entered the premises after the sale, and removed the bark-mill. Without deciding the question as to whether the bark-mill was in point of fact a fixture, the court held that, under the circumstances, he was a trespasser, and liable for a wrongful entry. In *Holmes v. Tremper*, 20 *Johns.* (N. Y.) 20, the defendant had been a tenant of certain premises of the plaintiff, on which he had erected a cider-mill and press. After the tenancy had expired, and after his removal from the premises, he entered and took away the cider-mill and press. The court held him a trespasser, upon the ground that the property should have

been removed during his tenancy, and having been left there by his own wrong, he was not justified in entering to take it away. In *Chambers v. Bedell*, 2 W. & S. (Penn.) 225, the court expressly held that where the goods of another had been wrongfully taken from him, and placed upon the premises of the taker, the owner of the goods might enter upon the premises of the taker and remove it, without being liable even to nominal damages therefor. This case follows the doctrine of *Chapman v. Thumblethorpe*, Cro. Eliz. 329, in which it was held that if J S drives the beast of J N into the close of J S, or if it has been driven therein by a stranger, with the consent of J S (and this consent may be implied—see *Richardson v. Anthony*, 12 Vt. 273), J N may lawfully go thereinto to take it away, because J S was himself the first wrong-doer. *Patrick v. Colerick*, 3 M. & W. 484; *Rhea v. Sheward*, 2 id. 424; *Spencer v. McGowen*, 13 Wend. (N. Y.) 256. So, if the goods of one have been stolen and put upon the premises of another, the owner may lawfully enter to take them away. *Higgins v. Andrews*, 2 Rolfe's Rep. 55. So, if a person has fraudulently obtained the property of another, the owner may enter upon the premises of the person who has it in his possession, if he can do so peaceably, to take it away. As if A, by means of fraud, obtains a horse from B, B upon discovery of the fraud may go upon A's land to take the horse away, if he can do so without a breach of the peace. *Wheelden v. Lowell*, 50 Me. 503; *Spencer v. Mc-*

SEC. 10. Instances in which License is Irrevocable. — There are few instances in which a parol license to do acts upon the land of another is not revocable. In some of the States, as we have seen,¹ it is held that a parol license which is executed,

¹ *Ante*, § 9 and notes. See also Russell v. Hubbard, 59 Ill. 335; Ricker v. Kelley, 1 Me. 117; Androscoggin Bridge Co. v. Bragg, 11 N. H.; Sullivan v. Commrs. &c., 3 Ohio, 89; Huff v. McCauley, 53 Penn. St. 206; Cumberland Valley R. R. Co. v. McLanahan, 59 id. 23; Lane v. Miller, 27 Ind. 534; Cook v. Frigdon, 45 Ga. 331; Williamstown &c. R. R. Co. v. Battle, 66 N. C. 540. In New Hampshire and Maine the doctrine of the cases cited has been virtually repudiated by

later decisions of the court in those States. Dodge v. McClintock, 47 N. H. 383; Pitman v. Poor, 38 Me. 237; Moulton v. Faught, 41 id. 298; Houston v. Laffee, 46 N. H. 505; and in England the doctrine of Wood v. Lake, Sayer, 3; Taylor v. Waters, 7 Taunt. 374, holding a quite similar doctrine, has been repudiated. Wallis v. Harrison, 4 M. & W. 538; Bryan v. Whistler, 8 B. & C. 288; Bird v. Higginson, 6 Ad. & El. 824; Rex v. Herndon, 4 M. & S. 565.

Gowen, 13 Wend. (N. Y.) 257. So, if a man who is assaulted by another, and in danger of his life, enters the premises of another, trespass will not lie, "because the doing of this—it being necessary for the preservation of his life—is lawful." 37 H. 6, 37 pl. 26. So, if "A enters the premises of B to succor the beast of B, which is in danger, an action does not lie, because, as the loss to B if his beast had died would be irremediable, the doing of this is lawful. But if A go into the close of B to prevent the beast of B from being stolen, or to prevent his corn from being consumed by hogs, an action *would* lie, for the loss, if either of these things had happened, would not have been irremediable." Bro. Tresp. pl. 215. So, too, if a tree belonging to A is *blown* down, and falls upon the land of B, A may lawfully go upon the land of B to remove it, for the tree did not fall there by any fault of A: Bro. Tresp. pl. 215; but if A *cuts* a tree upon his land, and it falls upon the land of B, this is a trespass of itself, and he may not lawfully enter to remove it, for the tree is there by his fault, and might have been avoided. *Ib.* In Millin v. Fawdry, Latch. 120, it was held that if the fruit of a tree standing upon the land of a person falls upon the land of another, the

owner of the tree may lawfully enter to get the fruit, because the falling of the fruit there was not by the fault of the owner of the tree. So in Toplady v. Sealey, 2 Roll. Abr. 568, it was held that where one is looking for cattle which he has lost, he may lawfully go upon a footpath over the lands of another, but if he goes outside the path, trespass lies. See Bac. Abr. Trespass F. In Millin v. Fawdry, Latch. 120, it was held not to be trespass for one to drive cattle belonging to another from his own lands upon the land of the owner of the cattle. So, too, in the same case it was held that trespass would not lie, even if the cattle were chased out "with a little dog," and the dog, notwithstanding the master's endeavor, afterwards chases the beasts into the owner's enclosure, for the chasing of them out of the close was lawful, and it is not in his power to prevent them from being chased into the cattle-owner's enclosure. But otherwise, if a stranger chases the cattle out; for, by doing this, although the owner of the land on which the cattle are trespassing is apparently benefited, yet by his act the owner is deprived of his right to distrain the beast. Bro. Tresp. pl. 421; Kelw. 46 B.; Bac. Abr. Trespass F. In Nettleton v. Sikes, 8 Met. (Mass.) 34, the defendant cut down

and has involved the expenditure of large sums of money, is not revocable, upon the ground that the party giving it is estopped from revoking it. But this doctrine seems to us to be in defiance of the statute, and to operate as a complete abrogation of its salutary provision in respect to the transfer of interests in land, and is an instance of judicial legislation which is wholly unwarranted. If a person, in view of the statute in this regard, of which he is presumed to have knowledge, sees fit to go on and make extensive and permanent improvements upon the lands of another, without first investing himself with a legal right to enjoy them, it is difficult to see upon what ground a court of equity should interfere to protect him against the consequences of his folly, or why the owner of the land who has merely consented to such erections or improvements should have his estate thus burdened with a permanent easement, and be equitably estopped from revoking this authority, and ridding his premises of a burden which the statute provides shall only be imposed in a certain mode. In the words of a distinguished judge,¹ relative to the force of a parol license to erect a building upon lands, "if a parol license, even when carried into effect, will give the builder a right to continue the house so long as it

¹ SWIFT, J., in *Benedict v. Benedict*, 5 Day (Conn.) 458.

and peeled trees upon the plaintiff's land, under a valid agreement that he should have the bark for his services. He entered upon the plaintiff's premises and removed the bark. The plaintiff brought an action of trespass against him therefor, but the court held that the action would not lie, as the bark at once, upon being taken from the trees, became the property of the defendant, and that he might lawfully enter to take it away; and the doctrine of this case has been reaffirmed by the courts of that State in several later cases. *McNeal v. Emerson*, 15 Gray (Mass.) 384; *Drake v. Wells*, 11 Allen (Mass.) 141; *McLeod v. Jones*, 105 Mass. 403. But the doctrine of these cases rests upon the ground that, where there is an absolute sale of property which is lying upon the vendor's land, there is an

implied license to enter and take it away; and in the case of *McLeod v. Jones*, *ante*, where the defendant was the mortgagee of chattels in the possession of the plaintiff, it was held that no such license could be implied when the goods were locked up in the mortgagor's house, and an entry could not be had without breaking in. The rule in reference to the sale of the property lying or being upon the premises of another at the time of sale would seem to be that when there is an absolute sale of property which the purchaser is to remove, which at the time of sale is upon the premises of the vendor, there is an implied license to enter to remove the property. In *any* event, if the entry is made peaceably, and in doing so no special damage is sustained, no action will lie therefor.

shall last, and to maintain ejectment for it, then real estate may be transferred by parol, which is directly contrary to the statute." It is now well settled in England,¹ and by the better class of cases in this country,² that a parol license which confers any interest in land is invalid, and is revocable at any time whether executed or not, at the will of the licensor, and that, after such revocation, whether by notice from the licensor, or a conveyance of the estate by him, or his death, the only right remaining in the licensee is that of entering upon the land within a reasonable time thereafter, to remove his erections.³ But a license to do an act upon another's land, which confers no estate or interest in the land, but which is coupled with an interest in chattels thereon, as, when the owner sells chattels which are situated upon the land, an irrevocable license to enter and take the same is implied, if not expressly given.⁴ Thus, where A sold to B certain corn to be put in a crib on A's land, B to take it away at his pleasure, it was held that the license was coupled with an interest and was irrevocable.⁵ So where a person has erected a house,⁶ cut timber,⁷ or dug ore,⁸ upon another's land, while the license may be revoked so as to prevent further use of, or severance from, the land, yet it cannot be so revoked as to prevent an entry within a reasonable time for the removal of the house, or the ore, or the timber, which has already been severed; and the same rule prevails where property has been deposited upon another's land by his permission.⁹ But it will be seen that the license

¹ *Fentiman v. Smith*, 4 East, 107; *Wallis v. Harrison*, *ante*; *Rex v. Standon*, 2 M. & S. 461; *Ruffey v. Henderson*, 21 L. J. Q. B. 49.

² *Cook v. Stearns*, 11 Mass. 533; *Duineen v. Rich*, 22 Wis. 550; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; *Collins Co. v. Marcy*, 25 Conn. 239; *Trammell v. Trammell*, 11 Rich. (S. C.) 471; *Gauthier v. Atkinson*, 35 Wis. 48; *Pitman v. Poor*, 38 Me. 237; *Carter v. Harlan*, 6 Md. 20; *Owen v. Field*, *ante*; *Bridges v. Purcell*, 1 D. & B. (N. C.) L. 492; *Deslage v. Pearce*, 38 Mo. 588; *Clute v. Clute*, 20 Wis. 531; *Yeakle v. Jacobs*, 33 Penn. St. 376; *Haux v. Seat*, 26 Mo.

178; *Foster v. Browning*, 4 R. I. 47; *Hall v. Chaffee*, 13 Vt. 150.

³ *Prince v. Case*, 10 Conn.; *Collins Co. v. Marcy*, *ante*; *Arrington v. Larabee*, 10 Cush. (Mass.) 512.

⁴ *Cook v. Stearns*, *ante*.

⁵ *Addison v. Dark*, 1 Gill (Md.) 221.

⁶ *Prince v. Case*, *ante*; *Arrington v. Larabee*, *ante*.

⁷ *Giles v. Simonds*, 15 Gray (Mass.) 441.

⁸ *Silsby v. Trotter*, *ante*.

⁹ *Poor v. Oakman*, 104 Mass. 309; *Erskine v. Plummer*, 7 Me. 457; *Whitmarsh v. Walker*, 1 Met. (Mass.) 313; *Wood v. Manley*, 11 Ad. & El. 34.

which exists in this class of cases is one which is implied by law, as an incident to the act licensed, and exists, even though its exercise is prohibited or forbidden by the owner of the land, and whether or not he has ever, by words, authorized it. So too, a parol license given by the owner of a dominant estate to the owner of a servient estate, to do an act which interferes with or destroys his easement therein, the license, after it is executed, is irrevocable, upon the ground that, while an easement cannot be created except by deed or prescription, yet it may be surrendered in whole or in part without deed, and consequently such a license is not within the statute,¹ and the granting of the license is treated as an abandonment of the easement to the extent of the act licensed. But, of course, the circumstances attendant upon the granting of the license may be considered in determining whether or not an abandonment of the easement was intended.² So too, a license to do an act upon another's land for which a stated compensation is paid, as where parol permission is given to another to flow his lands by means of a dam, for a regular rent, which is done for several years, while the license might have been revocable during the first year, yet by permitting the act to go on for a longer period, and receiving rent therefor, the license grows into a parol lease for an indefinite time, and thereby creates a tenancy from year to year which can only be terminated by the requisite notice.³

SEC. 11. License Revoked by Conveyance. — If the grantor of a parol license conveys the land to a third party, the license is determined at once, without notice, to the licensee of the transfer,⁴ and from that time the licensee becomes liable to the grantor for all damages resulting from the exercise of acts done in pursuance of such license. Thus, in a Massachusetts case,⁵ it was held that a writing, not under seal, purporting to convey the right to flow lands, and to

¹ *Curtis v. Noonan*, 10 Allen (Mass.) 406; *Dyer v. Sanford*, 9 Met. (Mass.) 406; *Winter v. Brockwell*, 8 East, 308; *Davies v. Marshall*, 10 C. B. N. S. 97.

² *Wood v. Edes*, 2 Allen (Mass.) 578.

³ *Morrill v. Mackman*, 24 Mich. 279.

⁴ *Wallis v. Harrison*, 4 M. & W. 538; *Roffey v. Henderson*, 17 Q. B. 574; *Coleman v. Foster*, 1 H. & N. 37; *Gaussen v. Morton*, 10 B. & C. 731.

⁵ *Cobb v. Fisher*, 121 Mass. 169.

release all claims for damages therefor, does not bind the land nor estop a subsequent grantee thereof from recovering damages from the flowing of the land subsequent to the conveyance. In a Connecticut case,¹ in an action for diverting the water of a canal upon the plaintiff's lands, it appeared that the diversion was of the waters of what formerly constituted part of the Farmington canal, and the injury proved, was effected by a brick culvert, erected in February, 1848, running under the railroad of the New Haven and Northampton company, and the turnpike of the Cheshire turnpike company, no part of which was constructed on the plaintiff's land. The defendants offered evidence to prove, and claimed that they had proved; that the culvert was a permanent and expensive structure; about seventy feet in length, and of about six feet span, erected and built by the New Haven and Northampton company, in the construction of their railroad, under their charter; that it was erected and built by them, opposite to the plaintiff's premises, where it now remains, at the express solicitation and request of Uriah Foot, the then owner of the premises, who desired to have the same there placed, for the irrigation of his adjacent land; that he co-operated and assisted in the erection of the culvert, and agreed with the company, for himself and his heirs, forever, to take care of the waters so diverted, and to guarantee the company against damage therefrom; and that the company would have diverted the water at a point above the plaintiff's land where, as they claimed, they had acquired a right to discharge waters, but for such request and agreement.

The defendants insisted, that, if the facts were as claimed by them, they were not, any of them, liable to the plaintiff in damages for the necessary, natural, and foreseen effects, resulting from the erection of the culvert, and requested the court to charge the jury, in conformity to such claim.

The plaintiff claimed that, as the requests and agreements of Uriah Foot, claimed by the defendants, rested solely on parol evidence, they constituted a mere parol license which was revoked by his death,² and also by express notice to that

¹ Foot v. N. H. &c. R. R. Co., 23 Conn. 214.

² Eggleston v. N. Y. &c. R. R. Co., 35 Barb. (N. Y.) 162; Carter v. Har-

lan, 6 Md. 20; Chandler v. Spear, 22 Vt. 388. If a definite term is fixed upon, the license expires at the end of the term without notice, Glynn

effect, by the plaintiff, personally, to each of the defendants, since his father's decease; and that he was entitled to recover, from each of the defendants, whatever damages had accrued to him, by means of the diversion, since the revocation. The plaintiff requested the court to charge the jury in accordance with his claims. The court did not charge the jury as requested by the plaintiff, but did, *pro forma*, charge them in conformity to the claims of the defendants. This ruling was held to be erroneous, and the plaintiff under the facts stated was held to be entitled to recover upon the ground that the license was void under the statute of frauds, because it was not in writing, and was revocable by the plaintiff's grantor at any time, and was in fact revoked by the conveyance to the plaintiff, or by his notice to that effect after he acquired the title, and that the license could only be set up to excuse damages arising while it was unrevoked.¹ In passing upon this question, STORRS, J., said: —

“The plaintiff, having an absolute and unrestricted conveyance of his land from the former owner, has presumptively a full and unqualified dominion over it, subject to no servitude or easement in favor of any other person. The act, therefore, committed by the defendants, in turning the water of the canal upon it, was an invasion of the plaintiff's rights, unless it was justified by the facts put in evidence by the defendants, upon whom the burden of establishing such justification rests. The facts found by the jury, and on which the defendants rely, are these. The company built the culvert on land adjoining the land of the plaintiff, at the verbal request of Uriah Foot, who then owned the adjoining land, and by whom it was subsequently sold and conveyed to the plaintiff. The said Uriah desired that the said culvert should be so located, for the irrigation of his own land, and actually coöperated and assisted in building it; verbally agreeing with the defendants for himself and his heirs forever, to dispose of the water which should be diverted upon his land, and to guarantee the defendants against any damage

v. George, 20 N. H. 114; and the commencement of an action for damages operates as a revocation, *Lockhart v. Gier*, 54 Wis. 133.

¹ *Jamieson v. Milliman*, 3 Duer (N. Y.) 255; *Kimball v. Yates*, 14 Ill. 464; *Hall v. Chaffee*, 13 Vt. 150; *Dodge v. McClintock*, 47 N. H. 383; *Gilmore v. Wilson*, 53 Penn. St. 194.

therefrom. The company would have diverted the water at a point above the land of said Uriah, and where they had a right to discharge it, but for the said request and agreements of the plaintiff's grantor. On the other hand, it was found, for the plaintiff, that, after he became the owner of the land, and also after the death of Uriah Foot, he revoked the license conferred by his grantor, giving an express notice to that effect to all the defendants.

"These facts furnished ample proof of a license from Uriah Foot, to the defendants, to construct the culvert and to overflow his land; and as this license was never revoked by him during his ownership, it constituted a justification for the diversion of the water for that period. We are as clearly of opinion, however, that the effect of the license, or agreement referred to, inasmuch as it was by parol, was not to convey to the defendants any estate or interest in the land which it was contemplated to overflow. The right perpetually to divert water upon that land, as claimed by the defendants, would be an incorporeal hereditament, and therefore an estate or interest in it; and such a right, the license, proved by the defendants, would be ineffectual to convey.¹ To hold the contrary would be a direct abrogation of the statute of frauds, which requires all contracts for 'the sale of lands, tenements, or hereditaments, or of any interest in or concerning them,' to be in writing. The privilege, therefore, conferred on the defendants by the parol request and agreement of Uriah Foot, is rendered to a mere license, although, in its terms, it was a more extended grant. The authorities on this point are uniform.

"It is equally well settled, that a mere license, which is only an authority or power to do particular acts, uncoupled with an interest in the subject of those acts (serving simply to justify such acts, while leaving the estate, and all the incidents of ownership, in the proprietor of the land), is, in its nature, revocable. If it were not revocable, it would transfer to the licensee an interest in the land; it would have the

¹ *Brown v. Woodworth*, 5 Barb. 550; *Houghtating v. Houghtating*, 5 id. 379; *Stevens v. Stevens*, 11 Met. (Mass.) 251; *Carter v. Harlan*, 6 Md. 20; *Wood v. Edes*, 2 Allen (Mass.) 578; *Curtis v. Noonan*, 10 id. 406; *Dyer v. Sandford*, 9 Met. (Mass.) 395; *Marston v. Gale*, 24 N. H. 176.

effect of a grant.¹ We consider it also to be now an established principle of the common law, although some ancient cases may seem to conflict with it, that when the right to do acts upon the land of another is of such a nature as to require to be created by a grant, in order to be primarily indefeasible, a mere license to do such acts does not become irrevocable, because it has been executed by the licensee; although such execution may have been attended with expenditure of money or labor, and although, also, the termination of said license may cause the loss of such expenditure.²

¹ *Duineen v. Rich*, 22 Wis. 550; *Kimball v. Yates*, 14 Ill. 464; *Howe v. Searing*, 6 Bos. (N. Y.) 684; *Clute v. Carr*, 20 Wis. 531; *Marston v. Gale*, 24 N. H. 176; *Houx v. Seat*, 26 Mo. 178; *Owen v. Field*, 12 Allen (Mass.) 457; *Selden v. Del. &c. Canal Co.*, 29 N. Y. 634; *Dodge v. McClintock*, 47 N. H. 383; *Troxell v. Lehigh &c. Coal Co.*, 42 Penn. St. 513; *Hall v. Chaffee*, 13 Vt. 150; *Foster v. Browning*, 4 R. I. 47; *Houston v. Laffee*, 46 N. H. 505; *Carter v. Harlan*, 6 Ind. 20.

² The rule as stated is adopted in most of the States. *Woodward v. Seeley*, 11 Ill. 157; *Wolfe v. Frost*, 2 Sandf. (N. Y.) 72; *Desloge v. Pearce*, 38 Mo. 588; *Cook v. Stearns*, 11 Mass. 533; *Houston v. Laffee*, 46 N. H. 505; *Foster v. Browning*, 4 R. I. 47. But in Maine, *Clement v. Durgin*, 5 Me. 9; Nevada, *Lee v. McLeod*, 12 Nev. 280; Pennsylvania, *Lacy v. Arnett*, 33 Penn. St. 169; Indiana, *Buchanan v. Logansport &c. R. R. Co.*, 71 Ind. 265; Illinois, *Russell v. Hubbard*, 59 Ill. 335; and Ohio, *Wilson v. Chalfant*, 15 Ohio, 248; *Miller v. Brown*, 33 Ohio St. 547, executed licenses, involving the outlay of considerable money, have been held irrevocable upon the ground that the party granting the license is estopped from revoking it. But this doctrine is hardly sustainable, and is clearly opposed to the intent, if not to the language of the statute of frauds; and it can hardly be said that a person who has been so imprudent as to build expensive works upon another's land,

or which will impose a burden thereon, without first taking the precaution to procure such person's consent in writing, is entitled to any exception in his favor either at law or in equity: *Woodward v. Seeley*, 11 Ill. 157. In *Benedict v. Benedict*, 5 Day (Conn.) 468, *Swirt, J.*, in speaking of the revocability of a license to make permanent erections upon another's land, said: "If a parol license, even when carried into effect, will give the builder a right to continue the house so long as it shall last, and to maintain ejectment for it, then real estate may be transferred by parol, which is directly contrary to the statute." *Fryer v. Warne*, 29 Wis. 511; *Clute v. Carr*, 20 id. 531; *Miller v. Auburn &c. R. R. Co.*, 6 Hill (N. Y.) 61; *Wright v. Freeman*, 5 H. & J. (Md.) 467; *Hays v. Richardson*, 1 G. & J. (Md.) 366; *Mellor v. Watkins*, L. R. 9 Q. B. 400. In some of the cases, however, in total disregard of the statute and its obvious purpose, the courts have held that where a license is given to make permanent improvements or erections upon another's land, the license becomes irrevocable upon the ground of estoppel: *Ricker v. Kelly*, 1 Me. 117; *Russell v. Hubbard*, 59 Ill. 335; *Sullivan v. Commissioners, &c.*, 3 Ohio, 89; *Androscoggin Bridge Co. v. Bragg*, 11 N. H. 109; *Clement v. Durgin*, 5 Me. 9. In other cases it is held that a license under such circumstances cannot be revoked without paying or offering to pay the expenses incurred

"Nor do we think that the revocability of the license depends at all upon the circumstance that the acts authorized by the plaintiff's grantor were to be done, if considered only in respect to their immediate or direct effect, upon land not owned by him, so long as the necessary and inevitable consequence of those acts would be an exercise, on the part of the defendants, of a right in the land of the grantor himself, and to restrict the dominion of the latter over it: a right which, if made indefeasible by a grant, would burden the land with a perpetual easement. In fact, the privilege conferred on the defendants was, in form, a license to build the culvert on the defendants' own land, but in substance a right to overflow the land of the licensor himself. To construct a culvert on land adjoining his own, and really already under the defendants' control, by virtue of their charter, was an act, which, independently of its tendency to cause an overflow upon the land of the grantor, the defendants had an unquestionable right to do without his sanction, and which, in this view of the matter, was not done by virtue of his authority. What required his license was, that the company might, by means of the culvert, turn water upon his land; and this diversion was the subject of the license rather than the mere construction of the culvert. The permission to build the culvert, which would necessarily cause the diversion of the water, was really a permission so to divert the water, and to affect the rights of the licensor in his own land. We cannot see why such a license should not be revocable in the same manner, as if the acts authorized to be done were done on the premises of the licensor, consequently producing the same effect there.¹

by the licensee in its execution: *Clement v. Durgin*, *ante*; *Addison v. Hack*, 2 Gill. (Md.) 221; *Lane v. Miller*, 27 Ind. 534. In Pennsylvania, both at law and in equity, the courts have taken an extreme ground in support of the rights of a licensee under a parol license, and take a ground not recognized elsewhere: *Huff v. McCauley*, 53 Penn. St. 206; *Cumberland &c. R. R. Co. v. McLanahan*, 59 id. 23. And in several of the States the decisions will be found to be vacillating: *Cook v. Prigdon*, 45 Ga. 331;

Wilmington &c. R. R. Co. v. Battle, 66 N. C. 540; as in Illinois, *Woodward v. Seeley*, 11 Ill. 157; *Russell v. Hubbard*, 59 id. 335; *New Hampshire, Woodbury v. Parshley*, 7 N. H. 297; *Houston v. Laffee*, 46 id. 505; and *Maine, Ricker v. Kelly*, 1 Me. 117; *Moulton v. Fought*, 41 Me. 298. In the last two States the later cases sustain the doctrine stated in the text, while in Illinois the last named case takes the extreme ground.

¹ *Dodge v. McClintock*, 47 N. H. 383; *Hall v. Chaffee*, 13 Vt. 150.

“Reference has been made by the defendants to a few very peculiar cases, the most prominent of which is an English case,¹ as sustaining some such distinction as has just been alluded to. The doctrine of the decisions is, that if one who has a privilege on the land of another permits that other to do acts, which are inconsistent with the enjoyment of the privilege, or tend to its destruction, such indulgence or license, if acted upon, or executed by the owner of the land, operates as an extinguishment or abandonment of the privilege. If these cases were correctly decided (about which we express no opinion), they have no application to the case now before us. It will be seen, on examination, that the courts, so far from passing upon the question, whether an easement or interest in land can be acquired by parol license or agreement, executed or not executed, distinguish those cases from such as involve that issue. Besides, in the present case, Uriah Foot neither had, nor claimed, any privilege in the land on which the culvert was built, nor did he, by the terms of his license, deprive himself, or pretend to deprive himself, of any such privilege. On the contrary, the claim of the defendants is, that an easement was conferred upon them, in the adjoining land of Uriah Foot, consisting in a perpetual right to divert water upon it.

“We have not deemed it necessary to accompany our statement of principles with a particular citation of the authorities by which they are supported.² We are aware that several decisions have been made in the courts of some of the United States in which greater effect is given to the circumstance that a parol license to perform acts upon land has been executed by the licensee, especially where such execution has involved the expenditure of money or labor, than the principles we have adopted would warrant. It is true

¹ *Liggins v. Inge*, 5 Bing. 682.

² *Bridges v. Purcell*, 1 D. & B. (N. C.) 493. See *Wilmington &c. R. R. Co. v. Battle*, 66 N. C. 540, in which it was held that while a license under seal is as revocable as a license by parol, yet, that neither, *when coupled with an interest, or founded on a consideration, are revocable*. But in this case, the facts were such that a court of equity

would have decreed a specific performance of the contract, as to both parties; and, moreover, the license was in writing. When a license has been executed under circumstances which warrant it as being treated as an agreement on the part of the licensor to give the right, a court of equity will compel him to do so. *Cook v. Prigdon*, *ante*.

that some of those decisions go to the extent of holding that the license, after such execution, is irrevocable, and that thereby the licensee acquires an indefeasible and perpetual right to maintain, without disturbance, the condition in which he is placed by such execution. Those decisions were made in States where, as in Maine, Massachusetts, and New Hampshire,¹ there are no courts of equity, with ordinary chancery jurisdiction, and where, therefore, it may have been deemed necessary, in order to administer substantial justice, that the strict principles of the common law should be modified by the distinctive principles of equity jurisprudence; or where, as in Pennsylvania, courts 'possess the power of administering the principles of equity through the medium of legal forms.' With us, however, the administration of the two systems is kept distinct: so that, in considering the questions before us, we have been governed less by decisions in the States, to which allusion has just been made, than by cases adjudicated in other States of the Union, and in England, where courts administer purely the principles of common law, modified only, in certain instances having no relation to the subject now under discussion, by the incorporation of equitable principles, into the legal system. In the North Carolina case before referred to,² it was held that one whose land is overflowed by a mill-pond has a right to recover for the damages suffered thereby, notwithstanding that his ancestor, by parol, expressly permitted the grantor of the defendant to erect the dam, and consequently to overflow the land; that such permission, if set up as a grant of a perpetual right to overflow the land (which would be an incorporeal hereditament) was void for want of a deed; and that, if regarded as a mere license or authority, it was revocable and ceased with the life of the licensor. The eminent judge who delivered the opinion of the court reviewed with his usual ability and clearness the prominent authorities which might be supposed to favor the defendant, and discussed the general

¹ The early doctrine in New Hampshire, holding that an executed license is not revocable, seems to be overruled by later cases. *Blaisdell v. Portsmouth &c. R. R. Co.*, 51 N. H. 483; *Houston v. Laffee*, 46 N. H. 505;

Dodge v. McClintock, 47 id. 383; and the same also is the case in Maine: *Pitman v. Poor*, 38 Me. 237; *Moulton v. Fought*, 41 id. 298.

² *Bridges v. Purcell*, 1 D. & B. (N. C.) 493.

principles applicable to the case; showing most satisfactorily, as we think, that none of them sustained the doctrine that such a license, although acted upon by the licensee, passed any interest or estate in the land of the plaintiff, or was irrevocable. Unless there is distinction in principle between a license to turn back water upon another's land, by means of a dam below it, and a permission to overflow it by means of the diversion of a stream from above (which would hardly be claimed), the case just cited is strictly analogous to the present.

"It results from the principles which we have thus adopted, that it was the right of the plaintiff's grantor, at any time during his ownership of the land, now belonging to the plaintiff, and even after the erection of the culvert, to revoke the license under which the defendants were permitted to divert the water. It follows, as a matter of necessity, that the plaintiff, after his purchase, had an equal right to annul the license.¹

"Much stress has been laid on the fact that Uriah Foot, in connection with request that the culvert should be built, and his agreement concerning it, actually coöperated and assisted in its construction. Now, whether that agreement would be enforced in a court of equity, on the ground of its execution, we are not here called upon to determine; but at law, it cannot, existing only in parol, have any greater force, or stand on higher ground than a mere license, notwithstanding its execution.² If these acts of Uriah Foot were to be regarded as done independently of the defendants, and the erection of the culvert as his act, and not that of the defendants, the latter might indeed successfully urge that although the plaintiff might not be bound to allow the culvert to remain, the defendants would be exonerated from any obligation to remove it, and could not be treated as a trespasser on account of its continuance. But the facts proved will not allow us to regard the building of the culvert as the act of

¹ *Dempsey v. Kipp*, 62 Barb. (N. Y.) 611. written license to perpetually flow another's land is not a revocable li-

² *Druse v. Wheeler*, 22 Mich. 439; *Tanner v. Valentine*, 75 Ill. 624; *Fitch v. Constantine &c. Co.*, 44 id. 74. for credit. *Hitchins v. Shaller*, 32 Mich. 496; *Turner v. Stanton*, 42 id. 506. But a

Uriah Foot. On the contrary, the finding shows that 'it was erected and built by the defendants in the construction of a railroad, under the charter' of the principal defendants, to whom, of course, Uriah Foot's services were rendered; and that although the culvert was made at his request, his assistance was furnished in behalf of such principal defendants and not in his own. Indeed, if it was built 'under the charter,' it must have been built by those defendants, who were authorized to construct it for the accommodation of a railroad; otherwise we must adopt the idea that Uriah Foot constructed it, without law or right; a supposition unwarranted by the proof and inconsistent with the defendants' claim.

"But, whatever might be the rights of parties if the land in question still remained the property of Uriah Foot, the issue now presented is between the defendants and a *bona fide* purchaser of the land for a valuable consideration, without any notice, actual or constructive, of any previous agreements between the former owner and the railroad company. That such a purchaser is not affected by such an agreement, was settled by this court in an early case.¹ To hold that such an agreement runs with the land and creates an easement upon it even in the hands of a *bona fide* purchaser, amounting to a permanent encumbrance, would be not only to invade the statute of frauds, but a violation of the most salutary policy of our recording system, and also in such cases as that now under review, of obvious principles of justice. On this point we give our renewed sanction to the views of this court, as expressed by CHIEF JUSTICE WILLIAMS, with his accustomed force and clearness, in the case just quoted; views which are strongly confirmed by the case of *Bridges v. Purcell et al*, ante. In the latter, the ancestor of the plaintiff had given a license to the vendor of the defendant. The opinion of JUDGE GASTON, after showing that the pretended grant, for want of a deed, passed no interest in the land, and imposed no charge upon it, and could not prevent the plaintiff from succeeding to an unlimited and unshackled fee-simple therein, thus proceeds in respect to the privilege claimed: 'Regarded as a license, how does it enure to the benefit of the defend-

¹ Prince v. Case, 10 Conn. 375.

ants? If it passed as an appurtenance to the land, it partook of its nature; it was more than an authority, it was a hereditament. To hold that a permission, thus given, shall operate for ever for the benefit of the grantee and his assigns against the grantor and his heirs, would be in effect to permit a fee-simple to pass under the name of an irrevocable license.¹ Purchasers would never know what encumbrances were upon their lands, and instead of the solemn and deliberate instruments, which the law requires as the indispensable means of transferring freeholds, valuable landed interests would be made to depend wholly on the integrity, capacity, and recollection of witnesses.'

"The defendants claim, lastly, that as the act of diverting the water upon the plaintiff's land was within the scope of the company's chartered powers, communicating the exercise of the right of eminent domain, nothing remained but to compensate the owner for the damages caused to him thereby, and that this had been done by an adjustment between the defendants and the owner. If the land had been lawfully condemned for the purposes of the company, no objection could be made to the validity of such an adjustment. But the powers of the defendants were acquired under a special grant, to be exercised only on special terms; and it was necessary for the company, in order that there should be such a condemnation, to pursue the steps prescribed by their charter for that purpose. Those steps were not taken, and the land was not therefore subject to the powers claimed by the defendants. This ground of jurisdiction therefore fails."

SEC. 12. Reasonable Notice of Revocation must be Given.—

A licensee under a revocable license is entitled to reasonable notice of revocation and a reasonable time afterwards to remove his goods. The rule of law is, that a simple license, in order to be binding on the licensor, must be under seal; but if it is not, the licensee is not a trespasser until the licensor revokes the license. Under a parol license the licensee has a right to a reasonable time to go off the land after it has been withdrawn, before he can be forcibly thrust off it; and he could bring an action if he were thrust off

¹ Woodward v. Seeley, *ante*; Benedict v. Benedict, *ante*.

before such a reasonable time had elapsed.¹ But, where a reasonable time has been given to the licensee to remove the erections made under the license, the licensor may resume the possession, and the licensee cannot enter to remove the property without rendering himself liable in trespass.² But, where there is a license coupled with an interest, the licensee may enter within a reasonable time after its revocation and remove the property, and if resisted by the licensor, may use all the force necessary to secure the removal without rendering himself liable to an action of trespass; either for the entry, or for an assault.³

SEC. 13. Injunction to Restrain Interference with License. — Where, by a memorandum endorsed on a lease, it was provided that the lessee should have the exclusive right of sporting and killing game over the demised and adjacent properties, and it was proved that the enjoyment of this privilege was an essential part of the consideration for taking the lease, the landlord was restrained by injunction from interfering with the tenant in the exercise of the right, until a lease under seal should be executed according to the agreement. It was doubted in this case whether the court would have interfered in case the agreement had been already entered into by an instrument under seal.⁴

SEC. 14. Parol Agreement for Sale may Operate as License to Excuse Trespass. — Although a deed is necessary to create an easement, yet a contract for the sale of an interest in lands without a note in writing may operate as a license, so as to excuse the entry of a purchaser on the land, but it cannot be made available in any way as a contract.⁵ So a parol demise of land, reserving to the landlord "all the hedges, trees, thorn bushes, fences, with lop and top," oper-

¹ *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 400.

² *Druse v. Wheeler*, 22 Mich. 439.

³ *Sterling v. Warden*, 51 N. H. 217.

⁴ *Frogley v. Lovelace*, Johns. (Eng.) 333.

⁵ *Carrington v. Roots*, 2 M. & W. 248; *Ruffey v. Henderson*, 21 L. J. Q.

B. 49; *Wood v. Manley*, 11 Ad. & El. 34. In *Van Deusen v. Young*, 29 N. Y. 9, a tenant for life agreed to sell, and gave possession of the premises to his vendee. It was held that though the contract could not operate as a contract of sale, it did operate as a license to enter and occupy until such license was revoked.

ates as a license to enter the land for the purpose of cutting and carrying away the trees; but not as a grant or easement.¹ A reservation of growing crops, standing trees, etc., in a deed of lands, is a reservation of the property named, and the title thereto does not pass to the grantee; and although nothing is said as to a right to enter to cut and remove the same, yet such a license is implied, and the grantor may, even by parol, sell such crops or timber to another and confer upon him the same right to enter and cut and take away the same, which he possesses. But, if no time is fixed within which the right is to be exercised, it is held that it must be exercised within *a reasonable time*, in view of the circumstances, and whether it was exercised within a reasonable time is a question for the jury. If entry is made *after* the lapse of a reasonable time, the person making the entry is liable as a trespasser, but a recovery against him can only be had for the damages resulting from the entry, and the value of the crops or timber constitute no part of the damages.² The actual possession of Crown lands under a parol license from the Crown entitles the party in possession to maintain trespass against a wrong-doer.³ If a party take the goods of another, and place them upon his own land, the owner may enter that land for the purpose of retaking them, without making himself liable in trespass.⁴ A plea of leave and license to erect and maintain a wall upon a given spot is not supported by proof of license to erect only.⁵ It is sufficient for the plaintiff in an action against a wrong-doer to allege possession, but such an allegation cannot be sustained without showing that the easement in respect of which the action is brought is held under a legal title.⁶

SEC. 15. Signature not Necessary in Case of a Deed.—It has been doubted whether a lease under seal for more than three years should not also be signed, but the better opinion seems to be that the statute does not apply to such instruments. BLACKSTONE lays it down,⁷ that the statute has restored the

¹ Hewitt v. Isham, 7 Exch. 77.

² Heflin v. Bingham, 56 Ala. 566.

³ Harper v. Charlesworth, 6 D. & R. 572, 4 B. & C. 574.

⁴ Patrick v. Colerick, 3 M. & W. 483.

⁵ Alexander v. Bonnin, 6 Scott, 611;

⁴ Bing. (N. C.) 799.

⁶ Fentiman v. Smith, 4 East, 109.

⁷ "Comm." vol. ii. 306.

old Saxon form of signing, and superadded it to sealing and delivery in case of a deed. MR. PRESTON, on the other hand,¹ treats this passage as a mistake from not attending to the words of the statute, and holds it clear that no signature is necessary in the case of a deed.² In *Cherry v. Heming*,³ ROLFE, B., said: "I am strongly inclined to think that the statute does not extend to deeds, because its requirements would be satisfied by the parties putting their mark to the writing. The object of the statute was to prevent matters of importance from resting on the frail testimony of memory alone. Before the Norman time, signature rendered the instrument authentic. Sealing was introduced because the people in general could not write. Then there arose a distinction between what was sealed and what was not sealed, and that went on until society became more advanced, when the statute ultimately said that certain instruments must be authenticated by signature. That means that such instruments are not to rest on parol testimony only, and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or a mark," and ALDERSON, B., and PARKE, B., expressed opinions to the same effect.

SEC. 16. **Appointment of Agent.** — An agent to contract for the sale of land under the second section need not be authorized by writing.⁴ In South Carolina,⁵ under the statute, it is held that the authority of the agent must be proved in writing, and that if the instrument is signed by an agent, even though the principal is present and assents thereto, that it is inoperative, and a similar doctrine is held in Illinois.⁶ But in England and in most of the States of this country, except where the statute specially provides that the author-

¹ Shep. Touch. fol. 57, n. 24.

² *Per* DENMAN, J., in *Cooch v. Goodman*, 2 G. & D. 159; 2 Q. B. 580; *Aveline v. Whisson*, 4 M. & Gr. 801; *Irgin v. Thompson*, 4 Bibb (Ky.) 295; *Gardner v. Gardner*, 5 Cush. (Mass.) 483; *Parks v. Hazlerig*, 7 Blackf. (Ind.) 536. But see *Wallace v. McCullough*, 1 Rich. (S. C.) Eq. 426;

Rockford &c. R. R. Co. v. Shunick, 65 Ill. 223, *contra*.

³ 4 Ex. 631. See also *Taunton v. Pepler*, 6 Madd. 166.

⁴ *Clinan v. Cooke*, 1 Sch. & Lef. 31.

⁵ *Wallace v. McCullough*, 1 Rich. (S. C.) Eq. 426.

⁶ *Rockford &c. R. R. Co. v. Shunick*, 65 Ill. 223. But the statute in Illinois expressly so provides.

ity shall be in writing,¹ a lease or other instrument under seal signed by an agent *in the presence* of the principal is held to be the act of the principal,² and a similar doctrine has been held in Kentucky,³ and it would seem that this is generally the rule, particularly where, as should always be done, the agent signed the name of the principal instead of his own,⁴ the ground upon which this note rests being that the execution thereof is the act of the principal and not of the attorney.⁵ But where a deed is executed by an agent in the name of the principal when he is *not* present, it is held to be invalid, where the agent acts only under oral authority.⁶

SEC. 17. Term Commences from Time of Agreement.—Such lease for three years, of land, as will be good under the second section, must be for three years, to be computed from the time of the agreement,⁷ and a lease, to commence at a future day, will therefore not be within the statute.⁸ But if by the terms of the lease the term is *to commence from a future day*, it is within the statute, and void.⁹ But in New York,¹⁰ Colorado,¹¹ and Indiana,¹² such leases are held to vest *a present interest*, and therefore not to be within the statute. Where a parol lease is for a longer term than that permitted by the statute, the fact that *the rent is paid in advance for the whole term* does not take the lease out of the statute.¹³ In *Inman v. Stamp*,¹⁴ DAMPIER, J., said the practice had been

¹ As in Alabama, Arkansas, California, Dakota, Kansas, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Utah, Wisconsin, New Hampshire, and Illinois.

² *Gardner v. Gardner*, 5 Cush. (Mass.) 483; *Rex v. Longnor*, 4 B. & Ald. 647; *Ball v. Dunsterville*, 4 T. R. 313.

³ *Irvin v. Thompson*, 4 Bibb (Ky.) 295.

⁴ *Elwell v. Shaw*, 16 Mass. 42; *Combe's Case*, 9 Coke, 75 a.

⁵ *Mutual Benefit Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Frost v. Deering*, 21 Me. 156.

⁶ *Burns v. Lynde*, 6 Allen (Mass.) 305; *Upton v. Archer*, 41 Cal. 85.

⁷ *Rawlins v. Turner*, 1 Ld. Raym. 736.

⁸ *Rawlins v. Turner*, 1 Ld. Raym. 736; *Ryley v. Hicks*, 1 Str. 651; *Tress v. Savage*, 4 E. & B. 36; 18 Jur. 680; 23 L. J. Q. B. 339; *Baker v. Reynolds*, 2 Sel. N. P. 13th ed. 759.

⁹ *Inman v. Stamp*, 1 Starkie, 12; *Delano v. Montague*, 4 Cush. (Mass.) 42; *Croswell v. Crane*, 7 Barb. (N.Y.) 191.

¹⁰ *Besar v. Flues*, 64 N. Y. 518; *Young v. Duke*, 5 id. 463; *Trull v. Granger*, 8 id. 115.

¹¹ *Sears v. Smith*, 3 Col. 287.

¹² *Huffman v. Stark*, 31 Ind. 474.

¹³ *Brockway v. Thomas*, 36 Ark. 578.

¹⁴ B. R. Trin. 55 Geo. III.

with the foregoing case of *Ryley v. Hicks*, although he rather inclined to think that the second section of the statute, taken with section four, was confined to leases executed by possession on which two-thirds of the improved rent had been paid.¹

In England, by the Act 7 & 8 Vict. c. 76, which was only in force from the 31st December, 1844, to the 29th September, 1845, it was enacted that no lease in writing of any freehold, copyhold, or leasehold land should be valid unless the same should be made by deed, but that any agreement in writing to let any such lands should be valid and take effect as an agreement to execute a lease.² By the Real Property Amendment Act, 1845³ (which is retrospective in its operation),⁴ the above act was repealed, and it was enacted⁵ that a lease required by law to be in writing, of any tenements or hereditaments which might by law have been created without writing, made after the 1st of October, 1845, shall also be void at law unless made by deed. The effect of a void demise under this statute is the same as that of a void demise under the statute of frauds, notwithstanding that the words of the statute are that it "shall be void at law."⁶

SEC. 18. Statute not to Apply to Tolls nor to Equitable Estates.—This statute does not apply to agreements for the lease of tolls of turnpike roads made under the statute,⁷ as these are valid if signed by the trustees, their clerk, or treasurer, notwithstanding they are not under seal.⁸ Nor

¹ Sel. N. P. 13th ed. p. 759, n. 7. If a parol lease is made to hold from year to year during the pleasure of the parties, this is adjudged to be a lease for only one year certain, and every subsequent year is a new springing interest arising upon the first contract, and parcel of it; so that if the tenant should occupy ten years, still it is prospectively a lease for a year certain, and therefore good within the execution of the statute; though, as to the time past, it is considered as one entire and valid lease for so many years as the tenant has enjoyed it. *Taylor on Evidence*, 884; *Roberts on Frauds*, 241-244.

² See cases decided under this Act: *Burton v. Reeve*, 16 M. & W. 307; 16 L. J. Ex. 85; *Doe v. Moffatt*, 15 Q. B. 257; 19 L. J. Q. B. 438; *Bird v. Defonvielle*, 2 C. & K. 415; *Arden v. Sullivan*, 14 Q. B. 832.

³ 8 & 9 Vict. c. 106.

⁴ *Upton v. Townsend*, 17 C. B. 50.

⁵ § 3.

⁶ *Tress v. Savage*, 4 E. & B. 36; 18 Jur. 680; 23 L. J. Q. B. 339.

⁷ 3 Geo. IV. c. 126, §§ 55, 57.

⁸ *Shepherd v. Hodsman*, 18 Q. B. 316; *Markham v. Stanford*, 14 C. B. (N. S.) 380.

does the statute affect merely equitable estates; it only refers to legal estates, and it is therefore necessary, in order to pass the legal estate on a transfer of mortgaged premises, that the document should be under seal, but where the equitable estate is to be dealt with, such an instrument of transfer need not be under seal.¹

SEC. 19. Entry under Void Lease.—If a party enters into possession under a lease, void by reason of the statute, or under an agreement for a lease, he is, in the first instance, only tenant at will;² and even if he has expended money in the improvement of the premises, that will not give him a term to hold till he is indemnified;³ but if he subsequently pays rent under the agreement, he becomes tenant from year to year.⁴ The payment of rent must be understood to mean a payment with reference to a yearly holding, such as payment by the quarter or some other aliquot part of a year.⁵

SEC. 20. How a Tenancy at Will may be Created.—All leases for an uncertain period are *prima facie* leases at will,⁶ and a reservation of rent is not essential to uphold this species of tenancy.⁷ Consequently a person who occupies land

¹ *Stamers v. Preston*, 9 Ir. C. L. R. 355.

² *Goodtitle v. Herbert*, 4 T. R. 680; *Clayton v. Blakey*, 8 T. R. 3; 2 Sm. L. C. 7th ed. 102; *Chapman v. Towner*, 6 M. & W. 100; *Doidge v. Bowers*, 2 M. & W. 365; *Berrey v. Lindley*, 3 M. & Gr. 498; 4 s. c. (N. R.) 61; *Doe v. Wood*, 14 M. & W. 687.

³ *Richardson v. Langridge*, 4 Taunt. 128.

⁴ *Doe v. Browne*, 8 East, 165; *Doe v. Amey*, 12 Ad. & El. 476; *Berry v. Lindley*, 3 M. & Gr. 498; *Tooker v. Smith*, 1 H. & N. 735; *Doe v. Moffatt*, 15 Q. B. 257.

⁵ *Braythwayte v. Hitchcock*, 10 M. & W. 497; *Doe v. Wood*, 14 ib. 687; see also *The Marquis of Camden v. Batterbury*, 5 C. B. (N. S.) 808; 7 C. B. (N. S.) 864; *Doe v. Watts*, 7 T. R. 85; *Doe v. Cox*, 17 L. J. Q. B. 3; and see *Doe v. Davies*, 7 Exch. 89.

⁶ *Rich v. Bolton*, 46 Vt. 84; *Jackson v. Brodt*, 2 Cal. (N. Y.) 169; *Jones*

v. Shay, 50 Cal. 508; *Roe v. Lewis*, 2 W. Bl. 1173; *Larned v. Hudson*, 60 N. Y. 102; *Richardson v. Langridge*, 4 Taunt. 128.

⁷ *Rex v. Jobling*, 2 R. C. & M. 28; *Rex v. Collett*, R. & R. C. C. 498. An entry under permission of the owner to take care of the premises: *Jones v. Shay*, *ante*; *Herrell v. Sizeland*, 81 Ill. 457; is a tenant at will. In *Humphries v. Humphries*, 3 Ired. (N. C.) L. 362, a person who was let into possession without any agreement for rent, but with the understanding that he should leave whenever required, was held to be strictly a tenant at will, and entitled to the statutory notice to quit. In *Whoon v. Drizzle*, 3 Dev. (N. C.) L. 417, the defendant went into possession under an agreement that he should cultivate the land during his life, or as long as he pleased, but without the power to sell his right, was held to create only a tenancy at will.

rent free, or by the naked permission of the owner¹ and, as is held in some of the States, as a mere squatter, disclaiming title in himself,² or a person who holds under a void lease or deed,³ or under a contract to purchase,⁴ or under a lease of premises till they are sold,⁵ or a person who remains in the

¹ *Hull v. Wood*, 14 M. & W. 682; *Larned v. Hudson*, 60 N. Y. 502; *Williams v. Devian*, 31 Mo. 13; *Jones v. Shay*, *ante*; *Doe v. Gardner*, 12 C. B. 319; and the fact that a person pays rent does not change the character of his tenancy, *unless he pays it with reference to a yearly holding*. *Bars-tow v. Cox*, 11 Q. B. 122; *Rich v. Bolton*, *ante*; *Braythwayte v. Hitchcock*, 10 M. & W. 497; *Hull v. Wood*, *ante*. A person who occupies as a servant, under the agreement to pay monthly rent, is a mere tenant at will, although the contract is for a year. *McGee v. Gibson*, 1 B. Mon. (Ky.) 105.

² *Stamper v. Griffin*, 20 Ga. 312; *Gay v. Mitchell*, 34 id. 159; *Smith v. Houston*, 16 Ala. 111; *Weaver v. Jones*, 24 id. 420.

³ *Ezelle v. Parker*, 41 Miss. 20; *Cromelin v. Thiess*, 31 Ala. 412; *Galloway v. Herbert*, 4 T. R. 680; *Warren v. Fearnside*, 1 Wils. 176; *Medina v. Polson*, Holt. 47. In Tennessee, where a parol lease for two years is void, a tenant entering under it is held to be a tenant at will: *Duke v. Harper*, 6 Yerg. (Tenn.) 280; and in Maine, a parol lease at an annual rent creates a tenancy at will. *Wethers v. Larabee*, 48 Me. 570; *Cole on Ejectment*, 456; but he holds, subject to the terms of the lease in all other respects, except as to duration of the term. *Riggs v. Bell*, 5 T. R. 471; *Tress v. Savage*, 4 E. & B. 36; *Richardson v. Gifford*, 1 Ad. & El. 52; *Pennington v. Taniere*, 12 Q. B. 998; *Lee v. Smith*, 9 Exch. 662; *Arden v. Sullivan*, 14 Q. B. 832; but upon payment of rent, he becomes a tenant from year to year, under the terms of the void lease so far as they are applicable to, and not inconsistent with, a yearly tenancy. *People v. Rickert*, 8 Cow. (N. Y.) 226; *Strong v. Crosby*, 21

Conn. 398; *Schuyler v. Leggett*, 2 Cow. (N. Y.) 600. But see *Jackson v. Rogers*, 1 John. Cas. (N. Y.) 33, where a tenant who went into possession under a void lease was held to be a mere trespasser, and not entitled under the statute to a notice to quit. *Goodtitle v. Herbert*, 4 T. R. 680; *Denn v. Fearnside*, 1 Wils. 176.

⁴ *Patterson v. Stoddard*, 47 Me. 355; *Jones v. Jones*, 2 Rich. (S. C.) 542; *Manchester v. Doddridge*, 3 Q. B. 30; *Stanway v. Rock*, 4 M. & G. 30; *Howard v. Shaw*, 8 M. & W. 118; *Tucker v. Adams*, 52 Ala. 254; *Right v. Beard*, 13 East, 210; *Carpenter v. United States*, 6 Ct. of Cl. (U. S.) 157; 17 Wall. (N. S.) 489; *Harris v. Frink*, 2 Lans. (N. Y.) 35; 49 N. Y. 24; *Kirtland v. Ponsett*, 2 Taunt. 145; *Ball v. Cullimore*, 5 Trwy. 753; *Hew v. Jones*, 13 M. & W. 12; *Doe v. Jackson*, 5 B. & C. 448; *Tomes v. Chamberlain*, 5 M. & W. 14.

⁵ *Braythwayte v. Hitchcock*, 10 M. & W. 494; *Emmons v. Scudder*, 115 Mass. 367; *Jackson v. Kingsley*, 17 John. (N. Y.) 158; *Dunn v. Trustees, &c.*, 39 Ill. 578; *Anderson v. Prindle*, 26 Wend. (N. Y.) 616; *Hollingsworth v. Stennett*, 2 Esp. 717. In *Anderson v. Prindle*, 23 Wend. (N. Y.) 616, it was held that a person who enters under a parol agreement for a lease, the rent to be paid monthly, and refuses to accept the lease, becomes a tenant at will or by sufferance, and is liable to be ejected immediately; but that, if the landlord accepts rent from him, he becomes entitled, under the statute, to notice to quit. If the parol agreement was for a term exceeding one year, and therefore void under the statute of frauds, it was held that the tenancy created by the acceptance of rent was from month to month, and that the tenant would be entitled to a

possession of premises after they are sold upon execution,¹ or a person who occupies under an agreement that he may remain as long as he is in the owner's employ,² or until a certain contingency happens, are tenants at will. Thus, in a Massachusetts case,³ the tenant went into possession under an agreement that he might occupy "as long as he kept a good school"; and the court held that this was a tenancy at will, with a conditional limitation not requiring entry or notice to terminate it, and that evidence that the tenant was deficient as a teacher in literary and scientific attainments was competent evidence of the happening of the contingency; but that if the contingency did not happen, his right of occupancy continued, and the landlord had no right to expel him. Indeed, it may be stated generally, as the rule, that in all cases where a person enters into the possession of the premises of another by his permission, no definite term of occupancy binding upon the parties being agreed upon, he is a mere tenant at will, and this, too, irrespective of the question whether he occupies rent free or pays rent therefor.⁴ A mere permission and occupancy under it is sufficient to create this species of tenancy,⁵ and it may be created by express terms, or may arise by construction or implication of law. Thus, a lease of premises, whether in writing or by parol, "so long as the parties please," or at the lessor's "will and pleasure," is a lease at will;⁶ so a lease of premises reserving the new house, when-

month's notice to quit. See also *S. C.* 19 Wend. 391; *Hammerton v. Stead*, 3 B. & C. 483; *Reynaut v. Porter*, 7 Bing. 451.

¹ *Lee v. Hernandez*, 10 Tex. 137.

² *McGee v. Gibson*, 1 B. Mon. (Ky.) 105.

³ *Ashley v. Warren*, 11 Gray (Mass.) 43.

⁴ In *Herrell v. Sizeland*, 81 Ill. 457, the defendant and his wife moved into a house by the owner's permission, and remained there, rent free, and took care of him until his death. They were held to be tenants at will. In *Rex v. Filloughy*, 1 T. R. 458, it was held that a person occupying, under a permission, given in those words, "I give you a lease to enjoy as long as I please, and to take again

when I please, and you shall pay nothing for it," followed by occupancy under it, was held to create a tenancy at will, and the relation of tenant so strictly, that by residence under it for forty days, the tenant acquired a settlement. In *Groves v. Groves*, 10 Q. B. 486, the defendant occupied the premises in question by permission of the owner or lessee, for about forty-four years, paying no rent therefor. He was held to have occupied as a tenant at will, and that he was precluded from setting up an adverse title in himself.

⁵ See cases cited in the last note; also *Hull v. Wood*, 14 M. & W. 682.

⁶ *Richardson v. Langridge*, 4 Taunt. 128; *Bartow v. Cox*, 11 Q. B. 122.

ever the lessor chooses to occupy it, and at all other times to be used by the lessee, constitutes the lessee a tenant at will of such house.¹ A tenant who holds over pending a treaty for a renewal of the lease is a tenant at will, and if the renewal is not effected, may be ejected without demand or notice;² but in some cases, under such circumstances, the person holding over has been held a tenant at sufferance.³ A tenant holding over after the expiration of his term is a mere tenant at will, or by sufferance; but if the lessor accepts rent from him, his tenancy is thereby at once converted into a tenancy from year to year, upon the terms of the former demise, so far as they are applicable to his new relation.⁴

¹ Cudlip v. Randall, 3 Salk. 156.

² Hollingsworth v. Stennett, 2 Esp. 717.

³ Simpkin v. Ashurst, 1 C. M. & R. 261.

⁴ Jackson v. McLeod, 12 John. (N. Y.) 182; Wilde v. Cantillon, 1 John. Cas. (N. Y.) 123; Jackson v. Parkhurst, 5 John. (N. Y.) 123; Clayton v. Blakeley, 8 T. R. 3. This question should not be lightly passed over, as it is one that has involved considerable conflict, and that even now is not satisfactorily settled in all the States. The difference, however, in the decisions of the courts, is referable to the difference in the language of the section of the statute of frauds relative to parol demise. Under the statute 29 Car. 2, c. 393, it is provided that all leases by parol, for more than three years, shall have the effect of leases at will only; and in England, under this statute, it is held that, notwithstanding this statute, a person holding under a parol lease for a longer term, as in one case under a parol lease for seven years, Rigg v. Bell, 5 T. R. 471; 2 Smith's Leading Cas. 72, and paying rent, although not deriving an interest or estate commensurate in duration with that fixed in the lease, is nevertheless considered as holding upon all the terms of the agreement so far as they are applicable to a tenancy from year to year. Richardson v. Gifford, 1 Ad. & El. 52; Beale v. Sanders, 3 Bing. (N. C.) 850;

and in the cases last mentioned the tenant was held bound by the covenants to repair. In the case last cited the defendants had for several years occupied and paid rent, as assignees, under a void lease. The lease contained a warrant on the part of the lessees to keep the buildings and premises in repair. The court held that the assignees were liable to repair to the end of the term, but that their liability to repair under this implied assumpsit, ceased with the termination of the term fixed in the lease. "Although the lease was void," said PARK, J., "yet, as the defendants held the premises to the end of the term, and continued to pay the rent, they are liable to all the stipulations contained in the lease, in the same way as a tenant who holds upon the expiration of a void lease." This doctrine was also held in Pistor v. Cator, 9 M. & W. 315, in which the tenant entered into possession under an agreement for a lease as soon as the lord's license could be obtained, in which he was to covenant to repair. No lease was ever obtained, and no lease was ever made, yet he was held liable to repair so long as he occupied. In this case, however, it should be stated that the tenant occupied for the whole term agreed upon, and ABINGER, C. B., says: "The defendant having occupied for the whole of the term agreed upon, and having had the full benefit which he could have enjoyed under the lease,

In order to create a tenancy for an uncertain period into a tenancy from year to year there must be a reservation

he cannot now say that the covenants are not binding, because the lease was not granted. In all these cases, the tenant had the benefit of the full term. If the landlord had evicted him before the full term expired, as he might have done, by giving proper notice to quit, a different question would have been presented, and possibly with a different result. In the case of such tenancies, the landlord may put an end to them at any time by notice to quit of the usual length. *Chapman v. Towner*, 6 M. & W. 100, but in any event it is put an end to by the determination of the term, without any notice to quit, and this is one of the peculiarities of this species of tenancy from year to year. *Tilt v. Stratton*, 4 Bing. 446; *Berney v. Lindley*, 3 M. & Gr. 511. The doctrine of these cases as to the occupancy of a tenant, under a void lease being subject to the terms of the lease so far as they are applicable to the relation, is generally accepted by our courts. *Lockwood v. Lockwood*, 22 Conn. 425; *Strong v. Crosly*, 21 id. 398; *Taggard v. Roosevelt*, 2 E. D. S. (N. Y. C. P.) 100; *People v. Rickert*, 8 Cow. (N. Y.) 227; *Creech v. Crockett*, 5 Cush. (Mass.) 133; *Hollis v. Pool*, 3 Met. (Mass.) 350; *Schuyler v. Leggett*, 2 Cow. (N. Y.) 660; *Edwards v. Clemons*, 24 Wend. (N. Y.) 480; *Prindle v. Anderson*, 23 id. 616. But upon the point, that a tenant under a lease void under the statute of frauds, becomes a tenant from year to year upon payment of rent, there is a great diversity of doctrine, growing out of the difference in the language of the statute. In Massachusetts in several cases under the statute it is held that nothing more than a tenancy at will exists under parol leases, either for a certain or uncertain term, and that this tenancy cannot be enlarged into a tenancy from year to year, by entry and payment of rent. *Ellis v. Paige*, 1 Pick. (Mass.) 45; *Hollis v. Pool*, 3

Met. (Mass.) 151; *Kelly v. Waite*, 12 id. 300; *Bingham v. Sprague*, 10 Pick. (Mass.) 102; and a similar doctrine, under a similar statute, has been held in Maine. *Davis v. Thompson*, 13 Me. 214; *Withers v. Larabee*, 48 id. 570, and in New Hampshire *Whitney v. Swett*, 12 id. 10, and in the latter State it is held that a tenancy shown by written receipts for rent, to be from year to year, or month to month, is but a lease at will. *Whitney v. Swett*, *ante*, and a similar doctrine is intimated in *Cromelin v. Theis*, 31 Ala. 411. But in most of the States the English doctrine prevails. *Hull v. Wadsworth*, 28 Vt. 10; *Prindle v. Anderson*, 19 Wend. (N. Y.) 391, *aff'd* 23 id. 616; *Jackson v. Wilsey*, 9 John. (N. Y.) 267; *Ridgeley v. Stillwell*, 28 Miss. 400; *McDowell v. Simpson*, 3 Watts (Penn.) 135; *Pugsley v. Aiken*, 11 N. Y. 494; *Porter v. Gordon*, 5 Yerg. (Tenn.) 100; *Drake v. Newton*, 3 N. J. L. 111, and unless the language of the statute is such as to prevent such a construction, it would seem to be the better doctrine that, while in the first instance such holdings are merely as tenants at will, yet the estate is susceptible of being enlarged into a tenancy from year to year, and that this is done, whenever a yearly rent is reserved in the lease, when the tenant pays, and the landlord accepts the rent. *Silsby v. Allen*, 43 Vt. 172. In *Morris v. Niles*, 12 Abb. Pr. (N. Y.) 103, it was held that payment of a quarter's rent is evidence of a yearly tenancy at that rate. It seems that actual payment of the rent is not necessary, but in one case an admission by the tenant of a half year's rent in an account of the landlord was held sufficient. *Cox v. Burt*, 5 Bing. 185; *GOSELER, J.*, before whom the case was tried at the assizes, saying, "The admission was equivalent to the payment of so much rent, and that the plaintiff thereby became tenant from year to year." See for English cases

of *annual rent*, and unless there is such a reservation, the tenancy is *prima facie* only a tenancy at will.¹ Thus, in an English case,² the landlord let a shed to be used as a stable, for the dung that was made therein, as compensation. No definite term was agreed upon, and the court held that the tenancy was merely one at will, because there was no reservation of rent referable to a year or any aliquot part thereof. And it seems that an implied obligation to pay rent is not enough to convert a tenancy at will into a tenancy from year to year. Thus in a Vermont case,³ the defendant, by the parol permission of the plaintiff, went into possession of certain premises as tenant, without any agreement as to the terms of holding or the payment of rent, and continued in possession about fourteen years. He erected a barn on the premises and repaired the house. The plaintiff tried to settle with him, but could get nothing from him beyond the repairs, and it appeared that he refused to pay rent. The plaintiff brought an action to recover the possession of the premises, giving no notice to quit. The defendant resisted the action upon the ground that his tenancy had ripened into a tenancy from year to year, and consequently that he was entitled to six months' notice to quit. But the court held that the tenancy was merely one at will, because

holding that a tenant under a void lease is a tenant from year to year, *Tress v. Savage*, 4 E. & B. 36; *Doe v. Calling*, T. C. P. 933; *Lee v. Smith*, 9 Exchq. 662; *Davenish v. Moffatt*, 15 Q. B. 257. Holding that a similar result ensues from an entry under an agreement for a lease, *Bolton v. Tomlin*, 5 Ad. & El. 856; *Doe v. Smith*, 1 Man. & R. 137; *Mann v. Lovejoy*, Ry. & Moo. 355; *Bennett v. Ireland*, E. B. & E. 326; *Knight v. Bennett*, 3 Bing. 361; *Chapman v. Towner*, 6 M. & W. 100; *Cox v. Burt*, 5 Bing. 185; *Braythwaite v. Hitchcock*, 10 M. & W. 494; *Doe v. Amey*, 12 Ad. & El. 476; although the agreement is void, *Knight v. Bennett*, *ante*; also that it arises from implication of law by payment of yearly rent. *Braithwaite v. Hitchcock*, *ante*; *Hull v. Wood*, 14 M. & W. 682; *Tress v. Savage*, *ante*; *Davenish v. Moffatt*, *ante*; *Doe v. Taniere*,

12 Q. B. 998. But, as stated elsewhere, p. , note , this is only an inference of law that cannot be raised against the intention of the parties clearly expressed, and it seems that it cannot arise where the tenant fails to comply with conditions precedent established either by contract, usage, or law. Thus, in an Iowa case, *Dubuque v. Miller*, 11 Iowa, 583, the tenant of a market-stall, under lease for one year, from the city, at the close of the lease, held over without complying with certain terms as to the payment of rents made by the city for such second year, and the court held that his tenancy was only at will.

¹ *Roe v. Lewis*, 2 W. Bl. 1173; *Chamberlain v. Dunham*, 45 Vt. 50.

² *Richardson v. Langridge*, 4 Taunt. 128.

³ *Rich v. Bolton*, 46 Vt. 84.

it lacked the essential element of annual rent, and that the fact that the repairs upon the premises were to be allowed upon the rent did not amount to a yearly payment of rent, but were merely payments in gross for the whole occupancy.

In Vermont, under the statute, a parol lease, with a stipulation to pay an annual rent, is an "estate at will" only, but it has been held in several cases that the character of the tenancy may be changed, and become one from year to year by subsequent acts of the parties; as, by entry into possession by the tenant, and a payment by him, and an acceptance by the landlord of the rent stipulated to be paid, and continuing in possession beyond the first year,¹ *and this change is not wrought by the length of time that the tenant holds and pays rent, but by the fact that he enters and holds under a stipulation to pay annual rent, and pays accordingly.*² It has been held that an entry upon, and a continuance in, possession of premises for several years under a parol agreement to support the owner, creates a tenancy from year to year, because the support furnished is treated as in the nature of yearly rent.³

It may be said that *prima facie* leases, indefinite as to the term, merely create a tenancy at will; and only a reservation of annual rent converts them into leases from year to year.⁴ It is not essential that there should be stipulation for the payment of rent in money, or of a certain amount, but there should be a reservation of some benefit or advantage that stands as yearly rent.⁵ A lease, indefinite as to terms, but reserving an annual rent payable quarterly, is held in Pennsylvania to be a lease from year to year, and cannot be terminated except by regular notice to quit, and, if such notice is not given, and if the tenant commences a new year without any notice to quit having been given, the landlord cannot put him out until the end of the next year; but for the second year the tenant must pay according to the terms of the lease,⁶ and the courts latterly are inclined to construe

¹ Barlow v. Wainwright, 22 Vt. 88; Lewis, 2 W. Bl. 1173; Jackson v. Silsby v. Allen, 43 Vt. 172; Hull v. Brodt, 2 Cai. (N. Y.) 169.
Wadsworth, 28 Vt. 410.

² Silsby v. Allen, 43 Vt. 172.

³ Hanchett v. Whitney, 1 Vt. 311.

⁴ Rich v. Bolton, 46 Vt. 84; Roe v.

⁵ Richardson v. Langridge, 4 Taunt. 128.

⁶ Lesley v. Randolph, 4 Rawle (Penn.) 123.

all leases at will at an annual rent as leases from year to year.¹ But when the lease in terms creates only a tenancy at will, the fact that rent is reserved and paid in pursuance of such reservation does not change the character of the tenancy. The intention of the parties, if clearly expressed, will control. Thus, where a tenant entered under an agreement "to become tenant at the will and pleasure of" the landlord, "and at and after the rate of twenty-five pounds per annum, payable quarterly," the tenancy was held to be at will, and not from year to year, LORD DENMAN, C. J., said: "The courts are desirous to presume a tenancy from year to year *where parties do not express a different intention*, but here they have expressed it."² In another case,³ it was

¹ *Pople v. Garland*, 4 You. & C. 394. In many of the States all parol leases merely create a tenancy at will, as in Massachusetts, Maine, Vermont, etc.

² *Bartow v. Cox*, 11 Q. B. 122. The reservation of yearly rent is not inconsistent with a tenancy at will. Co. Litt. 556; *Walker v. Giles*, 6 C. B. 662. And where the terms of the lease are such as to show a clear intention to create a tenancy at will, the reservation and payment of yearly rent, and an occupancy under it for a period of time, however long, will not change its character. *Dixie v. Davis*, 7 Exchq. 89. The English courts are inclined to hold all tenancies for an indeterminate period, except where otherwise clearly provided, tenancies from year to year, where there is a reservation of annual rent, and even in some cases they have so held where there was no such reservation, but rent had been so paid. *Parker v. Walker*, 1 Wils. 25. And a similar doctrine was held in *Jackson v. Bryan*, 1 John. (N. Y.) 323, but this is only the case where there is nothing to indicate a contrary intention. When it is clearly the intention of the parties to create only an estate at will, their intention will be upheld, notwithstanding the reservation of an annual rent: *Anderson v. Midland*

R. R. Co., 30 L. J. Q. B. 94; *Stedman v. McIntosh*, 4 Ired. (N. C.) L. 291; *Humphries v. Humphries*, 3 id. 363. In a Massachusetts case it was held that a written lease of a house at a certain rent per annum, payable "in monthly payments, otherwise *pro rata*," for a term to begin "when said house is suitable to be occupied" by the lessee, and undefined in duration, except by a stipulation that if, after two years from the time when the lessee should move into the house, the lessor should wish to live there, he might do so, and the lessee might then retain, if he should desire, certain rooms "for such a time as may be agreeable to us both," creates only a tenancy at will; and parol evidence is inadmissible to give it a different construction. *Murray v. Cherrington*, 99 Mass. 229.

Where, by the terms of a written lease, the tenancy is to continue so long as the parties shall mutually agree, and either party may determine it on four days' notice — the rent to be paid monthly or semi-monthly, as may be most convenient — such renting creates a tenancy at will; and the lessee, in such case, acquires no certain indefeasible interest in the premises, which he can sell and transfer to another. Such tenancy will be determined, by implication of law,

³ *Walker v. Giles*, 6 C. B. 662.

held that a clause in a mortgage that the mortgagors should become tenants to the mortgagees of the demised premises during their will, at a yearly rent, created only a tenancy at will.¹

SEC. 21. Rule in Doidge v. Bowers.—In *Doidge v. Bowers*,² three persons entered under a void lease; payments of rent were made; but, as it was not shown that they were made with the assent of one of the three, it was held that as against her there was no evidence of a tenancy from year to year, she not having resided a year on the premises. PARKE, B., said: "Under the original contract no demise could be created, but a mere tenancy at will. Then, in order to constitute a new tenancy, it must be shown that all three parties agreed to vary it by a new contract for a tenancy from year to year."³

SEC. 22. How Tenancy from Year to Year may be Created.—A tenancy from year to year may be created by express agreement, even by parol. Thus, if premises are let, "from year to year," at a certain annual rent, and from a certain time, and the lessee enters into the possession, a tenancy from year

upon the death either of the lessor or lessee; or by the desertion of the premises by the lessee; or by the sale and transfer of his possession to another. Therefore, where during such a tenancy the lessor died, having by will devised the premises; and the lessee, a month afterwards, sublet a portion of the premises to the plaintiff, without the consent of the devisee; and shortly thereafter removed wholly therefrom; and the devisee thereupon entered and removed doors and windows from a dwelling-house situated on the demised premises, and in the occupancy of the plaintiff; without unnecessary interference with the person or property of the plaintiff, and without a breach of the peace, such entry and acts of ownership were not tortious, and do not constitute a cause of action in favor of the plaintiff against the devisee. *Say v. Stoddard*, 27 Ohio St. 478.

¹ In *Dixie v. Davis*, 7 Exchq. 89,

an indenture of mortgage, among other things, contained a proviso and covenant by the mortgagee, that no sale, or public notice, or advertisement for any sale, should be made or given, nor any means be taken for obtaining possession, until the expiration of twelve calendar months after notice in writing of such intention should have been given to the mortgagor, *as tenant at will* to the mortgagee, on the payment of a certain yearly rent, by two equal half-yearly payments. No livery of seizin was made to the mortgagor. It was held that the mortgagor was tenant at will only, POLLOCK, C. B., remarking, "there can be no doubt that a tenancy at will may be coupled with a yearly rent."

² 2 M. & W. 365.

³ See also *Denn v. Fearnside*, 1 Wils. 176; *Goodtitle v. Herbert*, 4 T. R. 680.

to year is created which the lessor may determine the first year by giving six months' notice to quit,¹ and therefore is not within the statute of frauds. If a tenancy is created for one year certain, *and after that* from year to year, it is a lease for at least two years,² and therefore is within the statute of frauds in all those States where a verbal lease is good for only one year. It is said that, if an *annual* rent is reserved and the term indefinite, a tenancy from year to year is created, although it is expressly agreed that the tenant shall quit at ten, twenty, or thirty days' notice, the tenancy differing from an ordinary tenancy from year to year in no other respect than in the notice required for its termination.³ An entry under a lease for a term at the annual rent, void for any cause, and a payment of rent under it, creates a tenancy from year to year upon the terms of the lease except at its duration. Thus, in a New York case,⁴ a parol demise was made for seven years which was void under the statute of frauds, but the tenant having entered into possession and paid rent under it, it was held that it inured as a tenancy from year to year, and that the lease regulated the terms of the tenancy.⁵ At the end of the term under a void lease, the tenancy ceases by efflux of time, without any notice to quit, although either party might have put an end thereto by

¹ *Clark v. Smaridge*, 7 Q. B. 957. Such a lease was formerly held to be a lease for at least *two* years. *Agand v. King*, Cro. Eliz. 775; *Legg v. Strudwick*, 2 Salk. 414; *Crackwell v. Owerell*, Holt, 417; *Stamfil v. Hickes*, 2 Salk. 413. And, according to some of the cases, a lease for three years. *Potkin's Case*, 6 Coke, 35 b; *Carstrike v. Mason*, 2 Neb. 543. But the rule is now well settled, as stated in the text. *Lily v. Green*, cited 1 Ld. Raym. 708; *Jacklin v. Cartwright*, 4 East, 291; *Rex v. Chawton*, 1 Q. B. 247; *Birch v. Wright*, 1 T. R. 378; *Chadborn v. Green*, 9 Ad. & El. 38; *Fox v. Nathans*, 32 Conn. 348.

² *Birch v. Wright*, 1 T. R. 386; *Hanchett v. Whitney*, 1 Vt. 311; *Hall v. Myers*, 43 Md. 581; *Monck v. Geekie*, 5 Q. B. 841.

³ *Martin v. Kemp*, 7 T. R. 85.

⁴ *Schuyler v. Leggett*, 2 Cow. (N. Y.) 660.

⁵ *Tress v. Savage*, 4 E. & B. 36; *Clayton v. Blakely*, 8 T. R. 3; *Thurber v. Dwyer*, 10 R. I. 355; *Strong v. Crosby*, 21 Conn. 398; *Martin v. Watts*, 7 T. R. 88; *Beale v. Sanders*, 3 Bing. (N. C.) 850; *Riggs v. Bell*, 5 T. R. 471; *Lee v. Smith*, 5 Exchq. 662; *Doe v. Collings*, 7 C. B. 939; *Pennington v. Taniere*, 12 Q. B. 998; *Richardson v. Savage*, 4 E. & B. 36. In Pennsylvania a tenancy at will is treated as a tenancy from year to year, the same notice being required to terminate the tenancy in either case. *Clark v. Smith*, 25 Penn. St. 137. And in Tennessee a tenant under a void lease is treated as a tenant at will, or from year to year, according to the circumstances. *Duke v. Hooper*, 6 Yerg. (Tenn.) 280.

the requisite notice at the end of any previous year.¹ In a New York case,² a tenant who had leased premises for a year, took them for a second year on the expiration of the first year. It was claimed that the second lease was void because the officer granting it had no authority to do so. The court held that, if the second lease was void, the tenant should be regarded as holding over under the terms and conditions of the former lease, he became a tenant from year to year, and must give six months' notice to determine his tenancy; and that if he should be regarded as having entered under the void lease, possession under it, and payment and acceptance of rent would create a tenancy from quarter to quarter, not to be determined without three months' notice. Also, that a lessee for years whose term depends on a certainty, who holds over after the termination of the lease merely to remove his goods and chattels, none the less becomes a tenant from year to year by such holding over, because a tenant for years, whose term depends on a certainty, has no right to remain a reasonable time after his term expires for the purpose of removing his chattels; and, in order to entitle a landlord to regard a tenant under a demise for a year or more, as a tenant from year to year upon his holding over after the expiration of his term, it is not necessary that the holding over should be of such a character as to raise a presumption that the tenant intends to continue his occupancy. The matter is one purely within the election of the landlord, and the tenant has no option in that regard. The rule may be said to be well established, that although a parol lease for more than the period excepted from the statute is invalid, yet, if a person goes into possession under a parol lease for a longer period, he becomes a tenant from year to year upon the terms of such lease, and so continues as long as he remains in possession without any new or other agreement, and an occupancy by putting or leaving a portion of his property upon the premises is sufficient to establish his liability, although there is no personal occupancy. Thus, in a New York case,³ the defendant went into possession of a dwelling

¹ *Tress v. Savage*, *ante*; *Davenish v. Moffatt*, 15 Q. B. 257; *Hayne v. Cummings*, 16 C. B. & S. 421; *Thomas v. Parker*, 1 H. & N. 669.

² *Witt v. Mayor &c. of New York*, 6 Robt. (N. Y. Sup. Ct.) 441.

³ *Dorr v. Barney*, 12 Hun (N. Y.) 259.

house and brick-yard, under a parol lease for one year with the privilege of four years at his option, and continued in personal possession for two years. It was held that, although the lease was void as to the four years, yet by the entry of the defendant and his holding over after the first year, he became a tenant from year to year subject to all the terms and conditions of the verbal lease, except as to the term.¹ In that case the tenant went into possession in June, 1867, and in April, 1869, substantially told the plaintiff that he intended to leave at the end of that year, and at the end of the year he abandoned the *house*, and removed *most* of the *brick*, but he left a portion of them in a shed which he had erected upon the premises to protect the brick from the effects of the weather, and did not remove them until some time afterwards. The lease was never surrendered, nor did the plaintiff ever give his assent to the brick and shed being left there. The court held that the fact that the brick and shed were left there by the defendant after the expiration of the second year operated as such a continuance of the occupancy as to enable the plaintiff to treat him as a tenant for another year.

In the first instance, in order to give validity to a lease for a term longer than that excepted from the operation of the statute, it must be made conformedly to the requirements of the statute in the State where the premises lie. In most of the States, the provisions of the statute 29 Car. 2, c. 3, § 4, are practically adopted, and a writing signed by the lessor or some person by him authorized is sufficient; and under this statute is held that the agreement and memorandum need not be contemporaneous,² and any writing executed by the lessor which tends to establish a consummated agreement between them may be given in evidence as a memorandum, even though in order to apply it, evidence of conversations between them as to the subject-matter of the contract are necessary. Thus, in a Connecticut case,³ the plaintiff,

¹ Schuyler v. Leggett, 2 Cow. (N. Y.) 660; Lounsbury v. Snyder, 31 N. Y. 514; Bright v. McOuat, 30 Ind. 521; Reader v. Sayne, 5 Hun (N. Y.) 564; Schuyler v. Smith, 51 N. Y. 309; Thiebaud v. Vevay, 42 Ind. 212; Hall v. Myers, 43 Md. 446; People v. Rickert, 8 Cow. (N. Y.) 236;

Conway v. Starkweather, 1 Den. (N. Y.) 113.

² Lerner v. Wannemacher, 9 Allen (Mass.) 416; Parkhurst v. Van Cortlandt, 14 John. (N. Y.) 15; Tallman v. Franklin, 14 N. Y. 584.

³ Lindley v. Tibbals, 40 Conn. 522.

being desirous of raising a crop of strawberries on a portion of the defendant's land, offered him one hundred dollars for the rent thereof; but the defendant declined this offer, but offered to take a mowing-machine and horse-rake belonging to the plaintiff, which he valued at one hundred and ten dollars, for the use of the land. The parties separated without coming to any agreement. A few days afterwards, the plaintiff wrote to the defendant, asking him if he could have the land "on the terms proposed." The defendant replied, "Set your strawberries. Let me have mowing-machine and horse-rake." This was in May, 1868, and the plaintiff immediately went into possession of the land, set out his plants, and cultivated them during that spring and summer. By his letter, the plaintiff meant to offer one hundred dollars for the use of the land, but the defendant supposed he meant to offer the machine and rake. In July of the same year, the defendant sent for the machine and rake, and the defendant, supposing that he wished to buy them, delivered them to him. In the fall of the same year the plaintiff called for the pay for the mowing-machine and horse-rake, which the defendant refused, claiming that they had been received in compensation for the use of the land. In consequence of the difference thus existing between the parties as to the rental of the land, the defendant insisted that the plaintiff should have nothing more to do with the land, but he did not pay for the mowing-machine or rake, or offer to return the same. In the spring of 1866 the plaintiff sent his men to hoe and attend to the plants, and they were ordered off by the defendant. When the berries were ripe, the plaintiff again sent his men to gather them; but, after picking a portion of them, they were again ordered off by the defendant, who went on and gathered the crop and disposed of it, claiming it as his own. The plaintiff thereupon brought an action of trespass (*quare clausum*) against the defendant. The defendant insisted that, by reason of the misunderstanding between the parties, no contract existed between them, and that the plaintiff was not entitled to the berries which grew upon the land. The court, however, held otherwise, FOSTER, J., saying: "There was a contract made; the minds of the parties met so far as the use and occupation of the land was con-

cerned. The plaintiff worked the land during the season, and it was not until the autumn that it was discovered that a misunderstanding existed as to the rent. Nor was the contract then annulled or revoked. The defendant still kept the machine and rake, and made no offer to pay for them. He had insisted that the plaintiff should not occupy the land, except on condition of giving these articles in consideration. The plaintiff did not afterwards demand them, nor demand pay for them, but insisted on occupying and did occupy the land the next spring. This we think was an assent to the defendants' terms, a tacit agreement on both sides, 'Set your strawberries,' is certainly a brief form for a lease, but in the surroundings of the case, we think such a memorandum signed by the party obviates any difficulty under the statute of frauds."

It is not essential that the agreement or memorandum should be contained in a single paper, but a series of papers, as letters,¹ telegrams,² and a letter or other document *signed*, may be used in connection with one *not signed*,³ but not in connection with one subsequently to be prepared;⁴ and a *written* proposal, signed by the lessor, and *accepted orally* by the lessee, has been held sufficient;⁵ but a written proposal, signed by the lessee and accepted orally by the lessor, would not be sufficient.⁶ The writing or writings, in whatever form they exist, must be complete, and contain all the elements essential to constitute a valid contract, without the aid of extrinsic evidence.⁷ Thus, it must describe the premises with *reasonable* certainty,⁸ the duration of the

¹ Lerner v. Wannemacher, 9 Allen (Mass.) 416.

² Palmer v. Marquette &c. R. R. Co., 32 Mich. 274.

³ Loomer v. Dawson, Cheeves (S. C.) 68; Buxton v. Rust, L. R. 7 Exchq. 79.

⁴ Wood v. Bridgely, 5 De G. M. & G. 41.

⁵ Banker v. Allen, 5 H. & N. 61; Warner v. Willington, 3 Drew, 523; Smith v. Male, 2 C. B. N. S. 67; Reuss v. Picksley, L. R. 1 Exchq. 342.

⁶ Felthouse v. Bindley, 11 C. B. N. S. 869.

⁷ Peabody v. Sayers, 56 N. Y. 230;

Clarke v. Fuller, 16 C. B. N. S. 24; Forster v. Rowlands, 7 H. & N. 103; Watts v. Ainsworth, 6 L. P. N. S. 252; Williams v. Lake, 2 E. & E. 349.

⁸ Lancaster v. De Trafford, 31 L. J. Ch. 554. But the question as to what constitutes reasonable certainty in this respect is one which depends upon the circumstances of each case, and if the memorandum contains sufficient to form a basis from which the precise estate can be identified, parol evidence is admissible to apply it. Ogilvie v. Foljambe, 3 Mer. 61; Bleakley v. Smith, 11 Sim. 150; Haywood v. Cape, 25 Beav. 146; Jenkins

term,¹ the rent to be paid,² the parties thereto,³ and must be signed by the lessor or some person by him lawfully authorized for that purpose.⁴ In all cases, *the signature must be such as amounts to an acknowledgement by the party that the agreement is his*; consequently, if it is not signed by him or his agent authorized as provided by the statute, although it is wholly in his handwriting, and his name appears in the body of the instrument, it is not sufficient to satisfy the statute,⁵ and the absence of his signature is treated as affording absolute evidence that the contract is incomplete.⁶ But as to what constitutes a signing within the statute, see Chapter on "MEMORANDUMS."

v. Green, 27 Beav. 437; *Deven v. Thomas*, 3 My. & K. 353; *Price v. Griffiths*, 1 De G. M. & G. 80; *Daniels v. Davison*, 16 Ves. 249.

¹ *Hodges v. Howard*, 5 R. I. 149; *Fitzmaurice v. Bayley*, 8 E. & B. 664; *Blore v. Sutton*, 3 Mer. 237; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Hersey v. Giblett*, 18 Beav. 174; *Hughes v. Parker*, 8 M. & A. 224; *Clarke v. Fuller*, 16 C. B. N. S. 24; *Gordon v. Trevalyan*, 1 Price, 64.

² *Wain v. Walters*, 5 East, 10; *Nichols v. Allen*, 23 Minn. 542; *Underwood v. Campbell*, 14 N. H. 393; *Weldon v. Porter*, 4 Houst. (Del.) 236; *Taylor v. Pratt*, 3 Wis. 674; *Hutton v. Padgett*, 26 Md. 228; *Castle v. Beardsley*, 10 Hun (N. Y.) 343; *Buckley v. Beardslee*, 5 N. J. L. 570; *Janes v. Palmer*, 1 Doug. (Mich.) 379; *Hargraves v. Cooke*, 15 Ga. 321; *Putman v. Haggard*, 78 Ill. 607. But in many of the States the doctrine of *Wain v. Walters* is not accepted, and a memorandum in other respects sufficient is held to be operative, although the consideration is not stated therein. *Gillingham v. Boardman*, 29 Me. 79; *Sage v. Wilcox*, 6 Conn. 81; *Halsa v. Halsä*, 8 Mo. 303; *Ashford v. Robinson*, 8 Ired. (N. C.) L. 114; *Patchin v. Swift*, 21 Vt. 292; *Reed v. Evans*, 17 Ohio, 128; *Packard v. Richardson*, 17 Mass. 121. While in others the matter is now regulated by statute, and the question set at rest so far as the courts are concerned. In Massa-

chusetts, Illinois, Indiana, Kentucky, Maine, Michigan, Nebraska, New Jersey, Virginia, and West Virginia, it is provided that the consideration need not be expressed in the memorandum but may be proved by any competent evidence. In Alabama, Minnesota, Montana, Nevada, New York, Oregon, and Wisconsin, the consideration must be contained in the memorandum, while in the other States no provision in this respect is made, and is therefore left subject to judicial construction.

³ *Lang v. Henry*, 54 N. H. 57; *Champion v. Plummer*, 5 E. & J. 87; *Williams v. Lake*, 2 E. & E. 349; *Warner v. Willington*, 3 Drew, 530.

⁴ *Bailey v. Ogden*, 3 John. (N. Y.) 417; *Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Stoddert v. Vestry of Port Tobacco*, 2 G. & J. (Md.) 227. In some of the States, the statute expressly provides that the memorandum must be signed by the party to be charged, or by some person by him authorized in writing, as in Alabama, California, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Vermont, Utah, and Wisconsin, while in the others authority may be shown by the ordinary modes.

⁵ *Stokes v. Moore*, 1 Cox, 219.

⁶ *Bawdes v. Amherst*, Prec. Ch. 402.

SEC. 23. Implied Tenancy from Year to Year.—A tenancy from year to year may be implied from the circumstances under which the parties hold. Thus, where the defendants became the occupiers of land, and paid the year's rent in advance for many years, it was held, that, as ordinarily speaking an occupation of premises for more than a year, and payment and acceptance of rent created a tenancy from year to year, the inference to be drawn from the above facts was, that the defendants were tenants from year to year.¹ And the presumption is the same against a corporation aggregate as against an ordinary person.² So where a tenant holds over after the expiration of a term, on payment of rent he will become a tenant from year to year.³

SEC. 24. Rebuttal of Presumption.—It is open, either to the party receiving or paying rent, to show the circumstances under which the payment was made; as, for instance, that the rent was received in ignorance of the death of a party upon whose life the premises were held; in order to rebut the presumption of a tenancy from year to year.⁴ A lease for a term, required by the statute of frauds to be in writing, may be collected from correspondence which has passed between the lessor and lessee, and the lessor will be entitled to distrain for rent.⁵

¹ *Hunt v. Allgood*, 10 C. B. (N. S.) 253. It has sometimes been thought that if the intention of the parties was that an *agreement* for a lease should take effect as a lease, it would be void under the statute: *Stratton v. Pettit*, 16 C. B. 420; but this doctrine has been repudiated: *Stranks v. St. John*, L. R. 2 C. P. 377; *Tidey v. Mollett*, 16 C. B. (N. S.) 298. In *Rollason v. Leon*, 7 H. & N. 77, an agreement was entered into as follows: "L agrees to let, and R agrees to take, the wood, mill site, etc., with the houses and land adjoining, for the period of three years from Lady Day then next, at the rent of £120 per annum. A lease for the same to be executed and signed as soon as possible, subject to the permission of the landlord of the mill, house, lands, etc., from this day, up to Lady Day then

next, upon the same terms and at the same rate of rent, R to have the sale of the mill, houses, land, etc." The court held that the agreement operated as a present demise from the time it was entered into, up to Lady Day, and as an agreement for a lease from that time for a term of three years, and consequently was not void under the statute.

² *Doe v. Taniere*, 12 Q. B. 998.

³ *Thomas v. Packer*, 1 H. & N. 669; *Furnivall v. Grove*, 8 C. B. (N. S.) 496.

⁴ *Doe v. Crago*, 6 C. B. 90; *Woodbridge Union v. Whien Union*, 13 Q. B. 269; *The Marquis of Camden v. Batterbury*, 5 C. B. (N. S.) 808, 820; 7 C. B. (N. S.) 864.

⁵ *Chapman v. Bluck*, 4 Bing. N. C. 187; *Jones v. Reynolds*, 1 Q. B. 506.

SEC. 25. Void Lease may Enure as an Agreement to Grant a Lease.—An instrument containing words of present demise which is void as a lease, may nevertheless enure as an agreement to grant a lease for the term mentioned. Thus in *Burton v. Reeve*,¹ by a memorandum of agreement M agreed to let and B to take rooms in a house from a certain date, at a monthly rent of 36 s., to be paid every four weeks, and it was held that this was only an agreement to execute a lease, and was admissible in evidence. So in *Bond v. Rosling*,² the plaintiff by an agreement not under seal agreed to let and the defendant to hire certain premises for seven years; and it was further agreed that a good and sufficient lease embodying the terms of the agreement should be prepared at the joint expense of the parties; it was held in an action for not accepting a lease, that though the instrument was void as a lease under the statute it was good as an agreement.³

SEC. 26. Specific Performance.—An agreement containing words of present demise, which is void under the statute, may be decreed to be specifically performed.⁴ Thus where A agreed in writing to let to B certain premises at a rent of £36 payable quarterly, and not to raise the rent or give B notice to quit so long as he continued to pay the rent when due; and A (who had only a leasehold interest to expire in 1881) also agreed verbally with B to let him remain in the premises for such term of years (not exceeding A's term therein) as B might desire to continue tenant thereof: it was held that B was not a mere tenant from year to year, but had a right to retain possession as long as his landlord's interest existed, and to enforce that right in equity.⁵ In a Connecti-

¹ 16 M. & W. 307.

² 1 B. & S. 371; 9 W. R. 746.

³ And see *Doe v. Moffatt*, 15 Q. B. 257; *Drury v. Macnamara*, 5 E. & B. 612; 1 Jur. (N. S.) 1163; *Tidey v. Mollett*, 16 C. B. (N. S.) 298; 12 W. R. 802; *Hayne v. Cummings*, id.; *Parker v. Laswell*, 2 De. G. & J. 559; *Cowen v. Phillips*, 33 Beav. 18; and even at law it may operate as a contract with respect to any stipulation therein: *Rollason v. Leon*, 7 H. & N. 73; *Hayne v. Cummings*, 16 C. B. (N. S.)

421; *Bond v. Rosling*, 1 B. & S. 371; *Strong v. Crosby*, 21 Conn. 398; *Taggard v. Roosevelt*, 2 E. D. S. (N. Y. C. P.) 100.

⁴ *Parker v. Taswell*, 2 De. G. & J. 559; *Poyntz v. Fortune*, 27 Beav. 398; *Cowen v. Phillips*, 33 Beav. 18; *Fenner v. Hepburn*, 2 Y. & C. C. C. 159; *Crook v. Corporation of Seaford*, L. R. 6 Ch. 551.

⁵ *In re King's Leasehold Estates*, L. R. 16 Eq. 521.

cut case,¹ the defendant having a freehold estate in certain lands, entered into a parol agreement with the plaintiff in September, 1843, that he should erect upon his estate a substantial brick store, and have it completed by April 1st then next, and that he would let the store to the plaintiff for the term of three years from that period for the yearly rent of five hundred dollars to be paid quarterly. In pursuance of the agreement, the defendant erected the store, and the plaintiff immediately took possession thereof, and occupied it for one year, paying the stipulated rent quarterly. Before the expiration of the year, the defendant gave the plaintiff notice to quit possession, and brought summary proceedings to get him out; thereupon the plaintiff brought a bill in equity to compel the defendant to give him a lease of the premises according to the agreement. The court held that although the agreement was within the statute of frauds, yet that there was such a past performance as warranted a court of equity in decreeing a specific performance of it, and that the circumstance, that the plaintiff caused to be drawn up and presented to the defendant for execution, a lease with *unusual* covenants, did not excuse him from executing a lease to the plaintiff with *usual* covenants.² The rule may be said to be that a court of equity will decree a specific performance of an oral contract for a lease, notwithstanding the statute of frauds, in favor of either the landlord or the tenant, in cases *where there has been such a past performance thereof by both parties, that to refuse it would work a fraud upon the party seeking its specific execution.*³ In a Wisconsin case,⁴ the defendants orally agreed to take a lease of the plaintiffs' stores for five years, whereby the plaintiffs were induced to break off negotiations for leasing them to another party, and to incur expense in altering and adapting the stores to the defendants' use. The defendants entered into possession under this agreement, and occupied them and paid the rent for two years, and neglected to execute a written lease in accordance with the agreement tendered to them for that purpose by the plaintiffs on taking possession, and at the end of two years

¹ *Eaton v. Whitaker*, 18 Conn. 222.

² See also *Morphett v. Jones*, 1 Swanst. 172.

³ *Steel v. Payne*, 42 Ga. 207; *Dick-*

erson v. Chrisman, 28 Mo. 134; *Aday v. Echols*, 18 Ala. 353.

⁴ *Seaman v. Aschermann*, 51 Wis. 678; 37 Am. Rep. 849.

refused to execute the lease, or to occupy the stores or pay rent. Upon a bill brought by the plaintiffs to compel an execution of the lease by the defendants, its specific execution was decreed.¹ But in order to warrant the exercise of this power, the contract must be certain and complete, and clearly established by the proof, or admitted by the pleadings;² and the proof must be full and complete, and such as leaves no reasonable doubt that an agreement was in fact made,³ and that it has been partly performed.⁴ For a full statement of the law relating to this subject, see Chapter on "SPECIFIC PERFORMANCE." An agreement to let land at a yearly rent, determinable by six months' notice to quit (no term being mentioned), provided that in case A and B erected any buildings upon the land, they were to have the privilege of removing them at any time during their occupation, or otherwise they were to be allowed a beneficial interest in the same to the amount of the sum expended in the erection of the buildings, such beneficial interest to extend over a period of twenty years; that is to say, if A and B were required to give up possession of the piece of ground before the expiration of the term of twenty years, they were to be allowed one-twentieth part of the amount expended for each remaining year of the unexpired term of twenty years; it was held that this agreement conferred on A and B such a beneficial interest in the land as constituted them owners within the interpretation clause of the Lands Clauses Act, 8 & 9 Vict. c. 18, and that therefore the company was not entitled to enter upon the land till it had satisfied A and B's claim as provided by § 84.⁵

SEC. 27. Terms of Occupancy Regulated by Parol Lease. — A lease, or an agreement for a lease, which is void as to the

¹ *Ferry v. Pfeiffer*, 18 Wis. 510. See also, analogous in principle, *Potter v. Jacobs*, 111 Mass. 32; *Glass v. Hulbert*, 102 Mass. 24; 3 Am. Rep. 418; *Rankin v. Say*, 2 De G. F. E. J. 65; *Nunn v. Fabian*, L. R. 1 Ch. App. 35; *McCarger v. Rood*, 47 Cal. 141; *Dowell v. Dew*, 1 Y. & C. 356; *France v. Dawson*, 14 Ves. Jr. 386.

² *Wilkinson v. Wilkinson*, 1 Dessau (S. C.) 201; *Smith v. Crandall*, 20 Md.

482; *Bunton v. Smith*, 40 N. H. 352; *Wallace v. Brown*, 10 N. J. Eq. 308; *Montal v. Lyons*, 8 Ir. Ch. 112; *Morphet v. Jones*, 1 Swanst. 172.

³ *Broughton v. Griffin*, 18 Gratt. (Va.) 184; *Lindsay v. Lynch*, 2 Sch. & Lef. 1.

⁴ *Nunn v. Fabian*, 35 L. J. Ch. 141.

⁵ *Rogers v. Hull Dock Co.*, 12 W. R. 1101, affd. 13 W. R. 217; 11 L. T. (N. S.) 42; ib. 463.

duration of the lease, may still regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of the year when the tenant is to quit, etc.,¹ and this whether the agreement is void as not amounting to a lease,² or whether the lease is void as not being duly executed under a power;³ but the terms must not be at variance with the species of tenancy which the law under the circumstances creates.⁴ In a Wisconsin case,⁵ the defendant attempted orally to lease premises for two years, at a specified sum for each year, "payable at such times during the term as the plaintiff should require." The defendant went into possession under the lease, and remained twenty months, paying the first year's rent, and also at the same rate until the next six months, and it was held that, although under the statute of frauds the lease was void, yet the defendant became a tenant from year to year *on the terms of the parol lease*.

SEC. 28. Rule in Tooker v. Smith.—In *Tooker v. Smith*⁶ an agreement for a lease contained a stipulation that the tenancy should continue until after two years' notice to quit had been given; and it was held that it could not be implied that the stipulation as to the two years' notice to quit was one of the terms under which the tenant held.

SEC. 29. Covenants in Farming Lease.—Where a party was let into possession, and paid rent, under an agreement for a future lease for years, which was to contain a covenant against taking successive crops of corn, and a condition of re-entry for breach of covenants, it was held that he became a yearly tenant, subject to the above terms of conditions, and

¹ *Doe v. Bell*, 5 T. R. 471; 2 Sm. L. C. 98; *Doe v. Breach*, 6 Esp. 106; *Arden v. Sullivan*, 4 Q. B. 832; *Doe v. Moffatt*, 15 Q. B. 257; *Tress v. Savage*, 4 E. & B. 36; 18 Jur. 680; 23 L. J. Q. B. 339.

² *Richardson v. Gifford*, 1 Ad. & El. 52.

³ *Beale v. Sanders*, 3 Bing. (N. C.) 850; 5 Scott, 58.

⁴ *Berrey v. Lindley*, 3 M. & Gr. 514; 4 Sc. (N. R.) 61, *per* Maule, J.; *Hunt v. Allgood*, 10 C. B. (N. S.) 253; *Bennett v. Ireland*, E. B. & E. 326.

⁵ *Koplitz v. Gustavus*, 48 Wis. 48. See also to the same effect *Williams v. Ackerman*, 8 Oregon, 405; *Coan v. Mole*, 39 Mich. 454; *Craske v. Christian Union Publishing Co.*, 17 Hun (N. Y.) 319; *Drake v. Newton*, 23 N. J. L. 111; *Cady v. Quarterman*, 12 Ga. 386; *Strong v. Crosby*, 21 Conn. 398; *McDowell v. Simpson*, 3 Watts (Penn.) 129; *Witt v. Mayor, &c.*, 6 Robt. (N. Y.) 441.

⁶ 1 H. & N. 732.

that ejectment might be brought upon successive crops of corn being taken.¹ In *Pistor v. Cater*² the tenant entered upon the land under an agreement for a lease as soon as the lord's license could be obtained, but no license ever was obtained. LORD ABINGER said: "This is a contract which is to bind both parties, even if no lease be granted. . . . No lease having been made, but the defendant having occupied for the whole of the term agreed upon, and having had the full benefit which he could have enjoyed under the lease, he cannot now say that the covenants are not binding."

SEC. 30. Covenant to Paint. — By an agreement, not under seal, the plaintiff agreed to let to the defendant, and the defendant to take of the plaintiff, a house and premises for seven years, upon the terms (amongst others) that the defendant would in the last year of the term, paint, grain, and varnish the interior, and also whitewash and color. The defendant entered under the agreement, and occupied and paid rent during the whole period of seven years. In an action for not painting, etc., the interior, and whitewashing and coloring in the seventh year, it was held that the defendant must be taken to have occupied on the terms that, if he should continue to occupy during the whole period of seven years, he would do those things which were by the agreement to be done in the seventh year, and that he was therefore liable.³

SEC. 31. Proviso of Re-entry. — A proviso in a lease for re-entry on non-payment of rent is a condition which attaches to the yearly tenancy created by the tenant, holding over and paying rent after the expiration of the lease.⁴

SEC. 32. Rent Paid in Advance. — In *Lee v. Smith*,⁵ A became tenant to the defendant of certain premises, under the terms of a written agreement (not under seal), for a term exceeding three years, the rent payable quarterly in advance. A occupied the premises for some time, and paid several

¹ *Doe v. Amey*, 12 Ad. & El. 476; 4 P. & D. 177.

² 9 M. & W. 315.

³ *Martin v. Smith*, L. R. 9 Ex. 50.

⁴ *Thomas v. Packer*, 1 H. & N. 669; *Watson v. Wand*, 8 Exch. 335.

⁵ 9 Exch. 662.

quarters' rent, and the receipts given to him by the defendant's agent stated that such payment was in advance, although in fact A never paid the rent in advance. It was held, nevertheless, that although the agreement was void under the 8 & 9 Vict. c. 106, as not being under seal, still that the receipt taken was ample evidence of the tenancy being upon the terms of the rent being paid quarterly in advance. So tenants under a void agreement or void lease have been held liable to repair.¹

SEC. 33. Parol Lease may be Special in its Terms.— A parol demise, rendered valid by the second section of the statute of frauds, may contain the same special stipulations as a regular lease, and the stipulations may be proved by parol. In *Lord Bolton v. Tomlin*,² at a letting of lands, the terms of letting were read from a printed paper, and a party present agreed to take certain premises from Lady Day then next, when the lease of the then tenant would expire. No writing was signed by the parties or their agents, but there was at the foot of the printed paper a memorandum, also read over to the future tenant, stating that the parties had agreed to let and to take, subject to the printed terms, the name of the farm and the rent, and that the letting was for one year certain from Lady Day, and so from year to year till notice to quit. Some of the terms were special, having relation to husbandry. It was held that on the trial of an action by the landlord against the tenant for a breach of them, the above-mentioned paper might be referred to, to refresh the memory of a witness as to such stipulations.

SEC. 34. Collateral Agreements.— Where the lessee of a house and his partner in trade agreed to pay the lessor annually, during the residue of the term, 10 per cent on the cost of new buildings, if the lessor would erect them; it was held, first, that this agreement was not required by the statute to be in writing; secondly, that though the partner quitted the premises, he was liable on this collateral agreement during the residue of the term.³ So where the defendant was ten-

¹ *Richardson v. Gifford*, 1 Ad. & El. 52; *Beale v. Sanders*, 3 Bing. (N. C.) 850; 5 Scott, 58.

² 5 Ad. & El. 856; 1 N. & P. 247.

³ *Hoby v. Roebuck*, 7 Taunt. 157; see also *Crowley v. Vitty*, 7 Exch. 319.

ant to the plaintiff of a house and bakehouse under a lease for twenty years, at the yearly rent of £50, and being desirous of some improvements in the house, proposed to the plaintiff to lay out £50 on such alterations, which the plaintiff consented to do; and the defendant thereupon agreed to pay him an increased rent of £5 a year during the remainder of the term, to commence from the quarter preceding the completion of the work, and a memorandum in writing was prepared to that effect, which the defendant refused to sign. The alterations were completed in November, 1827, at an expense of £55, and the defendant after Christmas, 1827, paid the increased rent for the first quarter, but afterwards refused to pay any more than the original rent. On an action of assumpsit, brought to recover arrears of the increased rent, it was held, that the landlord having done the work might recover the arrears, and that the case did not fall within the statute, the additional sum, though called rent, being a mere matter of personal contract.¹

SEC. 35. Determination of Term under Void Lease. — Where a tenancy from year to year by entry under an agreement for a lease, or a void lease, has been created, it can only be determined by six months' notice to quit, or by surrender in writing.² Thus where A entered upon premises as tenant to B under an agreement, not binding under the statute, for five years and a half from Michaelmas, 1823, and in 1826 a negotiation was entered into for a term of seven years "from the expiration of the present term," at an increased rent, the landlord to make some alterations, which he did, but no lease was ever executed; and at Michaelmas, 1829, a whole year's rent was paid at the increased rate, and payments were afterwards made on the same footing; it was held that a notice given on the 11th March, 1835, to quit at Michaelmas was a valid notice.³ If, however, the agreement provides that the tenant shall enter on a certain quarter-day and quit on another, the tenant holds under the terms of the lease in other respects, and the landlord can only put an end to the

¹ *Donellan v. Read*, 3 B. & Ald. 100; *Tress v. Savage*, 4 E. & B. 36; 18 899. Jur. 680; 23 L. J. Q. B. 339.

² *Chapman v. Towner*, 6 M. & W. ³ *Berrey v. Lindley*, 3 M. & Gr. 498.

tenancy on the particular quarter-day fixed by the agreement.¹ But where the agreement provided that the lessor should not turn out the tenant so long as he paid the rent, it was held that the agreement either purported to be a lease for life, which would be void as not being creatable by parol; or, if it operated as a tenancy from year to year, was necessarily determinable by either party on giving the regular notice to quit.² And the tenancy may be determined by the six months' notice to quit, even if the parol agreement is that two years' notice shall be given.³

SEC. 36. Tenancy determined at End of Term without Notice.—If a tenant remains in possession until the end of the proposed term, he is not entitled to notice to quit, and may himself quit without notice.⁴ And the fact that the void agreement provided that he might renew the tenancy upon terms, will not give him such an interest in the land as to entitle him to enforce renewal.⁵

In *Berrey v. Lindley*,⁶ COLTMAN, J., said: "A party who enters under an agreement void by the statute of frauds, becomes by that statute tenant at will to the owner, and the tenancy described in the statute as a tenancy at will has since been construed to enure as a tenancy from year to year. But such a tenant may quit without notice, and be ejected without notice, at the expiration of the period contemplated in the agreement."

¹ *Doe v. Bell*, 5 T. R. 471; 2 Sm. L. C. 98; *De Medina v. Polson*, Holt, N. P. 47.

² *Doe v. Browne*, 8 East, 165; but see *Browne v. Warner*, 14 Ves. 156; *in re King's Leasehold Estates*, L. R. 16 Eq. 521.

³ *Tooker v. Smith*, 1 H. & N. 732.

⁴ *Chapman v. Towner*, 6 M. & W. 100; *Doe v. Stratton*, 4 Bing. 446; *Tress v. Savage*, 4 E. & B. 36.

⁵ *Doe v. Moffatt*, 15 Q. B. 257.

⁶ 3 M. & Gr. 512; 4 Sc. (N. R.) 61.

SURRENDER AND ASSIGNMENT.

SECTION 3. No leases, estates, or interests, either of freehold or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall, at any time, be assigned, granted, or surrendered, unless by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

CHAPTER II.

ASSIGNMENT AND SURRENDER.

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SECTION 37. When Deed is not Required. — When a *deed* is not required by this section, any instrument in writing, duly signed and expressing an immediate purpose of giving up the estate on the part of the tenant, *if accepted by the landlord*, will be sufficient.¹ In the several States of this country in which provision is made as to the manner in which an assignment or surrender shall be made, considerable difference exists as to the mode in which it may be made. In any of them, an assignment or surrender by *deed*, would be sufficient,² and in many of them any writing signed by the party assigning or surrendering, or by his agent duly authorized in the mode provided in the statute, is sufficient, although not under seal,³ while in others no special provision is made as to the assignment or surrender of leases;⁴ but these matters are left subject to the general provisions of the statute relative to the sale or leasing of lands.

SEC. 38. Effect of the Statute. — The effect of this section of the statute of frauds is, not to dispense with any evidence required by the common law, but to add to its provisions somewhat of security, by requiring a new and more permanent species of evidence. Wherever, therefore, at common law a deed was necessary, the same solemnity is still requisite under this act; but with respect to lands and

¹ *Farmer v. Rogers*, 2 Will. 26; *Smith v. Mapleback*, 1 T. R. 441; *Weddall v. Capes*, 1 M. & W. 50; *Harrison v. Blackburn*, 17 C. B. N. S. 679.

² In Georgia, Maryland, and South Carolina, the statute is identical with the English statute in this respect. In Florida, "by *deeds* signed, sealed, and delivered in the presence of at least two witnesses."

³ In Arkansas, by deed or notice in writing. In Maine and Massachusetts, "unless by a writing signed, etc.," or by operation of law. In Michigan, Minnesota, Montana, Nebraska, Nevada, New York, Utah, Pennsylvania, and Wisconsin, "unless by act or operation of law, or by deed or conveyance in writing, etc." In New Hampshire, "except by writing." In New Jersey, Pennsylvania, and Missouri, "by deed or note in writing." In Ohio no lease can be "assigned or granted" except by deed or note in writing. In Oregon no interest in real estate can be "created, transferred, or declared" otherwise than by operation of law or by a conveyance or other instrument in writing. In Vermont "no estate or interest in land shall be assigned, granted, or surrendered unless by a writing signed, etc."

⁴ This is the case in Alabama, California, Dakota, Connecticut, Delaware, Illinois, Indiana, Iowa, Mississippi, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wyoming. In Kansas, a lease can only be assigned by deed or note in writing.

tenements in possession, which before the statute might have been surrendered by words only, some note in writing duly signed was by the statute rendered essential to a valid surrender.¹ In several of the States, an exception is made in favor of leases for a period not exceeding the term for which parol leases may be made, and they may be assigned or surrendered without deed or writing.²

SEC. 39. Tenancy from Year to Year cannot be Assigned by Parol. — A tenancy from year to year, created by parol, cannot be assigned by parol,³ and it appears that an agreement by a lessee for the transfer of his interest in a term (not exceeding three years) which, not being in writing, is invalid as an assignment by the statute, cannot operate as an underlease; as it is difficult to say, that, because an agreement is by parol, and therefore cannot operate as an assignment, it is to be construed to give a less interest than the parties intended.⁴

SEC. 40. Effect of Demise of Whole Term may be Lease in Certain Cases, or Assignment. — If, when the lessee demises the whole of his term to another, the parties intend to contract the relation of landlord and tenant, the transaction may, in certain cases, be supported as a lease, so as to allow the lessor to bring an action for use and occupation, for the whole of such term, although the lessee has given notice to quit before the expiration of the term, and has quitted accordingly,⁵ and although the lessor is unable to distrain for rent in arrear because of having no reversion.⁶ In *Poultney v. Holmes*,⁷ a lease of all the lessor's interest was supported as a lease. This case was cited as valid, but distinguished in *Palmer v. Edwards*,⁸ which decided that an

¹ Taylor on Evidence, 885; Roberts on Frauds, 248.

² As in Arkansas, California, Dakota, Florida, Kansas, Michigan, Minnesota, Montana, Nebraska, Nevada, New York, Oregon, Vermont, Utah, Wisconsin.

³ Botting v. Martin, 1 Camp. 319.

⁴ Barrett v. Rolph, 14 M. & W. 348. In this case it was said that the

decision in *Poultney v. Holmes*, 1 Str. 405, was of very doubtful authority, especially after the decision in *Parmenter v. Webber*, 8 Taunt. 593.

⁵ Pollock v. Stacy, 9 Q. B. 1033.

⁶ *Parmenter v. Webber*, 8 Taunt. 593; *Smith v. Mapleback*, 1 T. R. 441.

⁷ 1 Str. 405.

⁸ 1 Doug. 187 n.

instrument expressed to be an assignment may operate as such, although rent is thereby reserved to the assignor. In *Preece v. Corrie*,¹ the above doctrine was confirmed, and it was held that the lessee held of the lessor though there was no reversion. *Pollock v. Stacy*, however, can hardly be considered of great authority, after the recent decision of the Court of Common Pleas in *Beardman v. Wilson*,² where it was held that an under-lease of the whole term amounts to an assignment. In that case, BOVILL, C. J., said: "As far back as the year 1818 it was held, in *Parmenter v. Webber*,³ that where a lessee under-lets for the whole residue of the term, it amounts to an assignment, and it was there treated as established law. In a note to Shepherd's 'Touchstone,'⁴ the law is stated in the same way, and it is in accordance with the usual practice of conveyancers. In *Wollaston v. Hakewill*,⁵ the same question again arose, the under-lease in that case being for a term exceeding that of the original lease, and after taking time to consider, TINDAL, C. J., delivering the judgment of the court, said: 'The only question therefore is, whether, if a lessee for ninety-nine years demises for a longer term, such demise operates in law as an assignment, and we entertain no doubt, but that for a very long period the law has been held that it has such operation and may be so treated in pleading.' I think the matter must be considered to be settled. No doubt the question was sought to be in some degree raised in *Pollock v. Stacy*, but there the action was brought for use and occupation, and it was not necessary that there should have been any actual demise or assignment. The only question was whether the person in occupation was liable to pay rent. There was no deed in that case which could act as an assignment, and the court say: 'The parties intended to contract the relation of landlord and tenant. This they were at liberty to do by law, and we therefore carry their lawful intention into effect.' The case was decided on its special circumstances."⁶

¹ 5 Bing. 24.

² L. R. 4 C. P. 57.

³ 8 Taunt. 593.

⁴ P. 266, 8th ed.

⁵ 3 M. & Gr. 297.

⁶ And see *Cottee v. Richardson*, 7 Exch. 151.

SEC. 41. Definition of Surrender.—A surrender is “a yielding up of an estate for life or years, to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown by mutual agreement between them.”¹ “But having regard to strangers who were not

¹ Co. Litt. 337 b, Perk. § 584; 2 Vent. 206; 4 Bac. Abr. 299; Burton v. Barclay, 5 M. & P. 785; 7 Bing. 745; Thorn v. Woolcombe, 3 B. & Ad. 586. A surrender differs from a release in that it is the falling of a less estate into a greater, while a release operates by the greater estate falling to the less. Williams v. Sawyer, 3 B. & B. 70; Smith v. Mapleback, 1 T. R. 441. In order to constitute a valid surrender the surrenderor must not only have an estate in possession, but he must also be legally competent and able to make a surrender that will quiet all rights in the line of his title, and it must be made to the owner, in his own right of the immediate reversion. 4 Bacon's Abr. § 1, 213. In conformity with this rule it will be seen, and so it has been held, that an undertenant cannot surrender the lease and estate to the original lessor, *because the reversion is in the original tenant*, and the estate must pass back to him, and from him to the landlord. Springstein v. Schemerhorn, 12 John. (N. Y.) 357. *Prima facie*, a person who is not a party to the lease who is in possession, he is presumed to be in as an assignee, but this presumption may be overcome by showing that he is in merely as an undertenant, and this presumption may be overcome by showing that the landlord procured the surrender from the lessee, in which case such act operates as an admission that the lessee was tenant at the time of the surrender. Durand v. Wyman, 2 Sandf. (N. Y. Sup. Ct.) 597. If there is an intervening estate, there is no surrender, but in such cases it may operate as a grant of the term. Agar v. Brown, 2 B. & B. 331. So, too, there must be a privity of estate between the surren-

deror and the surrenderee, and the latter must have a higher and greater estate in the estate surrendered than the surrenderor, which exists in his own right, and not in the right of another or as joint tenant. Shep. Touch. 303; 2 Bl. Com. 336. But, see Shep. Touch. 308, where a contrary doctrine is advanced. Under this rule, if a lease is made by a husband and wife, of the wife's lands, a surrender should be made to her. Woodward v. Lindley, 43 Ind. 433. But if the husband has a lease or estate for years, he alone, or he and his wife together, may surrender it; but if he has an estate for life in right of his wife, who is tenant in dower or otherwise, a surrender by the husband alone is good only during his life, and if the wife survives him, the estate reverts to her. Shep. Touch. 303. So, where a surrender is made to an agent who is not shown to have power to accept a surrender for his principal, yet if the landlord subsequently, without returning the lease to the lessee, accepts rent from a person to whom the lessee had sublet the premises, it has been held to be a valid surrender. Amory v. Kanoffsky, 117 Mass. 351. A surrender to an infant is good unless the presumption of his assent thereto is overcome by proof of dissent. Thompson v. Leach, 2 Vint. 198. And generally it may be said that a surrender may be made to any person who is legally entitled to the immediate reversion, as to the lessor himself, or a person authorized by, or holding under him; but a surrender made to one who has not a greater estate is not good. 4 Bacon's Abr. tit. Leases, § 2. It should be remembered that a person who is from any cause disabled from granting the entire outstanding estate, is

parties or privies thereunto; lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance,"¹ and therefore, although a surrender of a life estate to the owner of the fee is as between the parties an extinguishment of the estate surrendered, yet it may have a continuance to uphold a prior interest derived under it,² for there is no privity of contract between the original lessor and the sub-lessee.³ Thus, where the defendant held two plots of land, B and C, under a lease which contained a covenant to build the houses not less than thirty feet apart, the effect of which was to secure to the houses on plot B a sea-view over plot C, and H, having entered into a treaty with the defendant for the under-lease of plot B, made inquiries of the defendant as to what could be built on the land in front, to which the defendant replied that he (the defendant) could not build on C closer than thirty feet, as his lease did not allow it, and H after having inspected the original lease took an under-lease of plot B, containing a covenant by the defendant that he, his executors, administrators, and assigns, would observe the lessee's covenants in the original lease; and the defendant afterwards surrendered his lease to the ground landlord, took a new lease not containing the old restrictions, and commenced building on plot C in a way which would obstruct the sea-view from houses on plot B belonging to the plaintiff, who was the assignee of H; it was held that the right of H under the defendant's covenants to observe the covenants in the original lease, was not affected by the surrender, and that the plaintiff was on that ground entitled to an injunction to restrain the defendant from building in contravention of those covenants.⁴

SEC. 42. Demise by Tenant from Year to Year.—Surrender by lease does not affect a sub-lessee. A demise by a tenant

unable to surrender such estate, and that a person who is disabled from taking by grant is disabled from taking by surrender. *Furnivall v. Grove*, 8 C. B. (N. S.) 403; *Pleasant v. Benson*, 4 East, 234; *Doe v. Pyke*, 5 M. & S. 154.

¹ Co. Litt. 238 b; *Davenport's Case*, 8 Co. 145 b.

² *Doe v. Pyke*, 5 M. & S. 146.

³ *Pleasant v. Benson*, 14 East, 237; *Torriano v. Young*, 6 C. & P. 8.

⁴ *Piggott v. Stratton*, 1 De G. F. & J. 33.

from year to year to another, also to hold from year to year, is a demise from year to year *during the continuance of the original demise*, although at the time of making the contract no such qualification is mentioned; for, although the lessee might surrender, his estate would as to the under-lessee have continuance.¹ It is well settled that the surrender of a lease will not affect or prejudice an under-lease previously granted,² unless the sub-tenant expressly assents thereto and in effect attorns to him.³ Thus, in an English case,⁴ at Michaelmas, 1851, A, the owner of two adjoining houses, Nos. 4 and 5, let No. 5 to A, as tenant from year to year. Defendant having become tenant to W of No. 4, A let him the cellars under No. 5, from year to year from Michaelmas, 1861. There was in the front cellar a gas-meter communicating with the house No. 5, and it was a term of the letting that A should be allowed to go to the meter, if necessary, whenever defendant's premises were open. In July, 1871, it was agreed between A, W, and D, that A should give up possession of No. 5 to W, and D became tenant from year to year to W from Michaelmas, 1871. Defendant was aware that No. 5 was given up by A and re-let to D, but no notice to quit the cellars was given to defendant. In March, 1872, D put up in the cellars a water-meter communicating with his house, without either objection or express permission of the defendant. Afterwards D surrendered his interest in favor of the plaintiff, and W let No. 5, expressly including the cellars, to the plaintiff for fourteen years, from the 24th of June, 1872. The plaintiff entered into occupation, the cellars remaining occupied by the defendant, and plaintiff, without objection or permission of the defendant, put up more pipes and some bell-wires in the cellars. In July, 1872, the plaintiff demanded possession of the cellars, but the defendant refused to give them up without a proper notice to quit, and he retained possession till April, 1873. On the 10th of

¹ Pike v. Eyre, 9 B. & C. 909; 4 Mann. & R. 661; Lambert v. McDonnell, 15 Ir. C. L. R. 136; The London Discount Co. v. Drake, 6 C. B. (N. S.) 798.

² Piggott v. Stanton, 1 De G. F. & J. 33; Beaden v. Pyke, 5 M. & S. 146;

Torriano v. Young, 6 C. & P. 8; Hayton v. Benson, 14 East, 237.

³ Lambert v. McDonnell, 15 Ir. C. L. 136.

⁴ Mellor v. Watkins, L. R. 9 Q. B. 400.

January, 1873, the defendant cut off the plaintiff's water supply by hammering up the service pipe passing through the cellars, and cut the gas-pipes and bell-wires. The plaintiff having brought an action for being kept out of possession of the cellars, and for the damages caused by the defendant's cutting the pipes, etc., it was held that the defendant was entitled to keep possession until a proper notice to quit had been given; for that the voluntary surrender by A could not affect the interest of the defendant, his sub-lessee, and that plaintiff was entitled to damages for the cutting of his pipes and wires; because a licensee, under a revocable license, was entitled to notice of revocation and a reasonable time afterward to remove his goods.¹ Not only is a sub-tenant protected against a surrender by the lessee, but a mortgagee of his term is also protected therefrom, and even a mortgagee of the tenant's fixtures, it not being competent to the tenant to defeat his grant by a *voluntary* surrender subsequent to the grant.² Thus, a party seized of a leasehold estate for life, subject to a covenant against waste, cannot defeat the rights of a mortgagee under a mortgage executed by himself, by a mere confession of waste to the landlord, and a surrender of possession to him for a consequent forfeiture of the lease. As against such mortgagee, and indeed, even as between the landlord and tenant, a re-entry for the forfeiture, *by suit at law*, is necessary to terminate the lease.³

¹ McKenzie v. Lexington, 4 Dana (Ky.) 129.

² The London &c. Loan and Discount Co. v. Drake, 6 C. B. N. S. 798.

³ Allen v. Brown, 60 Barb. (N. Y.) 39. In this case MILLER, P. J., said: "There is no reported case in the books which holds that where there is a condition in a lease that a party shall not commit waste, that the lease becomes forfeited without a trial and a judgment at law in favor of the party claiming the forfeiture. There is a difference between leases for *lives* and for *years*. In Woodfall's Land. and T., 271, it is said: 'In cases of conditions of re-entry, there is a difference between leases for *lives* and leases for *years*.' . . . 'As to leases for *lives*, it is held that if the tenant

neglect or refuse to pay his rent after a regular demand, or is guilty of *any other breach* of the condition of a re-entry, the lease is *only voidable*, and, therefore, not determined until the lessor re-enters; that is, *brings an ejectment for the forfeiture*; and this, though the clause of the condition should be that, for non-payment of rent, or the like, the lease shall cease and be void; for it is a rule that where an estate commences by *livery*, it cannot be determined before entry.'

"Applying the rule laid down, there can be no question that the plaintiff's action cannot be maintained. The authority quoted is cited in Jackson v. Elsworth, 20 John. (N. Y.) 180, and there is no case referred to which

Where a lessor, in consideration of the payment of an annual sum during a term of years, grants certain privileges to an under-tenant, which the *mesne* landlord was incapable of granting, a surrender to the latter will not affect the tenant's liability on his contract with the permanent lessor.¹

SEC. 43. Lessee reserving Interest not Good Surrender.—If a lessee reserves to himself any part of the estate, it is not a good surrender, as if he grants all his term to the lessor except the last year, month, or day.²

A surrender does not operate as such unless it is accepted by the reversioner.³

SEC. 44. Surrenders are of Two Sorts. Proper Operative Words.—A surrender, properly taken, is of two kinds,

disturbs the doctrine there laid down. It must, therefore, be considered as decisive, and the question as *res adjudicata*. I am also inclined to think that a forfeiture and re-entry on account of waste is a *condition* and not a *limitation* of an estate, and, therefore, waste of itself, without the institution of legal proceedings, does not terminate the estate. The condition does not defeat the estate, although it be broken, until entry by the grantor, or his heirs or representatives. The landlord may terminate the estate, if he chooses, by a proper proceeding, and take advantage of a breach of the condition. If he fails to do this, the estate continues the same as if there had been no breach of the condition, and the condition is waived. (2 Black. Com. 155; 4 Kent, 126, 127.)

"There is another difficulty, I think, in the way of the plaintiff and this action. James J. Allen, the owner of the leasehold estate, having conveyed his interest in the same by way of mortgage, I am strongly inclined to think that he could not make or execute a valid surrender of the premises as against the mortgagee, and thus defeat him from holding under the mortgage. The mortgage purports to convey the premises to the mortgagee, subject to be defeated upon

the performance of the condition contained in the mortgage. The mortgagor parts with an interest in the mortgaged premises, by the execution of the mortgage, and if he can surrender the premises in despite of the obligations he has incurred, it would open the door to collusion and the grossest fraud and injustice. A surrender is only a conveyance of the estate which the lessee has, and if it be subject to a mortgage, then the landlord can receive no greater estate than could be conveyed to any other person, and such as the tenant had, subject to the incumbrance thereon. There is eminent justice and equity in such a rule, and I can discover no good reason why it should not be applied. The lease is executed with knowledge that the property may be incumbered by mortgage, and no rights are lost if the incumbrance is recognized, without injury to the landlord, to prevent a forfeiture which must destroy the claim of the mortgage, and which the law abhors. See *Keech v. Hall*, 1 Douglass, 21; 1 Smith Leading Cases, 293."

¹ *Doscher v. Shaw*, 52 N.Y. 602.

² Com. Dig. tit. Surrender (H.); Bac. Abr. tit. Leases, § 3.

³ *Colles v. Evanson*, 19 C. B. (N.S.) 382, *per* BYLES, J.

namely, a surrender in deed, or by express words, and a surrender in law, wrought by consequent operation of law.¹ The proper operative words of a surrender are, "surrender and yield up."² But in an express surrender, it is not necessary to use the formal word "surrender" in the conveyance; nor, indeed, is any particular form essential, but any words, whereby the intent and agreement of the parties to that end appear, are sufficient to work a surrender, and the law will direct the operation and construction of the words accordingly.³ If a lessee for life or years grants all his estate to his lessor, that is a surrender.⁴ Thus, in *Farmer v. Rogers*,⁵ A B by deed indented, mortgaged lands to C D for five hundred years, with a proviso for cesser on payment of £ 500 and interest upon a certain day. This mortgage was set up as a defence to an action of ejectment, when the deed appeared to contain the following indorsement: "Received this — day of March, 1738 (being after the day limited by the proviso), of A B so much money for all principal money and interest till this day; and I do release the said A B, and discharge the within-mortgaged premises from the term of five hundred years." Signed by C D, the mortgagee. The indorsement was held to be a sufficient surrender of the term, the court observing that the words "release and discharge the term of five hundred years" were much stronger than words which, in many cases, had amounted to a surrender, *ut res magis valeat quam pereat*. So where a lease came into the hands of the original lessor by an agreement between him and the assignee of the original lessee, "that the lessor should leave the premises, as mentioned in the lease, and should pay a particular sum over and above the rent, annually, towards the good will already paid by such assignee," the agreement was held to operate as a surrender of the whole term, and the sum mentioned in the agreement was considered as a sum to be paid annually in gross.⁶ The statute does not, except in Florida, make a deed essential to a surrender, the words being either "by deed or note in writing," or "by deed

¹ Co. Litt. 338 a.

² Woodf. L. & T. 9th ed. 267.

³ 1 Wms. Saund. 289, citing *Williams v. Sawyer*, 3 Brod. & B. 70; 6 Moore, 226; *Doe v. Stagg*, 5 Bing.

(N. C.) 564; 7 Scott, 690; and see 2 Roll. Abr. 497 (H.) pl. 1.

⁴ 2 Roll. Abr. 497, pl. 15.

⁵ 2 Wils. 26, 27.

⁶ *Smith v. Mapleback*, 1 T. R. 441.

or conveyance in writing," signed, etc.,¹ and any instrument in writing duly signed, and expressing an *immediate* purpose of giving up the estate on the part of the tenant, *if accepted* by the landlord, will be sufficient.² Thus a written instrument in this form, "we hereby renounce and disclaim, and also surrender and yield up all right, etc.," a tenancy from year to year being in existence has been held to be a surrender and not a disclaimer.³ So a written request by a tenant to the landlord to re-let the premises to some other person, or even a parol agreement to surrender, *if acted upon*, amounts to a surrender by operation of law.⁴ But a parol agreement between the landlord and a tenant for a term, that the landlord shall make a new lease to a third person for the unexpired term, and the tenant will surrender, does not operate as a surrender by operation of law, *unless the new lease is executed*, and passes on interest according to the intention of the parties, even though the tenant quit, and such third person enters and occupies for a time.⁵

¹ *Peters v. Barnes*, 16 Ind. 219.

² *Shep. Touch.* 306; *Farmer v. Rogers*, 2 Wils. 26; *Harrison v. Blackburn*, 17 C. B. (N. S.) 679; *Smith v. Mapleback*, 1 T. R. 441; *Weddall v. Capes*, 1 M. & W. 50. Any words indicative of an intention and desire to surrender will operate as a surrender. *Weddall v. Capes*, *ante*; *Chamberlaine's Case*, 4 Mod. 151, as *dedi* or *concessi* Co. Litt. 301 b, "the lessee doth discharge the premises from the term." *Earl v. Rogers*, 2 Wils. 26; *Mason v. Treadway*, 1 Lev. 145, "the lessee is content that the lessor shall have the land." *Penruddock v. Newman*, 1 Leon. 279, have been held sufficient. An *interesse termini* is no impediment to a surrender. *Anon.* 2 Dyer, 112 a, pl. 49; but a remainder is. *Jenkin Cent.* 256, case 49.

³ *Wyatt v. Stagg*, 5 Bing. (N. C.) 564.

⁴ *Nickells v. Atherstone*, 10 Q. B. 944. In *Allen v. Devlin*, 6 Bos. (N. Y.) 1, it was held that a parol agreement on a good consideration made in January, 1858, for the surrender of the last year of the term ending in May, 1859,

and duly performed by the tenant, was valid, and a good defence to an action for rent. In *Lamar v. McNamee*, 10 G. & J. (Md.) 116, it was agreed by parol, between landlord and tenant, that the latter should give up his unexpired term in a lease and certain claims which he had for repairs done to the dismissed premises, in consideration of which the landlord promised to pay the tenant a certain sum of money, and the tenant actually surrendered on the same day, and the landlord took possession. It was held that the agreement, being immediately executed, was not void, and that the action by the tenant for the money was maintainable. When the tenant abandons the premises, and the landlord, at the request of the surety, re-lets them on *his account*, such reletting does not amount to a surrender. *McKenzie v. Farrell*, 4 Bos. (N. Y.) 192.

⁵ *Schefflin v. Carpenter*, 15 Wend. (N. Y.) 400. In *Wood v. Walbridge*, 19 Barb. (N. Y.) 156, it appeared that in November, 1843, the plaintiff leased a house of B and C for the term of eight years, to commence April 1,

SEC. 45. Estate Created without Deed may be Surrendered without Deed.—Where the estate may commence without deed, it may be surrendered without deed,¹ as for example, and estate for life of lands, which may be surrendered without deed, and without livery of seizin; because it is but a yielding or a restoring of the estate again to him in the immediate reversion or remainder.² But an estate for life or years of things which lie in grant whereof a particular estate cannot commence without deed, cannot be surrendered without deed.³

1844. In February, 1844, the house was destroyed by fire, and the plaintiff, who had been in possession, left the premises, and requested the lessors to cancel the lease, insisting that there had been a previous verbal agreement to cancel the lease in case of destruction by fire. The lessors refused, and the premises were unoccupied the first quarter: then the lessors entered. B conveyed his interest to C, who built thereon, and leased the same to defendants for three years. The plaintiff made no claim till November, 1846, when he brought ejectment against the defendant. Held, that the acts of the lessors must be taken to have been with the plaintiff's assent, and were inconsistent with the continuance of plaintiff's lease, which must be considered as surrendered by operation of law. A parol agreement to surrender, predicated on a good consideration, is binding on the tenant. *Bogert v. Dean*, 1 Daly (N. Y. C. P.) 250.

¹ Co. Litt. 338 a; *Farmer v. Rogers*, 2 Wils. 26; *Lamar v. McNamee*, 10 G. & J. (Md.) 126; *Rowan v. Little*, 11 Wend. (N. Y.) 616; *Peters v. Barnes*, 16 Ind. 210; *Bailey v. Wells*, 8 Wis. 141. In Pennsylvania, it is held that a surrender need not in all cases be in writing: *Keister v. Miller*, 25 Penn. St. 481; *Greider's Appeal*, 5 id. 422; as where the lease is for less than four years. *McKinney v. Reader*, 7 Watts (Penn.) 123. Evidence of a parol agreement entered into contempora-

neously with the making of the lease cannot be shown. *Brady v. Peiper*, 1 Hilt. (N. Y. C. P.) 61. In Delaware, an agreement to accept the surrender of even a parol lease is required to be in writing. *Logan v. Barr*, 4 Harr. (Del.) 546. In Kentucky, a parol surrender is good. *McKenzie v. Lexington*, 4 Dana (Ky.) 129. In Maine, a surrender must be by deed or writing. *Hesseltine v. Seaver*, 16 Me. 212. So in Vermont, Gen. Stat., p. 450, § 21; 1 Wms. Saund. 236, note n., an unexpired term of one year may be surrendered by parol. *Smith v. Devlin*, 23 N. Y. 363. At the common law before the 20 Car. 2, ch. 3, corporeal hereditaments might be surrendered without either deed, writing, or livery. *Lynch v. Lynch*, 6 Ir. L. R. 131; *Lyon v. Reed*, 13 M. & W. 285; Co. Litt. 336 a; *Perkins v. Perkins*, Cro. Eliz. 269; *Close v. McCullough*, Gilb. Eq. Rep. 235. And the circumstance that a lessee delivered up his lease to the lessor was a strong evidence of a surrender in fact. *Lyon v. Reed*, 13 M. & W. 285. But a deed was indispensable to a surrender of incorporeal hereditament. 2 Platt on Leases, 499; Co. Litt. 338 a; *Bennett's Case*, 2 Rolle, 20; *Lyon v. Reed*, ante; *Woodfall's L. & T.* 267.

² Co. Litt. 338 a; *Wilston v. Pilkney*, 1 Vent. 242; *Cartwright v. Pinkney*, id. 272.

³ *Shep. Touch.* 397; Co. Litt. 338 a; *Perkins v. Perkins*, Cro. Eliz. 269; *Lyon v. Reed*, 13 M. & W. 310; 13 L. J. Ex. 377.

SEC. 46. Effect of Surrender.—A surrender immediately diverts the estate out of the surrenderor, and vests it in the surrenderee; for this is a conveyance at common law, to the perfection of which no other act is requisite but the bare grant; and though it be true that every grant is a contract, and there must be an *actus contra actum*, or a mutual consent; yet that consent is implied; a gift imports a benefit, and an *assumpsit* to take a benefit may well be presumed, and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property, or sealing of a bond to another in his absence should be the obligee's bond immediately, without notice.¹

SEC. 47. Surrender on Condition Particular Estate may Revest.—A surrender, like any other conveyance, may be made upon condition;² and if the condition is broken, the particular estate may be revested,³ whether the surrender be express or implied,⁴ and the landlord's right to distrain will continue. Thus, where a tenant from year to year entered into a conditional agreement with his landlord to surrender, which was never acted upon, it was held that there was no surrender.⁵

SEC. 48. No Surrender to take Effect In Futuro.—There cannot be a surrender of an estate in possession, to take effect *in futuro*.⁶ A lessee for years to begin presently cannot, until entry or waiver of the possession by the lessor, merge or drown the same by any express surrender, because until entry there is no reversion wherein the possession may drown; but if the lessee enters and assigns his estate to another, such assignee before entry may surrender his estate to the lessor, because by the entry of the lessee the possession

¹ Thompson v. Leach, 2 Salk. 617.

² Perk. § 624.

³ Co. Litt. 218 b.

⁴ Doe v. Poole, 11 Q. B. 716; 17 L. J. Q. B. 143; and see Loyd v. Langford, 2 Mod. 176.

⁵ Coupland v. Maynard, 12 East. 134; and see Cocking v. Ward, 1 C. B. 868.

⁶ Coupland v. Maynard, 12 East. 134; Johnston v. Huddleston, 4 B. & C. 922; 7 D. & R. 411; Weddall v. Capes, 1 M. & W. 50; Doe v. Milward, 3 M. & W. 332; 7 L. J. (N. S.) Ex. 57; Foquet v. Moore, 7 Ex. 870; 22 L. J. Ex. 35; and see Bessell v. Landsberg, 7 Q. B. 638; 14 L. J. Q. B. 355.

is severed and divided from the reversion, which possession being by the assignment transferred to the assignee, may without any other entry be surrendered and drown in the reversion.¹

If a lease for years is made, to begin at a future day, this future interest cannot be surrendered; but if the lessee before that day take a new lease for years, either to begin presently or at the days named, this is a surrender in law of the first lease.² A lessee for years of a term to begin at a day to come, cannot surrender it by an actual surrender before the day the term begins, as he may by a surrender in law.³ A notice to quit may operate as a surrender, but not if it was given under a mistake as to the time when the term expires, and consequently is not good as a notice to quit. Thus, in a case previously cited,⁴ a tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that period, which the landlord accepted, and made no objection to. The tenant having afterwards discovered that his tenancy expired at Christmas, gave his landlord another notice accordingly, and, on possession being demanded at Midsummer, refused to quit the premises. An ejectment having been brought, it was held that the tenancy was not determined by notice, inasmuch as it was not good as a notice to quit, and could not operate, as a surrender by note in writing under the statute being to take effect *in futuro*. PARKE, B., said: "I am very strongly of opinion that there cannot be a surrender to take place *in futuro*. In *Johnstone v. Huddlestone*, *ante*, it was held that an insufficient notice to quit, accepted by the landlord, did not amount to a surrender by operation of law, and it was there agreed that there could not be a surrender to operate *in futuro*. The case of *Aldenburg v. Peaple*,⁵ was much shaken by the decision of this court in *Weddall v. Capes*, *ante*; for, although this precise point is not there determined, yet it is clear that the court were of opinion that the instrument could not operate as a surrender *in futuro*."

¹ Bac. Abr. tit. Leases, § 2; and see *Doe v. Walker*, 7 D. & R. 487; 5 B. & C. 111.

² Bac. Abr. tit. Leases, § 2; Shep. Touch. 302.

³ Shep. Touch. 304; *Ive v. Sams*, Cro. Eliz. 521; *Hutchins v. Martin*, ib. 605.

⁴ *Murrell v. Milward*, 3 M. & W. 327.

⁵ 6 C. & P. 212.

SEC. 49. Surrender for the Purpose of Renewal.—The surrender of a lease will not affect an existing sub-lease. Formerly, if a lessee created out of his estate an under-lease for a less term, and surrendered his immediate reversion to his own reversioner, as his estate became merged, there was no reversion on the sub-lease, and the rent as incident to such reversion ceased.¹ As regards surrenders for the purpose of renewal, it is provided by 4 Geo. II. c. 28, § 6, that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord, or landlords, the same new lease shall, without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes, as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons, in whom any estate for life, or lives, shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators, shall be entitled to the rents, covenants, and duties, and have like remedy for the recovery thereof; and the under-lessees shall hold the messuages, etc., in the respective under-leases comprised, as if the original leases, out of which the under-leases are derived, had been kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy, by distress or entry in and upon the messuages, etc., for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which the under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the under-leases had been renewed under such new principal lease. The object of the legislature in framing this clause appears to have been to place all parties as to every matter in the same situation as if no surrender had taken place.² In England, by 8 & 9 Vict. c. 106, § 9, it is provided that, when the “reversion expectant on a lease made either before or after the passing of the Act, shall, after the 1st of Octo-

¹ *Thre'r v. Barton*, Moore, 94; *Shep. Touch.* 301; *Webb v. Russell*, 3 T. R. 393; *Burton v. Barclay*, 7 Bing. 756; 5 M. & P. 785.

² *Doe v. Marchetti*, 1 B. & Ad. 721, *per* Lord Tenterden, C. J.; *Cousins v. Phillips*, 3 H. & C. 892; *re Ford's Estate*, L. R. 8 Eq. 309.

ber, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, etc., shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.”¹

SEC. 50. Requisites to Good Surrender.—To make a good surrender it is essential: 1st. That the surrenderor be a person able to grant and make, and the surrenderee, a person capable and able to take and receive or surrender, and that they both have such estates as are capable of a surrender; and for this purpose that the surrenderor have an estate in possession [or rather an actual vested estate] of the thing surrendered at the time of surrender made, and not a bare right thereunto only. 2d. That the surrender be to him that hath the next immediate estate in remainder or reversion, and that there be no intervenient estate coming between. 3d. That there be a privity of estate between the surrenderor and the surrenderee. 4th. That the surrenderee have a higher and greater estate in the thing surrendered than the surrenderor has [or an estate equally large], so that the estate of the surrenderor may be drowned therein. 5th. That he have the estate in his own right, and not in the right of another. 6th. And that he be sole seized of the estate in remainder or reversion, and not in joint tenancy.²

SEC. 51. To whom Surrender made.—Under the rules stated, a lessee for years may surrender to him who has the reversion only for years; though the lease be for several years and the reversioner has it only for one year or a less term.³

SEC. 52. Who may Surrender.—Those persons who are disabled to grant are unable to surrender; and such persons

¹ *Farmer v. Rogers*, 2 Wils. 26; *Williams v. Sawyer*, 3 Brod. & B. 70; *Doe v. Stagg*, 5 Bing. (N. C.) 564; 7 Scott, 690.

² *Shep. Touch.* 303. See note, *ante*, p. 76.

³ *Hughes v. Robotham*, Cro. Eliz. 302; *Dighton v. Greenvil*, 2 Vent. 326, 327; *Challoner v. Davis*, 1 Ld. Raym. 402; *Bac. Abr. tit. Leases*, § 2; *Edwards v. Wickwar*, L. R. 1 Eq. 68, 403.

as are disabled to take by a grant are unable to take by a surrender.¹ A sub-lessee cannot surrender to the original lessor, by reason of the intermediate interest, but the lessee may surrender to the lessor and then the sub-lessee likewise, because then his lease is become immediate to the reversion of the lessor.² If a husband has a lease or estate for years in the right of his wife, he alone, or he and his wife together, may surrender the lease. But if the husband has an estate for life in the right of his wife, being tenant in dower or otherwise, and he alone, or he and she together, surrender it, the surrender is good only during the life of the husband, except it is made by fine, nor even if there be a fine, unless the wife join.³ One executor may surrender an estate or lease for years which the executors have in the right of their testator.⁴ One joint-tenant cannot surrender to another joint-tenant, but a release is the proper assurance between them.⁵ Where the lessee of premises under a covenant of re-entry, if the rent should be in arrear twenty-eight days, died in bad circumstances, and his brother administered *de son tort*, and agreed with the landlord to give him possession and suffer the lease to be cancelled on his abandoning the rent, which was twenty-eight days in arrear, and took out letters of administration, it was held that the agreement of the brother made as administrator *de son tort*, did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made any formal claim in respect of the forfeiture, nor taken a regular surrender of the lease.⁶ Where a lessee gave up possession on the last day of the term to a trustee to whom he had been in the habit of paying his rent, and not to the person having the legal estate, it was held there was no surrender.⁷ So a surrender to sequestrators is not sufficient.⁸ The surrender of an infant lessee by deed is void; but his surrender in law by the acceptance of a new lease is good, if such new lease increases his term or decreases his rent.⁹

¹ Woodf. L. & T. 9th ed. 277;
Shep. Touch. 303.

² Bac. Abr. tit. Leases, § 2.

³ Shep. Touch. 303.

⁴ Shep. Touch. 303.

⁵ Ib. 303-4.

⁶ Doe v. Glenn, 1 Ad. & El. 49.

⁷ Ackland v. Lutley, 9 Ad. & El. 879.

⁸ Cornish v. Searell, 8 B. & C. 471.

⁹ Lloyd v. Gregory, Cro. Car. 501;
see Zouch v. Parsons, 3 Burr. 1794.

SEC. 53. **At what Time a Surrender may be made.** — A lessee for a term of years to begin presently cannot, before entry, merge or drown the term by a surrender, because until entry there is no term, and no reversion in the possession to drown; but if the lessee enters and assigns his estate to another, such assignee may, before entry, surrender his term to the lessor, because by the entry of the lessee the possession was severed and divided from the reversion, which possession, being by assignment transferred to the assignee, may without other entry be surrendered and drowned in the reversion;¹ but it is not necessary that the surrenderor of a lease to begin at a future day should be in possession, in order to make a surrender before the period of commencement.² As to surrender of leases *in futuro* or future interest, there is this distinction to be observed, that a lessee for years of a term, to begin at a day to come, cannot surrender it by an actual surrender before the day of the term begins, but he may by a surrender in law.³ Whenever a deed purporting to be a surrender cannot operate *as such*, it will probably take effect as an assignment or as a release of the right to the term, *ut res magis valeat quam pereat*.⁴

SEC. 54. **Cancelling Lease not Surrender.** — Since the statute of frauds, a lease for years cannot be surrendered by cancelling, without writing, because the intention of the statute was to take away the former manner of transferring interests in lands by signs, symbols, and words only; and therefore, although the cancelling of a lease was a sign of surrender before the statute, it is now taken away unless there is a writing under the hand of the party;⁵ and the fact

¹ Bacon's Abr. tit. Leases, § 2.

² Shep. Touch. 302.

³ Shep. Touch. 304; Ives v. Sams, Cro. Eliz. 521; Hutchins v. Martin, id. 605.

⁴ Wood's Landlord and Tenant, 803.

⁵ Magennis v. MacCullough, Gilb. Eq. Rep. 236, per GILBERT, C. B.; Roe v. Abp. of York, 6 East, 86. A destruction of the lease does not operate as a surrender. Thus, where A voluntarily delivered up and destroyed a lease of land, and took a new lease, and afterwards claimed under the old

lease, it was held that if the old lease was not duly surrendered by writing within the statute of frauds, yet that A could recover no more land than what he could prove with absolute certainty was covered by the lease, especially after the premises had been in the possession of another for near 16 years. Jackson v. Gardner, 8 Johns. (N. Y.) 394; Leech v. Leech, 2 Chitt. 100; Courtail v. Thomas, 9 B. & C. 288; Close v. McCullough, Gilb. Eq. Cas. 235. A recital in a lease by one party, that a former lease granted

that the lessor has the lease in his possession in a cancelled state does not prove a surrender, but he must show a surrender by deed or note in writing. And it appears that the rule is the same, whether the deed relates to things lying in livery, or to those which lie in grant.¹ The deed is evidence of title, and if it is lost, secondary evidence may be produced to show the grant.² Moreover, alterations in a deed do not prevent it from being received in evidence.³ Where premises were demised to B, which he again demised to C, and subsequently sold his interest to D, upon which D obtained a new lease from A, the first lease having been cancelled, it was held that B's interest had not been surrendered.⁴

SEC. 55. Nor Evidence of Surrender, unless Other Evidence.

—Nor is the fact that the lease is cancelled by the parties *prima facie* evidence that there was a surrender by deed or note in writing.⁵ But where the lease was produced from the lessee's custody with the seals torn off, and it was proved

to another had been surrendered, does not of itself afford any evidence against strangers, of the fact of surrender. *Lyon v. Reed*, 13 M. & W. 285. Nor would the execution of a counterpart of a new lease taken by the lessee prior to the determination of his former interest, and reciting that it was granted in consideration of the surrender of the former lease (unless it were by operation of law), inasmuch as it did not purport of itself to be a surrender, having no words in it which could denote, or amount to, a yielding or rendering up of the interest of the lessee. *Earl of Berkeley v. The Archbishop of York*, 6 East, 86. So, a surrender would not be presumed from the circumstance of the rent having regularly been paid by a third person. *Copeland v. Watts*, 1 Stark. 95. Nor would the mere fact of a lease being in the custody of the lessor, and in a cancelled state, furnish a presumption of there having been the requisite deed or note in writing. It might raise a presumption of intention to determine the term, but no more. And if the lessor relied on such a

cancellation as evidence, it was incumbent on him to prove a surrender; not on the lessee to show how the lease came to be in that condition. If, however, the lease had been in the lessor's possession for a long series of years—twenty, for instance—without any dispute; or if there had been any destruction of his papers, or change of residence, or any foundation for supposing that there might have been a deed or note in writing, and that that deed or note had been destroyed, that might have been a ground for raising a presumption that there was a deed or note in writing accompanying the lease when it got into his possession. *Courtail v. Thomas*, 9 B. & C. 288.

¹ *Bolton v. Bp. of Carlisle*, 2 H. Bl. 263, 364; *Walker v. Richardson*, 2 M. & W. 892; 6 L. J. (N. S.) Ex. 229.

² *Bolton v. Bp. of Carlisle*, 2 H. Bl. 263.

³ *Stewart v. Aston*, 8 Ir. C. L. R. 35.

⁴ *Wootley v. Gregory*, 2 Y. & J. 536.

⁵ *Doe v. Thomas*, 9 B. & C. 288; 4 Mann. & R. 218.

to be the custom to send in old leases to the lessor's office before a renewal was made, which old leases were thereupon cancelled, it was held that there was evidence from which the jury might presume a surrender by operation of law.¹ The fact that the lease is cancelled by the mutual consent of both parties does not destroy the estates already vested or their incidents, nor prevent the lessor from maintaining an action of debt for the recovery of the rent.² In an English case³ the plaintiff leased to the defendant a building called "Her Majesty's Theatre," in Haymarket, for the term of four years and nine months, for the yearly rent of £6275, payable quarterly in advance. In an action for three-quarter's rent, the defendant set up in defence that the lease, by and with the assent of the plaintiff, was wholly cancelled, and that he, the defendant, never entered into the possession of the premises, and therefore claimed that he had duly surrendered the premises to the plaintiff, and was not liable for the rent thereof. The court held that this defence was not available, MARTIN, B., saying, "When a man demises land for a term of years, reserving to himself a rent, the effect of it is to create two estates, viz., the estate of the lessee, and the reversion of the lessor, and the rent is incident to the reversion. When the day of payment arrives, the rent still remains annexed to the reversion. Here the question is, whether the simply cancelling a lease destroys the lessor's right of action for the recovery of the rent. I am of opinion that it does not, *because the cancelling a lease does not destroy the estate already vested, nor its incidents.*" WATSON, B., said, "The authorities are clear that the cancelling a deed does not divest the estate of the lessee, or deprive the lessor of his right of action upon the demise." The rule seems to be well established, that when a conveyance of land operates as a transmutation of possession, the cancellation, destruction, or even the redelivery of the deed by mutual consent will not of itself revest the estate in the grantor, even though the deed has never been recorded.⁴ But where there

¹ Walker v. Richardson, 2 M. & W. 882; 6 L. J. (N. S.) Ex. 229.

² Ward v. Lumley, 5 H. & N. 87; Doe v. Thomas, 9 B. & C. 288; 4 Mann. & R. 218.

³ Ward v. Lumley, *ante*.

⁴ Wiley v. Christ, 4 Watts (Penn.)

199; Hatch v. Hatch, 9 Mass. 307; Jones v. Neale, 2 P. & H. (Va.) 330; Parker v. Kane, 4 Wis. 1; Holbrook

has been no delivery of the deed, as where it is delivered to a person to hold in escrow until a certain time, or the happening of a certain event, the redelivery of the deed to the grantor would put an end to the transactions relative thereto between the parties, because no estate had ever vested in the grantee under the deed.¹

SEC. 56. Definition of "Surrender by Act and Operation of Law."—A surrender by "act and operation of law" may be defined as a surrender effected by the construction put by the courts on the acts of the parties, in order to give those acts the effect substantially intended by them; and when the courts see that the acts of the parties cannot have any operation, except by holding that a surrender has taken place, they hold it to have taken place accordingly.²

SEC. 57. Cases to which these Words Applied. Estoppel.—The cases to which these words are to be applied are those where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such an act as amounting to a surrender. The acts *in pais* which bind parties by way of estoppel are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascer-

v. Tirrell, 9 Pick. (Mass.) 105; Grayson v. Richards, 10 Leigh (Va.) 57; Gilbert v. Bulkley, 5 Conn. 262; Coe v. Turner, 5 id. 86; Botsford v. Morehouse, 4 id. 550; Mallory v. Stodder, 6 Ala. 801; Morgan v. Elam, 4 Yerg. (Tenn.) 375; Hine v. Robbins, 8 Conn. 347; Libeau v. Libeau, 19 Mo. 269; Jackson v. Anderson, 4 Wend. (N. Y.) 474; Raynor v. Wilson, 6 Hill (N. Y.) 469; Jordan v. Jordan, 14 Ga. 145; Jackson v. Page, 4 Wend. (N. Y.) 585; Schutt v. Lange, 6 Barb.

(N. Y.) 373; King v. Crocheran, 14 Ala. 822; Lawrence v. Lawrence, 24 Mo. 369; Connelly v. Doe, 8 Bleakf. (Ind.) 320; Chessman v. Whittimore, 23 Pick. (Mass.) 231. But in New Hampshire under the statute relative to recording deeds, etc., the rule is otherwise. Dodge v. Dodge, 33 N. H. 487.

¹ Coe v. Turner, *ante*.

² Lynch v. Lynch, 6 Ir. L. R. 136, *per* Brady, C. B.; see Cannan v. Hartley, 9 C. B. 634; 19 L. J. C. P. 323.

taining, and then the legal consequences followed.¹ The surrender is presumed to have preceded the act to which the tenant is party.²

SEC. 58. **Disclaimer.**—A tenant for a definite term of years will not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and disclaiming his landlord's title.³

SEC. 59. **Agreement to Pay Additional Rent.**—A parol agreement by the tenant to pay an additional rent will not have the effect of creating a new tenancy.⁴ So a parol agreement by the landlord to lay out money on the premises, the tenant paying an increased rent or a percentage on the outlay, does not create a new demise so as to amount to a surrender of the then existing term, for it cannot be supposed to be in the contemplation either of the landlord or tenant that the old lease should be at an end, and that instead of it a new lease should be created, which being by parol would only have the effect of a lease at will.⁵ Nor does such an agreement come within the statute for the reason that no additional interest in the land is thereby conferred, but in that respect the interest of the parties remains the same as before,⁶ and the new agreement is merely collateral, and the additional rent cannot be distrained for, because it is not embraced in the lease.

SEC. 60. **Agreement to Purchase.**—An agreement by the tenant to purchase the premises from the landlord does not amount to a surrender,⁷ as there is an implied condition in the contract that the landlord shall make out a good title; but the contract may be so specially worded as to be an

¹ *Lyon v. Reed*, 13 M. & W. 306, 309; 13 L. J. Ex. 377, *per* PARKE, B.; see also *Bessel v. Landsberg*, 7 Q. B. 638; *Nickells v. Atherstone*, 10 Q. B. 944.

² *Cannan v. Hartley*, 9 C. B. 634, n. a.

³ *Doe v. Wells*, 10 Ad. & El. 435.

⁴ *Geekie v. Monk*, 1 C. & K. 307;

Doe v. Geekie, 5 Q. B. 841; *Crowley v. Vitty*, 7 Exch. 319.

⁵ *Donellan v. Read*, 3 B. & Ad. 905; *Lambert v. Norris*, 2 M. & W. 335.

⁶ *Donellan v. Read*, *ante*.

⁷ *Tarte v. Darby*, 15 M. & W. 601; 15 L. J. Ex. 326; and see *Hamerton v. Stead*, 3 B. & C. 483, *per* LITTLEDALE, J.

absolute contract for purchase, whether the vendor shows a good title or not.¹

SEC. 61. Determination of Tenancy from Year to Year.—A tenancy from year to year cannot be determined *unless there is either a legal notice to quit, or a surrender in writing or by operation of law.*² And such a tenancy cannot therefore be determined by a parol license from the landlord to quit in the middle of a quarter, although the tenant leaves the premises, as there is a subsisting term in the premises which can only be surrendered by deed or note in writing, or by act and operation of law.³

SEC. 62. Ineffectual Notice to Quit.—Nor can such a tenancy be determined by an ineffectual notice to quit, and the tenant's quitting accordingly, if the landlord does not accept possession. Where a tenant from year to year, by a Lady Day holding, agreed by parol with his landlord's agent to quit at the ensuing Lady Day, which was within half a year; and the premises were re-let by auction, at which the tenant attended and bid, but the new tenant was not put into possession: it was held that the tenancy was not determined, there not having been either a sufficient notice to quit, or a surrender by operation of law.⁴ So where the tenant gave a parol notice to the landlord, less than six months before the 25th of March, that he would quit on that day, and the landlord verbally accepted and assented to the notice, it was held that there had been no surrender.⁵ Again, where the tenant accepted an insufficient notice to quit, and agreed to give up the key of the premises, but afterwards refused to do so, saying that the notice was bad, to which the landlord replied, there would soon be another quarter's rent due; it was held that the tenant's agreeing to give up the key was no acquiescence in the notice, and no surrender within the statute.⁶ A notice to quit, signed by two only of

¹ Doe v. Stanion, 1 M. & W. 695, 701; Tyr. & Gr. 1065; 5 L. J. (N. S.) Ex. 253.

² Doe v. Ridout, 5 Taunt. 519.

³ Mollett v. Brayne, 2 Camp. 103; Thomson v. Wilson, 2 Stark. 379.

⁴ Doe v. Johnstone, McClel. & Y. 141.

⁵ Johnstone v. Huddlestons, 4 B. & C. 922; 7 D. & R. 411; and see Doe v. Milward, 3 M. & W. 328; Bessel v. Landsberg, 7 Q. B. 638.

⁶ Brown v. Burtinshaw, 7 D. & R. 603.

three executors of the original lessor, expressing the notice to be given on behalf of themselves and the third executor, is not good.¹

SEC. 63. Surrender by Consent, and Acceptance of Possession.—As has already been stated, a surrender by operation of law properly arises where the landlord or tenant has been a party to some act the subject of which cannot be affected while the particular estate exists, and the validity of which he is by law estopped from disputing. Such a surrender is the act of the law, and takes place independently, and even in spite of the intention of the parties,² and is presumed to have preceded the act to which the tenant is a party. In obedience to the rule stated, it is held that a surrender of demised premises by a tenant *and their acceptance by the landlord*, even though there is a lease under seal, *without any written agreement*, terminates the tenancy.³ A tenancy from year to year cannot be determined without either a sufficient

¹ Right v. Cuthell, 5 East, 491.

² Lyon v. Reed, 13 M. & W. 285.

³ Hanham v. Sherman, 114 Mass. 19; Randall v. Rich, 11 Mass. 493. In Amory v. Kanoffsky, 127 ed. 117, the lessee of land sub-let it, and when the first instalment of rent came due, both the lessee and sub-lessee paid it to the lessor. The lessee then told the lessor that if he continued to receive the rent from the sub-lessee, he must release him from liability under the lease. The lessor replied that he might give up his lease, and then refunded the money he had paid. The lessee took his lease to the office of the lessor and delivered it to a person there, who gave a receipt for it. The lessor knew that the lease had been left at his office, and did not return it, and without making any demand upon the lessee therefor, continued to receive the rent for several months from the sub-lessee, against whom he subsequently brought an action to recover possession. In an action brought by him against the lessee to recover the rents, it was held that there had been a surrender by opera-

tion of law, although there was no evidence that the person to whom the lease was delivered, as before stated, had authority to accept the surrender of leases, and that the record of the action brought against the sub-lessee was competent evidence of a surrender. The fact that the lease is for a longer term than three years does not prevent a rescission thereof by a parol agreement of the parties when accompanied by a surrender of the term and possession by the tenant to the landlord, and the acceptance thereof by the latter. It is not like a sale and transfer to a stranger of an interest in land greater than a term of three years, and therefore is not within the statute of frauds. It is a yielding up to the reversioner the limited estate derived from him, whereby the future tenancy is rescinded. The relation of landlord and tenant is thereby ended. See Boyce v. McCulloch, 3 W. & S. (Penn.) 428; Raffensberger v. Cullison, 28 Penn. St. 426; Magaw v. Lambert, 3 Penn. St. 444; Auer v. Penn., Penn. Sup. Ct. 1880.

notice to quit or a surrender,¹ and even a parol license given by the landlord to quit before the end of the year, and the tenant quitting accordingly, of itself is not sufficient to amount to a surrender;² but if under such a license the tenant quits *and the landlord accepts the possession of the premises*, a complete surrender results which destroys the lessor's right to rent either for the balance of the year or that for the portion of the year already expired.³ Thus, in a Massachusetts case,⁴ it was held that the surrender of leased premises by the administrator of a deceased lessee who has occupied the premises after the death of the lessee, and its acceptance by the lessor, without any reservation of, or agreement for, a right to sue the administrator or to prove against the insolvent estate of the lessee, terminates all liability of the administrator or of the estate, upon the covenants of the lease. In all cases, an *executed* agreement to surrender is operative as a surrender.⁵ Thus, where a tenant consented that the lessor might lease the premises to another *and gave up possession to the new lessee*, a surrender by operation of law was held to transpire;⁶ and this doctrine

¹ Read v. Ridout, 5 Taunt. 519.

² Mollett v. Brayne, 2 Camp. 103; Thompson v. Wilson, 2 Stark. 379; Gore v. Wright, 6 Ad. & El. 118; Whitehead v. Clifford, 5 Taunt. 518; Dodd v. Acklom, 6 M. & G. 672; Stone v. Whitney, 2 Stark. 235; Reeve v. Bird, 4 C. M. & K. 31; Thomas v. Cooke, 2 B. & Ald. 119; Matthews v. Sawell, 8 Taunt. 270; Phipps v. Sculthorpe, 1 B. & Ald. 50; Grimson v. Legge, 2 B. & C. 324; Walls v. Atcheson, 3 Bing. 462; Havland v. Bromley, 1 Stark. 455; Redpath v. Roberts, 3 Esp. 325. But the doctrine of these cases has been much shaken by Lyon v. Reed, *ante*; but in Nicholls v. Atherstone, 11 Jur. 778, the Court of Queen's Bench dissented from the reasoning and observations on the previous cases in that judgment, and said there was no estoppel in the case, although the judgment was correct. In Biddulph v. Poole, 12 Jur. 450, is an elaborate judgment upon the effect of a surrender by acceptance of a new lease, which is

voidable and afterwards avoided; and it was there held, that, to operate as a surrender, the estate passing by the new lease must be such as was contemplated by the parties at the time. See Lyon v. Reed, discussed, 2 Smith's Leading Cases, 459 *a*, 459 *i*.

³ Grimman v. Legg, 8 B. & C. 324; Brown v. Burtinshaw, 7 D. & K. 603; Allen v. Devlin, 6 Bos. (N. Y.) 1; Lamar v. McNamee, 10 G. & J. (Md.) 116.

⁴ Deane v. Caldwell, 127 Mass. 242.

⁵ Whitney v. Meyers, 1 Den. (N. Y.) 266; Davison v. Gent, 1 H. & N. 744.

⁶ Nickells v. Atherstone, 10 Q. B. 944; Thomas v. Cook, 2 B. & Ald. 119; Davison v. Gent, *ante*. The doctrine of Thomas v. Cook, *ante*, was impugned in Lyon v. Reed, 13 M. & W. 285, but the first and last cases cited in this note, which were decided after Lyon v. Reed, re-affirmed the doctrine of Thomas v. Cooke. In the case first cited LORD DENMAN, C. J., said: "In this case, the defendant

has been held in numerous cases in our courts.¹ Where a tenant abandons the possession, and the landlord enters and

¹ *Murray v. Shane*, 2 Den. (N. Y.) 182; *Randall v. Rich*, 11 Mass. 494; *Gehegan v. Young*, 23 Penn. St. 18; *Smith v. Nevins*, 2 Barb. (N. Y.) 180; *Scheffelin v. Carpenter*, 15 Wend. (N. Y.) 400; *Heseltine v. Leary*, 16 Me. 212; *Baker v. Pratt*, 15 Ill. 569; *Whitney v. Myers*, 1 Den. (N. Y.) 266; *Creigh v. Blood*, 1 Jones & S. (N. Y.) 133; *Dayton v. Craik*, 26 Minn. 133; *Smith v. Pendergast*, 26 id. 318. And where the tenant abandons the premises and the landlord takes possession, a surrender by operation of law results. *Smith v. Wheeler*, 8 Daly (N. Y. C. P.) 135; *Krank v. Nichols*, 6 Mo. App. 72; *Stewart v. Munford*, 91 Ill. 58.

being the lessee in possession of the premises, the plaintiff, his landlord, with his consent, let them to a new tenant, and put him in possession, and discharged the defendant from his liability as tenant. The judge who tried the case held that these facts constituted a surrender by operation of law, and, therefore, a defence against the plaintiff's claim for rent. The correctness of that holding has been brought into question before us in consequence of the opinion expressed by the Court of Exchequer in *Lyon v. Reed*, 13 M. & W. 385, 305-310; but we are of opinion that it is correct. If the expression 'surrender by operation of law' be properly 'applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued,' it appears to us to be properly applied to the present. As far as the plaintiff, the landlord, is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the defendant's term. As far as the new tenant is concerned, the same is true. As far as the defendant, the owner of the particular estate in question, is concerned, he has been an active party in this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession, and so enabling the new ten-

ant to enter. If the defendant cannot technically be said to be estopped from disputing the validity of the estate of the new tenant, still, according to the doctrine of *Pickard v. Sears*, 6 Ad. & El. 469, he would be precluded from denying it with effect; and the result is nearly the same as an estoppel. If an act which anciently really was, in contemplation of law, and has always continued to be, an act of 'notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like' (*Lyon v. Reed*, 13 M. & W. 309), be required as requisite for a surrender by operation of law, and if the acts of the three parties are regarded together, this requisite is here found. Indeed, the notoriety is essentially greater than that which accompanies a parol redemise between the same landlord and tenant, which is a clear surrender by operation of law. In the present case three are concerned, and there is an actual change of possession: in the other, two are concerned, and there is no change of possession. This surrender by operation of law has been judicially recognized in each of the superior courts. *Matthews v. Sawell*, 8 Taunt. 270; *Thomas v. Cook*, 2 B. & Ald. 119; *Walker v. Richardson*, 2 M. & W. 882; *Bees v. Williams*, 2 C. M. & R. 581; S. C. Tyr. & G. 23. And held valid at *nisi prius* in *Stone v. Whiting*, 2 Stark. N. P. C. 235, and many subsequent cases. When the decisions on a point are numerous and uniform, and carry into effect the lawful inten-

uses the premises as his own,¹ as to make repairs² or to show the premises to parties *with a view to letting them on his own account*,³ or does any acts thereon which show that *the landlord has resumed the possession as owner*. Thus, in the case last cited, the defendant took a lease of a house, stable, and three cottages, at an entire rent for the term of seven years. The house and cottages were underlet to different tenants, the defendant only occupying the stable and yard. Before the expiration of the term the defendant assigned the

¹ *Krank v. Nichols*, *ante*; *Smith v. Wheeler*, *ante*; *Phené v. Popplewell*, 12 C. B. N. S. 334.

² *MacKellar v. Sigler*, 47 How. Jr. (N. Y.) 20.

³ *Reeve v. Bird*, 1 C. M. & K. 31.

tions of the parties according to the truth, and are opposed by no principle, the law on the point ought not to be considered doubtful because the reported decisions are only of modern date, as the fact that the reports on the point do not begin till lately may arise from there being no question on the point in earlier times. Indeed, in 1809, it seems probable that a restoration of the possession to the landlord, and a discharge of the tenant by him, was considered a surrender by operation of law. The defence in *Mollett v. Brayne*, 2 Campb. 103, was shaped on that principle; but, as the evidence failed to show a change of possession by mutual consent of landlord and tenant, the defence failed. In *Whitehead v. Clifford*, 5 Taunt. 518, where there was such change of possession by mutual consent, the defence to a claim for use and occupation succeeded; and the court distinguished the case from *Mollett v. Brayne*, 2 Campb. 103, for that reason. Where there is an agreement to surrender a particular estate, and the possession is changed accordingly, it is more probable that the legislature intended to give effect to an agreement so proved, as a surrender by operation of law, than to allow either party to defeat the agreement by alleging the absence of written evidence. *Although we do not assent to the observations upon the line of cases,*

from Thomas v. Cook, 2 B. & Ald. 119, *downwards*, in the learned and able judgment given in *Lyon v. Reed*, 13 M. & W. 285, *we wish to express our entire concurrence in the decision of that case*. The question there was not upon the estate of the tenant in possession of the premises, but upon the title of the plaintiff as assignee of the reversion; whether a lease of the reversion, granted to Ord and Planta in 1812, for ninety-nine years, could be presumed to be surrendered, from the fact that such lease was found among the deeds of the tenant in fee, who had granted in 1814 a term in the reversion to Osborne and Burt, through whom the plaintiff claimed. There was no change in the possession of the land. No actual change in the possession of the reversion could be made apparent; and the facts stated lead to the conclusion that Ord and Planta did not know of the demise to Osborne and Burt; but the probability is, that the term in them as trustees had been forgotten at the time when their concurrence was requisite for the new lease. As the defendant is entitled to our judgment on this point, it is not necessary to consider the effect of his letter as evidence of a surrender." See note to *Christmas v. Oliver*, 2 Smith's Lead. Ca. 459 a, 459 i, 3d ed.; and *Creagh v. Blood*, 3 Jones & Latouche, 133, there cited.

premises to one Bullock, and quit the possession. The landlord, after the defendant quit the possession, accepted and received the rent of the house and cottages from the several tenants, and gave them receipts therefor, which indicated that he treated and regarded them as his tenants. The tenants of two of the cottages quit before the expiration of the term named in the lease to the defendant, and the plaintiff advertised the premises "to be let on lease, or to be sold by private contract." It was not stated in the advertisement that the premises were in the possession of a tenant, nor was any time for giving possession of the premises named. At the expiration of the term the plaintiff brought an action against the defendant for the rent. The defendant claimed that the premises had been surrendered by him, and set up the facts detailed as evidence thereof. LORD DENMAN, C. J., upon these facts directed a non-suit to be entered, and upon hearing in exchequer, his ruling was sustained, it not appearing that the plaintiff requested to have the question left to the jury. In such cases, in the absence of any positive agreement, the decisive question is, whether the landlord accepts or takes possession of the premises and deals with them in such a manner as indicates that he takes the possession *as owner, and not for or on account of the tenant, or for the mere protection of the premises against damages from the elements*, etc.¹ Thus, where the landlord entered, after the tenant had quit possession, and put up a "To Let" in the windows, LORD KENYON held that such acts afforded no evidence of an acceptance of the possession by the landlord, saying "it was for the benefit of the tenant that the premises should be let, and that he would not from that fact alone infer that the contract was put an

¹ In *Griffiths v. Hodges*, 1 C. P. 419, the defendant having quit possession, the plaintiff, *during the unexpired term*, entered and built a fire and cooked a hare, and it was insisted that this amounted to such a resumption of possession by him as created a surrender by operation of law. But ABBOTT, C. J., said: "If a landlord, while his tenant is in the possession and use of apartments,

enters and uses such premises or any part of them, that will deprive him of his claim to rent. But here, the defendant had left the apartments vacant; *and, as it was proper that fires should be lighted in them*, I do not think that the plaintiff's lighting such fire, or even making some use of it when he had lighted it, is a sufficient taking possession of the premises to deprive him of his right to rent."

end to." In a Pennsylvania case¹ the fact that the landlord accepted the key to the house, put up a "To Let," and had repairs made, was held not sufficient to establish a surrender;² and in no case can a surrender be established from the mere circumstance that the landlord accepted the key of the premises,³ but it must also be shown *that he subsequently dealt with the property in such a manner as to indicate that he regarded the tenant's estate at an end*;⁴ as, if the landlord accepts the key and *re-lets* the premises,⁵ or if he accepts the key under a *parol agreement that the rent shall cease*,⁶ or if he accepts the key and deals with the premises in such a manner as warrants an inference that *he intended to resume possession*.⁷ Where two persons let a house by lease in writing, one of whom, after signing the lease, never further interfered, and the other, before the first quarter's rent became due, accepted the key from the tenant's wife, it was held that there was a sufficient surrender by the tenant which bound both the lessors, the wife of the tenant acting as his agent, and the lessor who accepted the key as the agent of the other;⁸ but a plea that three executors had agreed to accept a third person as tenant in lieu of the defendant is not proved by evidence that *one* of the plaintiffs had made the agreement.⁹ Where a lessee quit in the middle of his term apartments which he had taken for a year, *and the lessor let them to another person*, so that the lessee could not have come back if he had chosen, it was held that by so doing the lessor dispensed with the necessity of a written surrender.¹⁰ Where the owner of a ferry let it

¹ Pier v. Carr, 69 Penn. St. 316; Snyder v. Middleton, 4 Phila. (Penn.) 343.

² Snyder v. Middleton, 4 Phila. (Penn.) 343; Eastler v. Henderson, L. R. 2 Q. B. D. 375. See also Withers v. Larrabee, 48 Me. 570; Matthews v. Lobenor, 39 Mo. 115; Hanham v. Sherman, 114 Mass. 19; Harland v. Brawley, 1 Stark. 455.

³ Thomas v. Nelson, 69 N. Y. 118; Morgan v. Smith, 70 id. 537; Randall v. Rich, 11 Mass. 494; Prentiss v. Warne, 10 Mo. 601; Townsend v. Albens, 3 E. D. S. (N. Y. C. P.) 560.

⁴ Ladd v. Smith, 6 Oregon, 316.

The evidence must be such as to warrant a presumption that the landlord intended to resume possession. Landas v. Hollingshead, 4 Phila. (Penn.); Bloomer v. Merrill, 1 Daly (N. Y. C. P.) 485; Hegeman v. McArthur, 1 E. D. S. (N. Y. C. P.) 147.

⁵ Randall v. Rich, *ante*.

⁶ Whitehead v. Clifford, 5 Taunt. 518; Furnivall v. Grove, 8 C. B. N. S. 496.

⁷ Landas v. Hollingshead, 4 Phila. (Penn.) 57; Dodd v. Acklom, 6 M. & G. 672.

⁸ Dodd v. Acklom, *ante*.

⁹ Turner v. Hardy, 9 M. & W. 770.

¹⁰ Walls v. Atcheson, 3 Bing. 462.

for a year, but after a few weeks the lessee, finding it unprofitable, agreed instead to become servant to the owner, and received daily wages for attending to the ferry for him, it was held to be a surrender by act and operation of law.¹ Where a tenant from year to year agreed to buy the freehold of the land, it was held that the agreement, not being absolute, but conditional on a good title being found, did not operate as a surrender of the tenancy by operation of law.² The fact that the landlord re-lets the premises after they are abandoned by the tenant affords evidence from which a surrender may be found, but this is not the case where the landlord re-lets them on the tenant's account. Thus, where the tenant informed the landlord that he should leave the premises on a specified day, and the landlord told him that if he did he should let the premises on his (the tenant's) account, and hold him responsible for the rent, and the tenant moved out, and the landlord sent a person to occupy the house, it was held not to amount to a surrender, and that the tenant still remained liable for the rent. But where a tenant informed the landlord of his intention to leave, and the landlord said that he was sorry, for then he must get some one else to hire the premises, and gave the tenant permission to leave some of his things on the premises, it was held that the facts afforded evidence from which a surrender could be implied.³ But if the tenant abandons and the landlord re-lets the premises, *giving the tenant notice that he does so for and on his account*, a surrender is not established.⁴ And this is also the rule where the lease provides that in case the tenant leaves the landlord may re-let.⁵ Premises may be surrendered by the mutual agreement of the parties, even by parol, and when executed on both sides, a surrender by operation of law results, although the agreement under which it arose was invalid as such. And an agreement may be implied by operation of law, even where the tenant has quit without a sufficient notice, and the landlord re-enters and uses the premises in a manner which is

¹ *Peters v. Kendall*, 6 B. & C. 703.

⁴ *Peter v. Kendal*, 6 B. & C. 703;

² *Gray v. Stanion*, 1 M. & W. 695; *Walls v. Atcheson*, 3 Bing. 462.

Tarte v. Darby, 15 id. 601.

⁵ *Ogden v. Rowe*, 3 E. D. S. (N. Y.

³ *Stanley v. Koehler*, 1 Hilt. (N. Y. C. P.) 312.

C. P.) 354.

inconsistent with an outstanding right to the possession in the lessee.¹ Surrenders by operation of law result from the

¹ *Mollett v. Brayne*, ante; *Thompson v. Wilson*, 2 Stark. 379; *Amory v. Kanoffsky*, 117 Mass. 357; *McGlynn v. Brack*, 111 id. 219. In an Ohio case F rented certain premises to S for one year at an agreed rent of two hundred dollars, and possession was taken by S under the agreement. S sent word to F that he would no longer retain possession of the premises, but intended to abandon them. F. directed a person in the event of such abandonment to take charge of the premises. After this, S left the premises, and the possession was resumed by F. It was held, that the contract was put an end to by the concurrent act of the parties, and that the right of F to recover rent for the time S enjoyed the premises must be decided by the same rules as if possession had been originally taken upon an understanding that S should pay what was reasonable. *Fitch v. Sargeant*, 1 Ohio, 352. See also *Ladd v. Smith*, 6 Oreg. 316; *Jackson v. Gardner*, 8 John. (N. Y.) 394; *Coleman v. Maherly*, 3 T. B. Mon. (Ky.) 220. A tenancy from year to year, created by parol, is not determined by a parol license from the landlord to quit in the middle of a quarter, and the tenant quitting the premises accordingly. *Botting v. Martin*, 1 Camp. 318. But *contra*, see *Amory v. Kanoffsky*, 117 Mass. 357. But if in such case both parties act upon such parol notice or license to quit, that is, the landlord himself take possession, so as to render it impossible for the tenant to use or occupy the premises, the tenancy is thereby legally determined. *Mollett v. Brayne*, 2 Camp. 103; *Thompson v. Wilson*, 2 Stark. 379. And if, during a letting from year to year, the landlord, with the assent of his tenant, who quits the premises, accepts and treats a third person as his (the landlord's) tenant, this amounts to a valid surrender of the original tenant's interest by act

and operation of law. But in such case the *express consent* of all parties to the change of tenancy seems necessary: *Grimman v. Legge*, ante; *Ackland v. Lukey*, 1 P. & D. 640; *Gore v. Wright*, 3 N. & P. 243; though the assent of the old tenant may be presumed upon the landlord's producing the old lease cancelled, and on proof of a user in his office to have all old leases sent to be cancelled before renewals are granted. *Reeve v. Bird*, 1 C. M. & R. 31; *Thomas v. Cook*, 2 B. & Ald. 119; *Phipps v. Sculthorpe*, 1 id. 50; *Mathews v. Sewell*, 8 Taunt. 270; *Stone v. Whiting*, 2 Stark. 235; *Hamerton v. Stead*, 3 B. & C. 478; *Walls v. Atcheson*, 3 Bing. 462; *Bees v. Williams*, 2 C. M. & R. 581; *Rex v. Banbury*, 1 Ad. & El. 136; *Weddall v. Capes*, 1 M. & W. 50; *Walker v. Richardson*, 2 M. & W. 882. There must be a clear case of substitution and acceptance of the new tenant, and merger of the old tenant's interest; and it seems that the merely taking rent from the new occupier will not suffice. *Graham v. Wichelo*, 1 C. & M. 188. Thus where, as in the case last cited, there was a letting to A and B as partners, and A retired and C entered, and a receipt for rent from B and C was given, it was held that A was not discharged. And unless there is a written demise to the new tenant, or he takes possession, it appears that no surrender of the prior tenancy is effected by legal operation. *Taylor v. Chapman*, Peake's Addl. Cas. 19. Where a tenancy is thus determined in the middle of a quarter, while the rent is current, the tenant, in the absence of an express agreement, is not liable for a proportion of the current quarter's rent from the preceding quarter day to the day of quitting. *Hall v. Burgess*, 5 B. & C. 332; *Grimman v. Legge*, ante; *Walls v. Atcheson*, 2 C. & P. 268; 3 Bing. 462. There cannot, however, be a surrender to take place *in futuro*, and therefore

acts of the parties, and are in no wise dependent upon *their intention*, and exist in spite of the real intention of the parties. *They are inferences of law from the facts*, and cannot be overcome by showing that the landlord did not intend his act to operate as an acceptance of the surrender.¹ Under this rule it follows as a matter of course that, where an oral agreement is entered into between the landlord and the tenant, that another tenant shall be substituted in his place, while it is not valid as an executory agreement, it is binding when it has been executed, by the tenant giving up the possession on the one hand, and the landlord substituting another tenant on the other.² So, if a tenant who has

where a tenant, believing that his tenancy determined at a certain time, gave a written notice to quit at that period, which the landlord accepted and made no objection to; but the tenant, having afterwards discovered that his tenancy did not expire until a later period, and he gave his landlord another notice accordingly, and on possession being demanded at the time named in the first notice to quit, it was held, that the first notice to quit not being good as a notice did not operate as such to determine the tenancy, and that it could not be treated as a surrender by note in writing within the statute of frauds. *Murrell v. Milward*, 3 M. & W. 328; *Weddall v. Capes*, 1 M. & W. 50, overruling *Aldenburgh v. People*, 6 C. & P. 212. And where a tenant from year to year agreed by *parol* with his landlord's agent to quit at the end of the year ensuing, which was within half a year, and the premises were re-let by auction, at which the tenant attended and bid: but the new tenant was not let into possession, and the *old tenant refused to quit*; it was held that this did not amount to a surrender by operation of law. *Huddleston v. Johnson*, 1 McCl. & Y. 141. And where a defective *parol* notice to quit was given, and the landlord *verbally* assented to it, yet the notice was holden inoperative, it not being in writing, and there not being any sufficient surrender by

operation of law. *Johnston v. Huddleston*, 4 B. & C. 922, in which the avowry was for double rent, and it was held that double rent could not be recovered on a defective notice, nor single rent on an avowry for double. The mere cancellation of a lease, without a written surrender, does not amount to a surrender by operation of law: *Berkeley v. York*, 6 East, 86; *Wooley v. Gregory*, 2 Y. & J. 536; and where a lease appeared to have the names and seal of the parties torn off, it was decided that this was neither a surrender by construction of law, nor *prima facie* evidence of a written surrender. *Courtall v. Thomas*, 9 B. & C. 288; *Walker v. Richards*, *ante*, 330. The acceptance of a new lease for a term, to commence during the existence of a former demise, is a surrender of the first term: *Hamerton v. Stead*, 3 B. & C. 478; *Livingston v. Potts*, 16 Johns. (N. Y.) 28; and where A during his tenancy agreed with his landlord that he and B should become tenants, and B entered, this was held to determine the first tenancy. *Hamerton v. Stead*, 5 B. & C. 478.

¹ *Creagh v. Blood*, 3 J. & L. 133; *Nichols v. Atherstone*, *ante*; *Talbot v. Whipple*, 24 Allen (Mass.) 177; *Hall v. Burgess*, 5 B. & C. 332; *Wood v. Partridge*, 11 Mass. 493; *Murray v. Shane*, 2 Duer (N. Y.) 183.

² *Stone v. Whitney*, 2 Stark. 235; *Hobson v. Camley*, 25 L. J. Exchq.

under-let the premises surrenders the term by parol, the landlord's acceptance may be shown by the fact that he subsequently notified the undertenant that the rent must be paid to him, as the original tenant has no estate in the premises.¹ So, if the lessor consents to a change in the tenancy, and receives rent from the new tenant *as an original* and not as a sub-tenant, he cannot charge the first tenant for rent subsequently accruing.² But the mere circumstance

209; *Lawrence v. Faux*, 2 F. & F. 435. In *Murray v. Shaw*, 2 Duer (N. Y.) 182, a lease having been executed for a year, to commence *in futuro*, the tenant wished to abandon it, and obtained a substitute, who, by agreement endorsed on the lease, agreed to assume the lease and perform all the covenants, but changing the mode of paying rent. It was held, that the lessor, by accepting this, released the former lessee, and he could not alter the effect of the surrender by expressing, in his receipts for rent, that it was paid under the original lease. *Murray v. Shave*, 2 Duer (N. Y.) 182; *Smith v. Niver*, 2 Barb. (N. Y.) 180. By consenting to a change of tenancy, the original lessee is discharged. *Page v. Ellsworth*, 44 Barb. (N. Y.) 636.

¹ *Bailey v. Delaplaine*, 1 Sandf. (N. Y.) 5.

² *Smith v. Miner*, 2 Barb. (N. Y.) 180; *Thomas v. Cook*, *ante*; *Mines Royal Society v. Magnay*, 18 Jur. 1028. But the assent of the landlord to the assignment must be established as well as his acceptance of the new tenant as a substitute for the former tenant. The case of *Thomas v. Cook*, *ante*, sanctions the rule that a surrender in law will be implied from the fact that a tenant has put a third person in possession of the demised premises, and that each third person has been accepted as tenant with the assent of the original tenant; but this case was criticized strongly in *Lyon v. Reed*, 13 M. & W. 285. The court, in the principal case, says: "To ascribe the effect of a surrender to the mere act of the landlord ac-

cepting the assignee as his tenant, and receiving rent from him, would be going beyond the precedents. To warrant the inference that the original lease has been annulled, the facts ought to be of an entirely conclusive character." See, also, *Mills v. Auriol*, 1 Smith's L. C. (Phil. ed. Hare & Wallace's notes) 1239, where it is said by LORD KENYON that, "It is extremely clear that a person who enters into an express covenant in a lease continues liable on his covenant, notwithstanding the lease be assigned over. If the lessee assign over his lease and the lessor accept the assignee as his lessee, either tacitly or expressly, it appears from the authorities that the action of debt will not be against the original lessee; but all those cases with one voice declare that if there be an express covenant, the obligation on such covenant still continues." See, also, *Griffith v. Hodges*, 1 C. & P. 419; *Talbot v. Whipple*, 14 Allen (Mass.) 180; *Stobie v. Dills*, 62 Ill. 432; *Baker v. Pratt*, 15 id. 568; *Hegeman v. McArthur*, 1 E. D. S. (N. Y.) 147; *Dodd v. Acklom*, 6 M. & G. 673; *Grimman v. Legge*, 8 B. & C. 324. The mere receipt of rent by the landlord from an undertenant does not evidence the landlord's assent to the tenant's abandonment of the premises. *Slocum v. Branch*, 5 Cr. (U. S. C. C.) 315; *Copeland v. Watts*, 1 Stark. 65; *Burnham v. Hubbard*, 36 Conn. 542; *Bacon v. Brown*, 9 id. 334; *Hill v. Robinson*, 23 Mich. 24. In *Hull v. Wood*, 14 M. & W. 682, a tenant from year to year died, and his widow remained in possession, paying the rent to the land-

that the landlord receives the rent from a sub-tenant is not of itself sufficient to establish a surrender. Thus, where A and H, who were partners by agreement, in March, 1827, became tenants to the plaintiff, and in 1828, W retired from the partnership, and in January, 1829, H entered into partnership with S, and the plaintiff gave receipts for rent as received from H after W retired, and as received from H and S after S became a partner; and also gave H a letter to his attorney, signifying that a lease might be made to H and S, but which was kept by H and not acted upon, and no lease was prepared; it was held, that W remained liable for the rent accruing at the time of H and S.¹ But, where a lease is made to a firm with a covenant for revenues, and during the original term one or more of the partners retire from the firm, and new partners take their place, and the new firm, after the expiration of the term, continue in possession under the old lease, paying rent according to the terms of the old lease, the retiring partners cannot be held for the rent accruing after the expiration of the original term.² Where premises had been let to B for a term determinable by a notice to quit, and pending the term A, the landlord, agreed to let C stand in B's place, and C offered to pay rent, it was held, in an action for use and occupation against C, that he could not set up as a defence that B's term had not been determined either by a notice to quit or a surrender in writing.

Consequently where there is an agreement that the tenancy shall be put an end to, which is acted upon by the tenant's quitting accordingly, and the landlord, by some unequivocal act, takes possession of the premises, that will amount to a surrender by operation of law. Where, therefore, the tenant left the key of the premises at the counting-house of the landlord, and the latter, though he at first refused to accept it, afterwards put up a board to let the premises and used the key to show them, and painted out

lord. Subsequently, a person who knew the facts took out letters of administration upon the estate, the widow still continuing to pay the rent. It was held that this did not amount to a surrender of the tenancy by operation of law.

¹ *Graham v. Nichols*, 1 C. & M. 188; *Woodcock v. North*, 8 Bing. 170; *Beall v. White*, 94 N. S. 382.

² *James v. Pope*, 19 N. Y. 324; *Kinsey v. Winnick*, 34 Md. 112.

the tenant's name from the front, it was held that there was sufficient evidence of surrender by act and operation of law.¹ So where A and B demised a house by lease in writing to C at a rent payable quarterly, and the key of the house was delivered to C's wife, and C entered into possession, but before the first quarter's rent became due (there having been some dispute as to arrears of rent and taxes) C's wife delivered back the key to A, who accepted it, it was held that the delivering back of the key *animo sursum reddendi*, and the acceptance of it by the landlord, amounted to a surrender by act and operation of law.² The case was distinguished from *Mollett v. Brayne*³ on the ground that in that case it was not shown that the landlord took possession, and it was also distinguished from *Johnstone v. Huddleston*⁴ on the ground that there the agreement to put an end to the tenancy was never carried out. Where, however, A was tenant to B, who became bankrupt, and A sent the key of the rooms to the office of the official assignee, where it was left with a clerk, who was told that it was the key of the rooms, and A immediately quitted possession, and no further communication took place, it was held that there was no surrender, and the case was distinguished from *Dodd v. Acklom*,⁵ on the ground that the lessor in that case had authority to act for both.⁶ If the landlord enters into possession of the premises in pursuance of an agreement for a surrender, he cannot afterwards refuse to accept the surrender.⁷ Thus, in a New York case,⁸ after a lessee had

¹ *Phené v. Popplewell*, 12 C. B. (N. S.) 334; 31 L. J. C. P. 235; and see *Whitehead v. Clifford*, 5 Taunt. 518; *Ackland v. Lutley*, 9 Ad. & El. 879; *Grimman v. Legge*, 8 B. & C. 324; *Smith v. Lovell*, 10 C. B. 6; 20 L. J. C. P. 37; *Furnival v. Grove*, 8 C. B. (N. S.) 496; 30 L. J. C. P. 3. A surrender is effected either by words manifesting the intention of the lessee to yield up his estate, or by operation of law, where the parties without such words do some act which implies that they both agree to consider the surrender as made. *Beall v. White*, 94 U. S. 382. But the lessee remains liable under his lease for

all breaches of covenant occurring before the surrender. *Roe v. Conway*, 74 N. Y. 201.

² *Dodd v. Acklom*, 6 M. & Gr. 672; 7 Sc. (N. R.) 415; 13 L. J. C. P. 11.

³ 2 Camp. 103.

⁴ 4 B. & C. 922; 7 D. & R. 411.

⁵ 6 M. & Gr. 672; 7 Sc. (N. R.) 415.

⁶ *Cannan v. Hartley*, 9 C. B. 634; 19 L. J. C. P. 323.

⁷ *Natchbolt v. Porter*, 2 Vern. 112; *Whitehead v. Clifford*, 5 Taunt. 518; *Furnivall v. Grove*, 8 C. B. (N. S.) 496; 30 L. J. C. P. 3.

⁸ *Bailey v. Delaplaine*, 1 Sandf. (N. Y.) 5.

underlet the whole of the demised premises, by two written sub-leases, the landlord called on the undertenants, produced the sub-leases, demanded of them the rent, forbade their paying any more rent to the original lessee, and said he was the rightful landlord, and had taken the place off the lessee's hands; and he afterwards collected all the rents which were collected of the sub-tenants, it was held that there was a surrender of the original lease by operation of law, and that the landlord could not collect the subsequent rent of his original lessee.

SEC. 64. Presumption of Acceptance of Surrender when Rebutted.—But the mere fact of the landlord's taking possession will not necessarily amount to a surrender. Thus, if the tenant abandons possession of the premises during the term, and the landlord enters and does repairs, or even if he uses the premises, the tenancy may not be determined.¹ So where the tenant quitted without giving notice, the fact of the landlord's having put up a bill to let the apartments did not prevent his recovering in assumpsit for use and occupation.²

SEC. 65. Landlord Taking Tenant as Servant.—Where the owner of a ferry demised it by parol to A, who, finding it unprofitable, agreed to become the lessor's servant as boatman, and received wages, it was held that there was a surrender by act and operation of law.³ The acts from which it is sought to be inferred that the tenancy has been put an end to must be unequivocal.⁴

SEC. 66. Surrender by Operation of Law.—The statute of frauds in all the States where provision is made relative to surrenders, excepts implied surrenders, or surrenders resulting by act and operation of law, and of this class are those created by the acceptance by the tenant of a new lease from the reversioner, or other conveyance inconsistent with the first lease, whether for a longer or a shorter

¹ *Bessell v. Landsberg*, 7 Q. B. 638;
14 L. J. Q. B. 355; *Griffith v. Hodges*,
1 C. & P. 419.

² *Redpath v. Roberts*, 3 Esp. 225.

³ *Peter v. Kendal*, 6 B. & C. 703.

⁴ *Ackland v. Lutley*, 9 Ad. & El.
879, 894.

term, or to begin presently or at a future period *during the term*, because the acceptance of a *new* lease, to take effect during an existing term, necessarily implies a relinquishment of the former term, from the time when the *new lease* takes effect¹ unless there are facts which rebut the presumption that a surrender was intended.² But a surrender cannot be implied by the acceptance by the tenant of an invalid new lease³ or from a mere agreement for a *future* lease.⁴ Where a new lease is made, to take effect at a future time, in so far as the provisions of the new lease are inconsistent with the old, the former will prevail, the presumption being that a surrender of the old lease was intended;⁵ but a parol agreement between the parties to a lease under seal, reducing the rent, does not amount to a surrender, nor, unless founded upon a new consideration, has it any validity.⁶ But it has been held that a subsequent *unsealed* agreement to surrender upon a failure to perform certain conditions, the original lease being under seal, although inoperative as a defeasance, is valid as a contingent surrender, the agreement being treated as a conveyance *in presenti* to commence *in futuro*;⁷ but this doctrine is opposed to that held in England,⁸ where, as we have seen,⁹ it is held that a surrender cannot be made to take effect *in futuro*, although we confess that we can see no reason or justice in the rule, and cannot understand why a valid contract in this respect cannot be made, as well as in reference to any other matter; consequently we believe that the New York case, cited *supra*, expresses the better rule, and the one which will be most likely to obtain in this country.

A parol agreement to *change* a lease, or for a *new* lease for a longer period than that excepted from the statute, is inoper-

¹ *Livingston v. Potts*, 16 John. (N. Y.) 28; *Bromley v. Stanley*, 4 Burr. 2210; *Furnivall v. Grove*, 8 C. B. n. s. 496; *Crowley v. Vitty*, 7 Exchq. 319; *Logan v. Anderson*, 2 Doug. (Mich.) 101; *Whitney v. Meyers*, 1 Duer. (N. Y.) 266; *Clemens v. Broomfield*, 19 Mo. 118.

² *Van Rensselaer v. Penniman*, 6 Wend. (N. Y.) 569; *Livingston v. Potts*, 16 John. (N. Y.) 28.

³ *Biddulph v. Poole*, 11 Q. B. 713.

⁴ *Foquet v. Moore*, 7 Exchq. 870; *John v. Jenkins*, 1 C. & M. 227.

⁵ *Jungerman v. Bovee*, 19 Cal. 354.

⁶ *Coe v. Hobby*, 72 N. Y. 143.

⁷ *Allen v. Jaquish*, 21 Wend. (N. Y.) 628.

⁸ *Doe v. Milward*, 3 M. & W. 328;

Weddal v. Capes, 1 id. 50; *Johnstone v. Huddleston*, 4 B. & C. 922.

⁹ *Ante*, p. 84.

ative and invalid as a surrender or as a contract. Thus, in a New York case,¹ certain tenants who were holding under a lease made in 1869, for ten years, under seal at a yearly rental of \$5,000, claimed that prior to the sale of the premises by the lessor in 1873 they entered into an agreement with her by which she agreed to reduce the rent to \$4,000 a year. The agreement was not in writing, nor was there any consideration therefor. The court held that there was no surrender of the old lease, and that the agreement, not being in writing or predicated upon a good consideration, was void.² The reason why the acceptance of a new lease

¹ *Coe v. Hobby*, 72 N. Y. 141.

² ALLEN, J., in delivering the opinion of the court in *Coe v. Hobby*, *ante*, said: "The defendants contend that they are no longer liable upon and according to the lease made in 1868, from Mrs. Ingersoll, the plaintiff's grantor and assignor, to the defendants, upon the ground that by the act of the parties and operation of law, the lease was surrendered in 1872, and that from that time the occupation of the premises by the defendants has been in pursuance of a new contract of hiring, then made, at a different rent and upon different terms. There was no written surrender or cancellation of the original lease; neither was there any surrender of the possession of the demised premises, nor was any authority or dominion over the premises exercised by the landlord inconsistent with the rights of the tenant under that demise. Neither was there at any time any contract or lease, by deed or in writing, between the parties other than the indenture of 1868. The claim is, that there was a new letting of the premises by the lessor to the defendants at the time mentioned, by parol, and that by reason of such parol letting the original lease, and the term thereby created, were by act and operation of law surrendered. A surrender is the restoring and yielding up an estate or interest in lands to one who has an immediate estate in reversion or remainder, and by the statute of

frauds a term exceeding one year cannot be surrendered, unless by act or operation of law, or by a deed of conveyance in writing. A surrender is implied and so effected by operation of law within the statute quoted, when another estate is created by the reversioner or remainder-man, with the assent of the termor, incompatible with the existing estate or term. In the case of a term for years, or for life, it may be by the acceptance by the lessee or termor of an estate incompatible with the term, or by the taking of a new lease by a lessee. It will not be implied against the intent of the parties, as manifested by their acts; and when such intention cannot be presumed, without doing violence to common sense, the presumption will not be supported. *Van Rensselaer's Heirs v. Penniman*, 6 Wend. (N. Y.) 569. In the case referred to, the devisee of the lessor had made a new lease to the assignee of the lessee for the same time, and upon the same conditions as the first lease, but it was held that the original lease was not thereby surrendered, but remained in force, entitling the lessee and his assignees to the benefits of its provisions, and that under the circumstances the new lease was probably given to confirm the prior lease, and to give the lessee greater security for his improvements than he had by the first lease. There is an implication of intention to surrender an existing lease upon the giving of a second

operates as a surrender of the old one is, because the lessee, by accepting the new lease, has been a party to an act the

lease, for the reason that the lessor cannot legally execute a second lease of the same premises during the term of a first lease; and when the lessee accepts a second lease unexplained, he admits the power of the lessor which he cannot legally have without a surrender of the first. The presumption of law is, therefore, that a surrender has been made. *Livingston v. Potts*, 16 John. (N. Y.) 28; *Schiefelin v. Carpenter*, 15 Wend. (N. Y.) 400. It is said in that case by NELSON, J., that *unless such new lease be executed so as to pass an interest according to the contract and intention of the parties, it will not operate as a surrender of the prior lease by operation of law*. And it was so held where there was a parol letting for a term of years to third persons, who had entered into possession and paid rent to the landlord for a portion of the term agreed upon. The conclusion was that a valid parol lease, since the statute of frauds, might produce a surrender in law, and that the true rule was as laid down in 2 Starkie's Ev. 342, that the taking a new lease by parol is by operation of law a surrender of the old one, although it be by deed, *provided it be a good one, and pass an interest according to the contract and intention of the parties*; for otherwise the acceptance of it is no implied surrender of the old one. See, also, *Bedford v. Terhune*, 30 N. Y. 453, approving this case. See, also, *Rowan v. Lytle*, 11 Wend. (N. Y.) 617, and *Lawrence v. Brown*, 5 N. Y. 394. In England the rule is, that if there be a tenancy under a lease, and the parties make a verbal agreement for a sufficient consideration, that instead of the existing term there shall be a tenancy from year to year, at a different rent, that would not be a surrender of the lease by operation of law. *Foquet v. Moor*, 7 Exch. 870. The farthest that our courts have gone, is to hold that to

effect a surrender of an existing lease by operation of law, *there must be a new lease, valid in law, to pass an interest according to the contract and intention of the parties*. Within this rule there was no surrender of the lease upon which this action is brought. There was no new lease which could take effect according to the verbal contract of the parties as stated by the defendant. The claim is that in 1872, by the verbal agreement of the parties, there was in effect a new lease for the unexpired term of seven years, at a reduced rent, with liberty to the lessee to terminate the lease at any time on giving three months' notice. This could only operate as a lease from year to year, as long as the parties elected to continue the relation. *Schuyler v. Leggett*, 2 Cow. (N. Y.) 660; *People v. Rickert*, 8 id. 226; *Lounsbury v. Snyder*, 31 N. Y. 514. This was not the contract intended by the parties, and there was therefore no surrender of the existing lease implied by law as resulting from the intention of the parties. But there was no new lease, or a letting from year to year, as the legal result of a verbal lease for a term of years. Assuming that the contract and agreement of the parties was, that from the time of making it the rent should be reduced to \$4,000 per annum, and that the lessor should have the right to terminate the lease upon notice, and that such agreement was valid, it was but a modification of the terms of the original demise, leaving all the other covenants and conditions intact. There was no agreement inconsistent with the existing lease, or any assumption of dominion over the estate by the lessor inconsistent with the term vested in the lessee. Each, in dealing with the other, dealt with matters over which they had control under and by virtue of the lease. The lessor assumed to release his right to a portion of the

validity of which he is afterwards estopped from denying, and which would not be valid if the first lease continued to exist, for he would be estopped from saying that the lessor had no power to make the new lease; and as the lessor could not grant the new lease until the first lease was surrendered, the acceptance of the new lease is of itself a surrender of the old.¹ The question whether the taking of

rent, which he might lawfully do, and the lessee undertook to yield conditionally, and upon notice in the future, a portion of his term. It can not be assumed or implied from such agreement that a surrender of the old lease was contemplated by either party. The lease continued in full force, except as modified by the agreement. It is preposterous to say that a reduction of the rent is a surrender of an existing lease, and the granting of a new one. The new agreement in such case is virtually incorporated into, and made a part of, the antecedent agreement, and the two would constitute the lease for the unexpired term. *Evans v. Thompson*, 5 East, 193; *Hasbrouck v. Tappen*, 15 John. (N. Y.) 200. There was no surrender of the lease by operation of law, for the reason that there was no dealing with the estate by the lessor incompatible with the lease, and no new letting of the premises by parol or otherwise. The defendants, in their answer, and upon the trial, relied upon an alleged surrender of the lease; but upon appeal they contend that there was a valid agreement to reduce the rent, and that they are now entitled to the benefit of such modification of the terms of the lease. At most, the agreement alleged was executory and verbal, and it is well settled that before breach a covenant or contract under seal cannot be modified by a parol executory contract. *Delarnoux v. Bulkley*, 13 Wend. (N. Y.) 71; *Hasbrouck v. Tappen*, *ante*.

¹ In *Lyon v. Reed*, 13 M. & W. 285, PARKE, B., said: "The real question for our consideration is, whether the

plaintiff has succeeded in showing that the term of the 7th April was surrendered previously to the execution of the indenture of the 31st of August, 1812. On this subject it was argued by the counsel for the plaintiff, first, that the circumstances of the case warranted the conclusion that there was an actual surrender in fact; and if that be not so, then, secondly, that they prove conclusively a surrender in point of law. We will consider each of these propositions separately. And first, as to a surrender in fact. The subject-matter of the lease of the 7th April, 1812, was, it must be observed, a reversion; a matter, therefore, lying in grant, and not in livery, and of which, therefore, there could be no valid surrender in fact otherwise than by deed; and what the plaintiff must make out, therefore, on this part of his case is, that, before the execution of the first lease for ninety-nine years, Ord and Planta, by some deed not now forthcoming, assigned or surrendered to the dean the interest which they had acquired under the lease of the 7th of April. But what is there to warrant us in holding that any such deed was ever executed? *Prima facie* a person setting up a deed in support of his title is bound to produce it. But undoubtedly this general obligation admits of many exceptions. Where there has been long enjoyment of any right, which could have had no lawful origin except by deed, then, in favor of such enjoyment, all necessary deeds may be presumed, if there is nothing to negative such presumption. Has there, then, in this case been any

a new lease operates as a surrender of the old,¹*depends upon the circumstance whether the new lease confers a new interest so that*

¹ See also *Bessell v. Lundsberg*, 7 G. B. 638.

such enjoyment as may render it unnecessary to show the deed on which it has been founded? The only fact as to enjoyment stated in this case has precisely an opposite tendency; it is stated, so far as relates to the property, the rent of which forms the subject of this action, namely, the houses, etc., underlet to Reed, that no rent has ever been paid; and therefore, as to that portion of the property included in the lease of April, 1812, there has certainly been no enjoyment inconsistent with the hypothesis that that lease was not surrendered. The circumstances on which the plaintiff mainly relies as establishing the fact of a surrender by deed, are the statements in the two leases to Osborn and Burt, that they were made in consideration, *inter alia*, of the surrender of the lease of the 7th April, and the fact of that lease being found among the dean's instruments of title. These circumstances, however, appear to us to be entitled to very little weight. The ordinary course pursued on the renewal of a lease is for the lessee to deliver up the old lease on receiving the new one, and the new lease usually states that it is made in consideration of the surrender of the old one. No surrender by deed is necessary, where, as is commonly the case, the former lessee takes the new lease, and all which is ordinarily done to warrant the statement of the surrender of the old lease as a part of the consideration for granting the new one, is, that the old lease itself, *the parchment on which it is engrossed*, is delivered up. Such surrender affords strong evidence that the new lease has been accepted by the old tenant, and such acceptance undoubtedly operates as a surrender by operation of law, and so both parties get all which they require. We collect from the documents that this was the course pur-

sued on occasion of making the lease of the 26th of December, 1803, and the lease of the 7th of April, 1812; and we see nothing whatever to warrant the conclusion that anything else was done on occasion of making the lease to Osborn and Burt. Where a surrender by deed was understood by the parties to be necessary, as it was with reference to the term assigned to Barber and Parry, there it was regularly made, and the deed of surrender was endorsed on the lease itself. There is no reason for supposing that the same course would not have been pursued as to the lease of April, 1812, if the parties had considered it necessary. If any surrender had been made, no doubt the deed would have been found with the other muniments of title. No such deed of surrender is forthcoming, and we see nothing to justify us in presuming that any such deed ever existed. We may add, that the statement in the new lease, that the old one had been surrendered, cannot certainly of itself afford any evidence against the present defendants, who are altogether strangers to the deed in which those statements occur. It remains to consider whether, although there may have been no surrender in fact, the circumstances of the case will warrant us in holding that there was a surrender by act and operation of law. On the part of the plaintiff it is contended, that there is sufficient to justify us in coming to such a conclusion, for it is said, the fact of the lease of the 7th of April, 1812, being found in possession of the dean, even if it does not go the length as establishing a surrender by deed, yet furnishes very strong evidence to show that the new lease granted to Osborn and Burt was made with the consent of Ord and Planta, the lessees under the deed of the 7th of April, 1812. And this, it is contended, on

*the two cannot stand together because inconsistent with each other.*¹ Thus, where a tenant under a lease of a house for a term of

¹ *Gybson v. Searl*, Cro. Jac. 177; *Gie v. Rider*, Sid. 75.

the authority of *Thomas v. Cooke*, 2 B. & Ald. 119, and *Walker v. Richardson*, 2 M. & W. 882, is sufficient to cause a surrender by operation of law. In order to ascertain how far those two cases can be relied on as authorities, we must consider what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainder-man comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seizin in fee of the remainder-man, and so the law says, that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor. It is needless to multiply examples; all the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped

from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. *The surrender is not the result of intention. It takes place independently, and even in spite of intention.* Thus, in the cases which we have adverted to of a lessee taking a second lease from the lessor, or a tenant for life accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor, it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsundered. In all these cases the surrender would be the act of the law, and would prevail in spite of the intention of the parties. These principles are all clearly deducible from the cases and doctrine laid down in Rolle, and collected in Viner's Abridgment, tit. 'Surrender,' F. and G., and in Comyns' Dig., tit. 'Surrender,' T. and I. 2, and the authorities there referred to. But, in all these cases, it is to be observed, the owner of the particular estate, by granting or accepting an estate or interest, is a party to the act which operates as a surrender. That he agrees to an act done by the reversioner is not sufficient. Brooke, in his Abridgment, tit. 'Surrender,' pl. 43, questions the doctrine of Frowike, C. J., who says: 'If a termor agrees that the reversioner shall make a feoffment to a stranger, this is a surrender,' and says he believes it is not law; and the contrary was expressly decided in the case of *Swift v. Heath*, Carthew, 110, where it was held, that the consent of the tenant for life to the remainder-man making a feoffment to a stranger, did not amount to a sur-

years accepts a grant of the *custody* of the same house, it is a surrender, because a grant of the *custody* of a thing which

render of the estate for life, and to the same effect are the authorities in Viner's Abr., 'Surrender,' F. 3 and 4. If we apply these principles to the case now before us, it will be seen that they do not at all warrant the conclusion that there was a surrender of the lease of the 7th of April, 1812, by act and operation of law. Even adopting, as we do, the argument of the plaintiff, that the delivery up by Ord and Planta of the lease in question affords cogent evidence of their having consented to the making of the new lease, still there is no estoppel in such a case. It is an act which, like any other ordinary act *in pais*, is capable of being explained, and its effect must therefore depend, not on any legal consequence necessarily attaching on and arising out of the act itself, but on the intention of the parties. Before the statute of frauds, the tenant in possession of a corporeal hereditament might surrender his term by parol, and therefore the circumstance of his delivering up his lease to the lessor might afford strong evidence of a surrender in fact; but certainly could not, on the principles to be gathered from the authorities, amount to a surrender by operation of law, which does not depend on intention at all. On all these grounds, we are of opinion that there was in this case no surrender by operation of law, and we should have considered the case as quite clear had it not been for some modern cases, to which we must now advert. The first case, we believe, in which any intimation is given that there could be a surrender by act and operation of law by a demise from the reversioner to a stranger with the consent of the lessee, is that of *Slone v. Whiting*, 2 Stark. 236, in which *HOLROYD, J.*, intimates his opinion that there could; but there was no decision, and he reserved the point. This was followed soon afterwards by

Thomas v. Cooke, 2 Stark. 408; 2 B. & Ald. 119. That was an action of debt by a landlord against his tenant from year to year, under a parol demise. The defence was, that the defendant *Cooke*, the tenant, had put another person (*Parkes*) in possession, and that *Thomas*, the plaintiff, had, with the assent of *Cooke*, the defendant, accepted *Parkes* as his tenant, and that so the tenancy of *Cooke* had been determined. The Court of King's Bench held, that the tenancy was determined by act and operation of law. It is matter of great regret that a case involving a question of so much importance and nicety should have been decided by refusing a motion for a new trial. Had the case been put into a train for more solemn argument, we cannot but think that many considerations might have been suggested which would have led the court to pause before they came to the decision at which they arrived. *MR. JUSTICE BAYLEY*, in his judgment says, the jury were right in finding that the original tenant assented, because, he says, it was clearly for his benefit, an observation which forcibly shows the uncertainty which the doctrine is calculated to create. The acts *in pais* which bind parties *by way of estoppel* are but few, and are pointed out by *LORD COKE*, Co. Litt. 352 *a*. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as *livery, entry, acceptance of an estate*, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. But in what uncertainty and peril will titles be placed, if they are liable to be affected by such accidents as those alluded to by *Mr. Justice Bayley*. If the

was leased before, *is another interest* in the same thing leased, and cannot stand with the first lease.¹ But the taking of a *new* lease, to commence upon the expiration of the old lease, does not operate as a surrender of the latter, because the second lease being reversionary, is not inconsistent with the existing demise,² nor does the acceptance of a lease to com-

¹ *Gybson v. Searl*, *ante*; *Arundale v. Gray*, 2 Dyer, 200; *Woodward v. Aston*, 1 Vent. 296.

² *Rawlings v. Walker*, 5 B. & C. 111; *Anon.*, Dal. 74 pl. 58.

doctrine of *Thomas v. Cooke* should be extended, it may very much affect titles to long terms of years, mortgage terms, for instance, in which it frequently happens that there is a consent, express or implied, by the legal termor to a demise from a mortgagor to a third person. To hold that such a transaction could, under any circumstances, amount to a surrender by operation of law, would be attended with most serious consequences. The case of *Thomas v. Cooke* has been followed by others, and acted upon to a considerable extent. Whatever doubt, therefore, we might feel as to the propriety of the decision, that in such a case there was a surrender by act and operation of law, we should probably not have felt ourselves justified in overruling it. And, perhaps, the case itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in superseding the rent or compensation for use and occupation during the continuance of that occupation. But we feel fully warranted in not extending the doctrine of that case, which is open to so much doubt, especially as such a course might be attended with very mischievous consequences to the security of titles. If, in compliance with these cases, we hold that there is a surrender by act and operation of law where the estates dealt with are corporeal and in possession, and of which demises may therefore be made by parol or

writing, and where there is an open and notorious shifting of the actual possession, it does not follow that we should adopt the same doctrine where reversions or incorporeal hereditaments are disposed of, which pass only by deed. With respect to these, we think we ought to abide by the ancient rules of the common law, which have not been broken in upon by any modern decision, for that of *Walker v. Richardson*, 2 M. & W. 882, which has been much relied on in argument, is not to be considered as any authority in this respect, inasmuch as the distinction that the right to tolls lay in grant was never urged, and probably could not have been with success, as the leases, perhaps, passed the interest in the soil itself. Moreover, according to the report of that case, it would seem that the new lessees had, before they accepted their lease, become entitled to the old lease by an actual assignment from the old lessee. If this were so, then there could, of course, be no doubt but that the old lease was destroyed by the grant and acceptance of the new one. It is, however, right to say, that we believe this statement to have crept into the report inadvertently, and that there was not, in fact, any such assignment. The result of our anxious consideration of this case is, that the verdict on the issues on the first plea and on the rejoinder to the replication to the fifth plea, must be entered for the defendants, and as those pleas go to the whole cause of action, the judgment must be for them."

mence upon a contingency which may not occur until after the termination of the first term; as, if a lessee for a term of *twenty* years, takes a lease of the same lands for *forty* years, to commence upon the death of a certain person named, the acceptance of such lease does not operate a present surrender of the first lease, because the contingency may not occur during the term; but if it does occur, the acceptance of the last lease operates as a surrender of the first from the date of its occurrence,¹ even though the second lease is afterwards defeated by the non-performance of a condition subsequent.² So if a lessee for twenty years accepts a new lease for *ten* years, to begin at a certain *fixed* period, the term of twenty years is thereby surrendered immediately, because by the acceptance of the new lease he admits that the lessor is in a situation to lease to him, notwithstanding the existence of the other lease.³ But a mere agreement for a new lease is

¹ Anon., Leon, 30 pl. 83. In case the contingency *does* occur, what is left of the old term is surrendered and gone, because the new lease then becomes instantly operative. Bacon's Abr. tit. "Leases," § 3.

² Plowden, 107 b.

³ Ives v. Sams, Cro. Eliz. 522; Hutchins v. Martin, id. 604. The early books are not agreed as to the principle on which these cases of implied surrenders depend. Coke states it to be, that, by taking the new interest, the lessee affirms the lessor's ability to confirm it; an ability he cannot possess if the first lease is to stand; such new interest, therefore, being regarded as inconsistent with, and destructive of, the lessee's former estate. Ives's Case, 5 Coke, 11 b. The principle propounded in *Lyon v. Reed* has already been noticed, *ante*, p. 111. But there will be no surrender if a lessee for years takes a grant of a rent-charge out of the same lands for life, or without limiting the period of its commencement; or if a lessee for life takes a grant for years; for in each case he may have the benefit of the rent after the determination of the estate in the land. Gybson v. Searl, Cro. Jac. 176-7; 2

Roll. Abr. 496, pl. 15. So, according to TANFIELD, J., if a man possessed of Black Acre and other lands in D, let Black Acre for twenty-one years, and the next day let (to the same person) all his lands in D for ten years, it is not a surrender of Black Acre; but amounts to a lease of all the other lands, which may well stand with the former lease. Id.; and Cro. Jac. 84. So, acceptance of the equitable interest in a lease made to a friend as a trustee will not work a surrender of a former lease held by a *cestui que* trust. Gie v. Rider, 1 Sid. 75; Jay v. Rider, 1 Keb. 285. And it is held that the lessee's acceptance of an office collateral to the lands demised—as by a lessee of a park, of the office of park-keeper; or by a lessee for years of a manor, of the office of surveyor, bailiff, or steward thereof—will not effect a surrender by operation of law. And, on the same principle, if a lessor makes a feoffment, and appoints the lessee his attorney to deliver seizin, it is not a surrender, as the livery is made by the lessee in his official capacity. 1 Dy. 33 b. In cases of surrender by operation of law, it must be understood that the lessee takes the actual interest contracted

not sufficient to create an implied surrender of the old one,¹ nor is the acceptance of a new lease in trust for another.² A notice given by the tenant to the landlord of his intention

for under the second lease; for it is settled, in opposition to some early cases: *Whitley v. Gough*, 2 Dy. 140 b; *Mallows v. May*, Cro. Eliz. 873; *Corbet's Case*, 3 Dy. 280 a. And see *Brewster v. Parrot*, Cro. Eliz. 264, that the acceptance of a new lease which is void will not effect an extinguishment of the one previously subsisting. *Baker v. Willoughby*, cited, Hutt. 105; *Lloyde v. Gregory*, Cro. Car. 502; *Watt v. Maydewell*, Hutt. 104-5; *Wilson v. Sewell*, 4 Burr. 1975; *Bromley v. Stanley*, 4 Burr. 2210; *Earl of Berkeley v. The Archbishop of York*, 6 East, 86; *Hamerton v. Stead*, 3 B. & C. 481; *Bishop of Rochester v. Bridges*, 1 B. & Ad. 874; *Lowther v. Troy*, 1 Ir. T. R. 192. And, accordingly, where a lessee for years under the crown took a new lease for years of the same estate, which was void for want of a recital of the former lease, it was held that the former was not surrendered. *Harris v. Wing*, 3 Leon. 242; *Wing v. Harris*, Cro. Eliz. 231; cited, Cro. Car. 198. So, where one seized in fee granted a lease for ninety-nine years, and having in the interim made a settlement, and taken back an estate for life only, granted, previously to the determination of the former, a new lease of ninety-nine years, to the same lessee, who was not informed of the settlement, and then died, the court held that the latter did not annul the former, as it would be inconsistent with the intention of the parties to the contract, that an invalid lease should be substituted for a valid one. *Bromley v. Stanley*, 2 Burr. 2210. So a contract by a tenant from year to year with his landlord to purchase the fee will not amount to a surrender by operation of law of the existing tenancy, *unless the tenant's continuance in possession is clearly referable to an agreement for holding as tenant at will under the contract*. *Denison v. Wertz*, 7 S. & R. (Penn.)

372. If the contract is conditional to purchase only provided a good title be made out, and to pay the purchase-money when that shall have been done, and the estate conveyed, there is no room for implying any agreement as tenant at will in the mean time, the effect of which would be absolutely to surrender the existing term, whilst it would be uncertain whether the purchase would be complete or not. *Gray v. Stanion*, 1 M. & W. 695. So, an agreement for a new lease will not put an end to a former tenancy, *unless a new tenancy is actually created*. But if a tenant from year to year agrees during a current year to take a lease of the premises jointly with another, and he and his co-tenant actually enter and enjoy the property, this joint occupation, coupled with the agreement, will operate as a surrender in law of the separate tenancy: *Hamerton v. Stead*, 3 B. & C. 478; *Jay v. Ryder*, 1 Keb. 285; *Gie v. Rider*, 1 Sid. 75; *Perryn v. Allen*, Cro. Eliz. 173. It is, however, to be observed, that, with regard to an actual surrender by deed, a different rule prevails. The Bishop of Rochester v. Bridges, 1 B. & Ad. 847. In *Dankersley v. Levy*, 38 Mich. 54, an agent executed a lease to certain parties for his principal while it was still in force, the principal executed a lease of the same premises to the agent, who then verbally leased them to the same tenants, for a smaller rent than before, who continued in possession without change. It was held, that the original lease was surrendered by operation of law, and not assigned to the agent, and consequently that he could not claim the rent under the old lease.

¹ *John v. Jenkins*, 1 C. & M. 227; *Parris v. Allen*, Cro. Eliz. 173.

² *Comyn's Dig. tit. Surrender (H.) (D. 1.)*.

to quit does not operate as a surrender,¹ but a written request by the tenant to his landlord to re-let the premises to some other person, *if acted upon* by the landlord, amounts to a surrender by operation of law,² and it has been held that the same result ensues when the premises are re-let at the request of a surety for the lessee;³ but we apprehend that the latter doctrine can only apply where the tenant has abandoned the possession of the premises. Provision may be made in the lease itself for its surrender by the tenant upon doing certain things: he can only surrender the lease in the mode named therein,⁴ unless he can clearly establish a waiver by the landlord, of the modes named in the lease; as, where *notice in writing* is named, that the landlord waived such notice and accepted the possession.⁵ A recital in a second lease, that it was granted in consideration of the surrender of the first, is not a surrender by deed or note in writing, as it does not purport to be of itself a surrender or yielding up of the interest in the first lease.⁶

SEC. 67. Effect of New Lease of a Part of Premises.—If a tenant accepts a new lease of a *part* of the premises embraced in a prior lease, such new lease operates only as a surrender of that part only, and does not affect his interest in the remainder of the premises;⁷ and the rule that a contract for

¹ Bessell v. Landsberg, 7 Q. B. 638; Murrell v. Milward, 3 M. & W. 328.

² Nickells v. Atherstone, 10 Q. B. 944.

³ McKenzie v. Farrell, 4 Bos. (N. Y.) 192.

⁴ Kettle v. St. John, 7 Neb. 73.

⁵ Farson v. Goodale, 8 Allen (Mass.) 202.

⁶ Berkley v. York, 6 East, 86; Egremont v. Courtney, 11 Q. B. 702.

⁷ Fish v. Campion, 2 Roll. Abr. 498 (M.); Williams v. Sawyer, 3 B. & B. 70; Morrison v. Chadwick, 7 C. B. 266. In Earl Carnarvon v. Villebois, 13 M. & W. 313, ALDERSON, B., said: "At the trial, the plaintiff established his title by prescription through the bishops of Winchester to a general right of free warren over all the lands of these manors, including the lands

of the copyholders. But on the part of the defendant it was shown, that King Henry III., in the 16th year of his reign, granted by charter under the great seal of the then Bishop of Winchester and his successors *free warren in all their demesne lands of all their manors in England*; and it was contended that, by this grant, the bishop and all deriving title under him were estopped from setting up the original title by prescription, and so that the free warren over the lands of the *copyholders* was gone; no such right having been conveyed by the charter, which was confined to the demesnes. The defendant, in support of this proposition, relied on Com. Dig. tit. Prescription (G), and 17 Vin. Abridg. tit. Prescription, (T), pl. 5, and several old authorities there

years cannot be divided or severed so as to be good for a part of the term, and avoided as to the residue, has no application because, while the contract cannot be divided, the land may be, and the tenant may surrender a part, either expressly or by operation of law, and the lease will stand good as to the residue.¹ An unconditional assignment of a lease to the lessor operates as a surrender, but a *conditional* assignment for collateral purposes only, as to secure a loan, etc., does not so operate.²

SEC. 68. Acceptance of a New Lease.—If a lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the premises.³ So if there is a tenant for life remainder to another in fee, and the remainder-man comes on the land, and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for

referred to, particularly a case from the Year Books, 21 Hen. 7, fo. 5, and Brooke's Abridg., Estoppel, 210, and Prescription, 102. It may well be doubted whether any such principle as that contended for can be applied to a grant like the present, which probably was never intended as any thing more than a confirmation of rights already existing. It is not, however, necessary to go into this question, for it is clear the doctrine is not applicable to the case *where the subject-matter of the grant and of the prescription are different*. Now here, adopting the argument of the defendant that the copyholds are not to be considered as demesnes, then it follows that the prescriptive right was one which extended over two descriptions of land, namely, *copyholds* and *demesnes*. The grant was of a right over demesnes only. In such a state of things, it appears to us clear that the grant could not affect the prescription so far as related to the copyholds. It is, as was put by Mr. SMIRKE in his argument, to be likened

to the case of tenant for years or for life of Blackacre and Whiteacre accepting from his lessor a new lease of Blackacre only. This is, no doubt, a surrender by operation of law of Blackacre, but it in no respect affects the title to Whiteacre. On this short ground, even assuming that the charter in question is to be construed as a grant and not as a confirmation, and that it was duly accepted by the grantee, and that its effect was to destroy the prescriptive title to the free warren over the demesnes, still it *left the right over the lands of the copyholders untouched.*"

¹ Bacon's Abr. tit. Leases, § 3.

² Breese v. Bangs, 2 E. D. S. (N. Y. C. P.) 474.

³ Lyon v. Reed, 13 M. & W. 305; 13 L. J. Ex. 377, *per* PARKE, B.; and see Bernard v. Bonner, Aleyn. 59; Ives v. Sams, Cro. Eliz. 521; Hutchins v. Martin, ib. 505; Mallows v. May, ib. 874; Gybson v. Searl, Cro. Jac. 177; Crowley v. Vitty, 7 Exch. 319; Furnivall v. Grove, 8 C. B. (N. S.) 496.

life is thereby estopped from disputing the seizin in fee of the remainder-man; and so the law says such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accept from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not have been done during his term, therefore he is deemed in law to have surrendered his term to the lessor.¹ In these cases it will be observed there can be no question of intention; it is the act of the law, and will prevail in spite of the intention of the parties.²

SEC. 69. New Lease need not be in Writing.—In *Magennis v. MacCullogh*,³ LORD C. B. GILBERT said that the words “by act and operation of law” are to be construed a surrender in law by the taking a new lease which, being in writing, is of equal notoriety with a surrender in writing.⁴ According to this reasoning the new lease must be in writing. But in *Thomas v. Cook*,⁵ the tenancy, which was from year to year, was created by parol, and was held to have been surrendered by a parol under-lease, and the acceptance of the new tenant by the landlord, and therefore it would seem that the acceptance of a lease to himself by parol, by the old tenant, will be a surrender of the existing lease.⁶ A recital in a second lease, that it was granted in consideration of the surrendering up into the hands of the lessor by the lessee at or before the delivery thereof of the lease first granted, is not a sufficient surrender.⁷

SEC. 70. Agreement for New Lease.—A mere agreement to grant a new lease will not put an end to the tenancy unless a new tenancy is actually created.⁸ Thus where the

¹ *Lyon v. Reed*, 13 M. & W. 305; 13 L. J. Ex. 377, per PARKE, B.; and see *Bessell v. Landsberg*, 7 Q. B. 640; 14 L. J. Q. B. 355; *Nickells v. Atherstone*, 10 Q. B. 944; 16 L. J. Q. B. 371; Vin. Abr. tit. Surrender (F. & G.), Com. Dig. tit. Surrender (T. & J.).

² *Lyon v. Reed*, 13 M. & W. 306; 13 L. J. Ex. 377.

³ Gilb. Eq. Rep. 236.

⁴ And see *Roe v. Abp. of York*, 6 East, 86.

⁵ 2 Stark. 408; 2 B. & Ald. 119.

⁶ See 1 Wm. Saund. 203, n. u.

⁷ *Doe v. Courtenay*, 11 Q. B. 702; 17 L. J. Q. B. 151; *Roe v. Abp. of York*, 6 East, 86.

⁸ *Hamerton v. Stead*, 3 B. & C. 482; 5 D. & R. 206.

tenant agreed to relinquish his interest under his lease, and to accept a fresh lease, and to hold the premises as tenant from year to year until such lease was tendered, and no lease was executed: in an action for rent it was argued for the defendant that, if there is a tenancy under a lease, and the parties make a verbal agreement for a sufficient consideration, that instead of the existing term, there should be a tenancy from year to year, at a different rent, that would be a surrender of the lease by operation of law; but it was held that the term created by the existing lease would not be determined until the new lease was executed.¹ So also an agreement between the lessor and a stranger, that the lessee shall have a new lease, is not a surrender.² But if a tenant from year to year of premises gives them up to the landlord in pursuance of a parol agreement that the tenant shall take other rooms upon the same terms, this amounts to a surrender.³

SEC. 71. New Lease to Begin Presently.—Where a lessee for twenty-one years took a lease of the same lands for forty years, to begin immediately after the death of J S, it was held that this was not any present surrender of the first term, because J S might wholly outlive that term, and then there would be no union to work a surrender; and it being *in equilibrio* in the meantime whether he would survive it or not, the first term should not be hurt till that contingency happened; for if J S died within the first term, then what remained of it was surrendered and gone by the taking place of the second.⁴

SEC. 72. What is a Sufficient New Lease.—If a lessee accepts a new lease *de vestura terrae*, it will be a surrender.⁵ So, also, if he accepts a grant of common, or rent out of the same land, to commence at a certain day within the term.⁶

¹ *Foquet v. Moore*, 7 Exch. 870; 22 L. J. Ex. 35; and see *John v. Jenkins*, 1 Cr. & M. 227; *Crowley v. Vitty*, 7 Exch. 319; *Badeley v. Vigurs*, 4 E. & B. 71; 23 L. J. Q. B. 377; 23 L. T. 297; *Whitley v. Gough*, *Dyer*, 140 b; *Weddall v. Capes*, 1 M. & W. 51; *Doe v. Milward*, 3 M. & W. 328.

² *Porry v. Allen*, Cro. Eliz. 173.

³ *Giles v. Spencer*, 3 C. B. (N. S.) 251.

⁴ Bac. Abr. tit. Leases, § 2.

⁵ Com. Dig. tit. Surrender (T.) 1.

⁶ *Mallows v. May*, Cro. Eliz. 174; *Gybson v. Searl*, Cro. Jac. 176.

Where the lessee for years of a house accepts a grant of the custody of the same house, that is a surrender; for the custody of the same thing which was let before is another interest in the same thing leased, and cannot stand with the first lease.¹ If the sovereign grants an office by patent, or makes a demise for years, the acceptance of a new patent in the one case, or of a new lease in the other, is no surrender of the first grant.² So where a lessee for years of a park or a manor accepts a grant of the office of park-keeper of the same park for his life, or takes a lease of the bailiwick of the manor, that is not a surrender, because it is an office collateral to the land;³ and the acceptance of a new lease in trust is not a good surrender.⁴ If a lessee for twenty years takes a lease for ten years, to begin at Michaelmas, there is no doubt but that the term for twenty years is surrendered or determined presently; for by the lessee's acceptance the lessor hath power to make a new lease during the former.⁵ Where the lessee for years of an advowson was presented to the advowson by the lessor, it was adjudged to be a surrender of his term.⁶

If a lessee re-demises his whole term to the lessor with a reservation of rent, it will operate as a surrender.⁷ Where the tenant, by letter, authorized the lessor to let the premises to any one else, and the lessor did so, and the new tenant entered into possession, it was held that there was a surrender by operation of law.⁸ If there be two lessees for life, or years, and one of them takes a new lease for years, this is a surrender of his moiety.⁹ Again, if a lessee for years of lands accepts a new lease by indenture of part of the same lands, that is a surrender of that part only, and not for the whole, because there is no inconsistency between the two leases, for any more than that part only which is so doubly leased, and though a contract for years cannot be so divided and severed as to be avoided for part of the years, and to

¹ *Gybson v. Searl*, Cro. Jac. 177; *Earl of Arundel v. Lord Gray*, Dyer, 200 b.

² *Brook v. Goring*, Cro. Car. 197.

³ *Gybson v. Searl*, Cro. Jac. 176; *Woodward v. Aston*, 1 Vent. 296.

⁴ *Gie v. Ryder*, Sid. 75; Com. Dig. tit. Surrender (H.) L. 1.

⁵ *Ives v. Sams*, Cro. Eliz. 522; *Hutchins v. Martin*, ib. 605.

⁶ *Gybson v. Searl*, Cro. Jac. 84.

⁷ *Loyd v. Langford*, 2 Mod. 174;

Smith v. Mapleback, 1 T. R. 441.

⁸ *Nickells v. Atherstone*, 10 Q. B. 944; 16 L. J. Q. B. 371.

⁹ *Shep. Touch.* 302.

subsist for the residue, either by act of the party or act in law, yet the land itself may be divided or severed, and he may surrender one or two acres either expressly or by act in law, and yet the lease for the residue stands good and untouched, because here the contract for the residue remains entire, whereas in the other case the contract for the whole would be divided, which the law will not allow.¹

In *Morrison v. Chadwick*,² the landlord evicted his tenant from a part of the demised premises. It was held that the entire rent was suspended during the continuance of the eviction; but that the tenancy was not put an end to, nor was the tenant discharged from the performance of his covenants, other than the covenant for the payment of rent.

SEC. 73. Term Taken in Execution. — A sheriff who takes a term in execution under a writ of *fiery facias*, and sells, must execute an assignment of the term, according to the provisions of the statute, or the term will still remain in the debtor, and the purchaser will have no defence in an action for the recovery of land.³

SEC. 74. New Lease Voidable on Condition may be Surrender. — The acceptance of a new lease, made voidable upon condition, may be a surrender by operation of law, if rendered void according to the contract;⁴ for the surrender, by taking the new lease, is executed absolutely at the time, and it is not defeated, although the condition makes the second lease void, *ab initio*, for various purposes.⁵

But no surrender, express or implied, in consideration of a new lease, will bind if the new lease is absolutely void; for the ground of the surrender fails.⁶ It creates no new estate,

¹ Bac. Abr. tit. Leases, § 3; citing *Fish v. Campion*, 2 Roll. Abr. 498; see also *Earl of Carnarvon v. Villebois*, 13 M. & W. 342.

² 7 C. B. 266; 6 D. & L. 567; 18 L. J. C. P. 189.

³ *Doe v. Jones*, 9 M. & W. 372.

⁴ *Doe v. Poole*, 11 Q. B. 716.

⁵ *Fulmerston v. Steward*, Plowd. 107; and see *Roe v. Abp. of York*, 6 East, 102, and Co. Litt. 45 a.

⁶ *Zouch v. Parsons*, 3 Burr, 1807;

Wilson v. Sewell, 4 Burr, 1980; *Roe v. Abp. of York*, 6 East, 102; *Doe v. Courtenay*, 11 Q. B. 712; 17 L. J. Q. B. 151; *Doe v. Poole*, ib. 716; 17 L. J. Q. B. 143. No implied surrender by the grant of a new lease will take effect if the new lease is absolutely void: *Abbott v. Parsons*, 3 Burr, 1807; *Wilson v. Sewell*, 4 Burr, 1980; 1 W. Blac. 617; *Earl of Berkeley v. Abp. of York*, 6 East, 86; *Bromley v. Stanley*, 4 Burr, 2210; *Earl of Egremont*

and is no estate inconsistent with the tenant's former interest.¹ Besides, a void contract for a thing that a man cannot enjoy, cannot in common sense or reason imply an agreement to give up a former contract.² But where tenant from year to year entered into an agreement during a current year for a lease to be granted to him and A B, and from that time A B entered and occupied jointly with him, it was held that by this agreement, and the joint occupation under it, the former tenancy was determined, although the lease contracted for had never been granted, ABBOTT, C. J., saying: "In *Roe v. The Archbishop of York*, the occupation, by virtue of the new lease, took place under a mistaken idea that it was a good and valid lease; and when that was discovered to be

v. Courtenay, 11 Q. B. 702; *Smith, L. & T.* 307, 2d ed.; 3 *Priest. Conv.* 164, 165; or if the new lease does not pass an interest according to the contract and intention of the parties, an acceptance of it does not amount to an implied surrender of the old lease: *Com. Dig. tit. Estates (G.)* 13; *Whitney v. Myers*, 1 Duer, 266; *Schiefflin v. Carpenter*, 15 Wend. (N. Y.) 400; *Eton v. Luyster*, 60 N. Y. 252. The acceptance of a voidable lease which is afterwards made void contrary to the intention of the parties, but which has operated to pass *some part of the term contracted for*, is not a surrender of a valid former lease inconsistent therewith: therefore, where a tenant for life, with a power of leasing, made a lease of part of some land, which was not a good execution of the power, in consideration of the surrender of two prior leases of the whole of the land, and in order to effectuate an agreement entered into between the lessee and another person for the sale of the remaining part of the land, which the lease recited that it was intended to lease to the vendee by indenture of even date, and which was done, it was held, after the death of the tenant for life, that this new lease as to the premises thereby demised did not operate as a surrender of the two prior leases: *Biddulph v. Poole*, 11 Q. B. 713; *Earl of Berkeley*

v. Abp. of York, 6 East, 86; 2 *Smith, L. C.* 655, 4th ed.; *Smith, L. & T.* 308, 2d ed. So where a tenant for life, with power of leasing, granted a lease in "consideration of the surrender up" of a former lease, "which surrender is hereby made and accepted," it was held, the new lease not being a good execution of the power, and therefore voidable, did not operate as a surrender of the prior lease: *Earl of Egremont v. Courtenay*, 11 Q. B. 702; overruling *Earl of Egremont v. Forwood*, 3 Q. B. 627. Where a voidable lease, which had been granted in consideration of a surrender by deed executed a few days before of a prior lease, was avoided, it was held that the first lease was not revived by such avoidance. *Murray v. Bridges*, 1 B. & Ald. 847. A surrender is effected if the tenant relets to his landlord for the entire term, reserving an annual rent: *Lloyd v. Langford*, 2 Mod. 174; *Winton v. Pinkeney*, 2 Lev. 80; *Wilson v. Pig*, 3 Keb. 95; *Cartwright v. Pinkeney*, 1 Vent. 272; *Smith v. Mapleback*, 1 T. R. 441; though not if he retains a reversion: 2 *Roll. Abr.* 497, pl. 13; *Mallows v. May*, Cro. Eliz. 873; *Lit. §* 144; *Courtail v. Thomas*, 9 B. & C. 298; *Bernard v. Bonner*, Al. 58-9; *Shep. Touch.*

¹ *Lynch v. Lynch*, 6 Ir. L. R. 142.

² *Davison v. Stanley*, 4 Burr, 2213.

void, the court very properly held that it should not operate as a surrender of the former lease." Here there is nothing to show that the defendant refused to grant such a lease as was contracted for; and we find, in fact, that a new contract was made to let the premises to two persons instead of one, and that both entered and occupied.¹

The acceptance of a lease which is voidable, and afterwards made void, contrary to the intention of the parties, and which does not pass an interest according to the contract, will not operate as a surrender. Thus, where tenant for life, with a power of leasing, granted a new lease to the original lessee, which purported to be made in consideration of the surrender of the original lease, but the new lease was not a due execution of the power, it was held that the new lease did not operate as a surrender.² And the rule is the same whether the surrender be implied or express, for in the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and in the case of an express surrender so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument in order to effectuate the intention of the parties would make that surrender also conditional to be void in case the grant should be made void.³

Where a voidable bishop's lease, which had been granted in consideration of the surrender of a prior lease by deed poll, was avoided by the bishop's successor, it was held that the first lease was not revived by such avoidance.⁴

SEC. 75. New Lease Granted to Third Party. — If the landlord and tenant agree that a new lease shall be granted to a third party, and such third party either continues in or enters into possession, this will amount to a surrender by operation of law, though no new lease is ever granted. Thus, where A being tenant from year to year underlet the premises to B,

¹ *Hamerton v. Stead*, 3 B. & C. 478; 17 L. J. Q. B. 151; overruling *Doe v. 5 D. & R. 206.* *Forwood*, 3 Q. B. 627; 11 L. J. Q. B.

² *Doe v. Poole*, 11 Q. B. 716; 17 321.
L. J. Q. B. 143.

⁴ *Doe v. Bridges*, 1 B. & Ald. 847.

³ *Doe v. Courtenay*, 11 Q. B. 712;

and the original landlord with the assent of A accepted B as his tenant, but there was no surrender in writing of A's interest, it was held that there had been a valid surrender by act and operation of law.¹ But where a tenant from year to year whose holding commenced at Lady Day gave notice at Christmas to his landlord that he would quit the Lady Day following, and the landlord agreed to accept such notice, it was held that this was no determination of the tenancy, there not being a half year's notice, nor a surrender either in writing or by operation of law.² BAYLEY, J., observed that the question whether the landlord's assent to the notice operated as an actual surrender was not raised, inasmuch as that assent was not expressed in writing. The case of *Thomas v. Cook* was recognized by the court, but distinguished on the ground that there the surrender operated not by reason of the agreement of the parties alone, but by reason of that agreement coupled with the change of possession.³

The tenancy will not be surrendered unless the agreement is in writing, or the new tenant takes possession.⁴ Where the landlord grants a new lease to a stranger with the assent of the tenant under an existing lease, and the latter gives up his own possession, that is a surrender by operation of law.⁵ The privity of estate between the lessor and the first lessee is destroyed by the acceptance of a new tenant,⁶ and it is more probable that the legislature intended to give effect to an agreement, so proved as a surrender by operation of law, than to allow either party to defeat the agreement by alleging the absence of written evidence.⁷ The reason of the rule is that, as a new letting to an old tenant, commencing

¹ *Thomas v. Cook*, 2 B. & Ald. 119; 2 Stark, 408; and see *Stone v. Whiting*, 2 Stark, 235; *Hamerton v. Stead*, 3 B. & C. 482; 5 D. & R. 206; 3 L. J. (K. B.) 33; *Rex v. Banbury*, 3 Nev. & Man. 292; *Lynch v. Lynch*, 6 Ir. L. R. 131.

² *Johnstone v. Huddlestons*, 4 B. & C. 922; 7 D. & R. 411; and see *Doe v. Johnston, McClel. & Y.* 141; *Bessell v. Landsberg*, 7 Q. B. 638.

³ *Johnstone v. Huddlestons*, 4 B. & C. 922; 7 D. & R. 411; and see *Doe v. Johnston, McClel. & Y.* 141; *Bessell v. Landsberg*, 7 Q. B. 638.

⁴ *Taylor v. Chapman*, Peake Add. Cas. 19; and see *Cocking v. Ward*, 1 C. B. 868; *Kelly v. Webster*, 12 C. B. 283; *Doe v. Johnston, McClel. & Y.* 141.

⁵ *Davison v. Gent*, 1 H. & N. 744; *Lawrance v. Faux*, 2 F. & F. 435; *Gore v. Wright*, 8 Ad. & El. 118; 3 N. & P. 243.

⁶ *Thomas v. Cook*, 2 Stark, 408; 2 B. & Ald. 119.

⁷ *Nickells v. Atherstone*, 10 Q. B. 950; 16 L. J. Q. B. 371.

immediately, operates as a surrender of the original term, because the lessor could have no power to create the new term if the original term had subsisted; so a new letting to a third party, with the assent of the original tenant, has the same operation.¹

Where the defendant took premises for a year certain, but quitted at the end of the first quarter, and the plaintiff then let the premises for a portion of the remaining three quarters to another tenant at a less rent, it was held that by re-letting the premises the plaintiff had assented to the determination of the original tenancy, and dispensed with the necessity of a legal surrender; and the case was distinguished from *Mollett v. Brayne*,² as there the tenant had a subsisting term, which could not be determined by a mere parol surrender.³

Where the tenant of a house, three cottages, and a stable and yard, let at an entire rent for a term of seven years; before the expiration of the term assigned all the premises to B for the remainder of the term, the house and cottages being in the possession of undertenants, and the stables and yard in that of A; and the landlord accepted a sum of money as rent up to the day of assignment, which was in the middle of a quarter, and B took possession of the stables and yard only; and the occupiers of the cottages having left them after the assignment, but before the expiration of the term, the landlord re-let them; and A paid no rent after the assignment, but the landlord received rent from the undertenants; and before the expiration of the term the landlord advertised the whole of the premises to be let or sold; it was held that this was a surrender by operation of law of all the premises.⁴ Where two persons, holding from different lessors, verbally agreed to exchange their holdings, and on the same day each took possession of the other's land, the steward of both the lessors expressing his concurrence, it was held that there was evidence to go to the jury of surrender.⁵ A tenant from year to year died, leaving his widow

¹ *McDonnell v. Pope*, 9 Hare, 705; 3 Bing. 462; and see *Hall v. Burgess*, and see *Hobson v. Cowley*, 27 L. J. 5 B. & C. 332; *Woodcock v. Nuth*, 8 Exch. 209; *Walker v. Richardson*, 2 Bing. 170; 1 Moo. A. Sc. 317.

² *M. & W.* 882; 6 L. J. (N. S.) Ex. 229.

³ 2 Camp. 103.

⁴ *Walls v. Atcheson*, 11 Moo. 379;

⁵ *Reeve v. Bird*, 1 C. M. & R. 31; 4 Tyr. 612.

⁶ *Bees v. Williams*, 2 C. M. & R.

in possession, with the knowledge of the administrator to the deceased tenant. It was held that there was no evidence of a surrender.¹

Where premises had been let to B for a term, determinable by a notice to quit, and, pending such term, C applied to A, the landlord, for leave to become the tenant instead of B, and upon A consenting, agreed to stand in B's place, and offered to pay rent, it was held that A might maintain an action for use and occupation against C, and that the latter could not set up B's title in defence to that action.²

SEC. 76. Commencement of New Tenancy Question of Fact. — When there has been a surrender by the admission of a new tenant, it is a question for the jury, and not for the judge, to be determined by a consideration of all the facts, at what time the tenancy commenced.³ In order that there may be a valid surrender by the grant of a new lease to a new tenant, the transaction must be assented to by all the parties,⁴ as the legal presumption, until the contrary appears, is, that the new tenant came in as the assignee of the original lessee.⁵

Where W and H, by agreement, in March, 1827, became tenants to the plaintiff for three years, of premises occupied by them as partners, with power to them to extend the term to seven years by giving the plaintiff notice, which they did in January, 1827, and at Midsummer, 1828, W retired from the partnership, which was carried on by H with a new partner, S, the plaintiff giving receipts for rent as received from H and S, and in February, 1829, gave H a letter to his attorney signifying that a lease might be made to H and S, but no lease was ever prepared, it was held that W remained liable to the plaintiff for rent accruing in 1831.⁶

581; Tyr. & Gr. 23. In this case, *Thomas v. Cook* does not appear to have been cited.

¹ *Doe v. Wood*, 14 M. & W. 682; 15 L. J. Ex. 41.

² *Phipps v. Sculthorpe*, 1 B. & Ald. 50; but see *Hyde v. Moakes*, 5 C. & P. 42.

³ *Walker v. Godé*, 6 H. & N. 594; 30 L. J. Ex. 172.

⁴ *Rex v. Stow Bardolph*, 1 B. & Ald.

219; *Trent v. Hunt*, 9 Exch. 14; 22 L. J. Exch. 318; *Cadle v. Moody*, 30 L. J. Exch. 385.

⁵ *Doe v. Williams*, 9 D. & R. 30; 6 B. & C. 41.

⁶ *Graham v. Wichelo*, 1 C. & M. 188; 3 Tyr. 201; and see *Matthews v. Sawell*, 2 Moo. 262; 8 Taunt. 270; *Lyon v. Reed*, 13 M. & W. 285; 13 L. J. Ex. 377; *McDonell v. Pope*, 9 Hare, 705.

Assent to the grant of a new lease by one of several executors is not sufficient to determine the tenancy, although possession is given up by the original tenant.¹

The foregoing cases apply exclusively to chattel interests, and it is not quite clear whether the doctrine of surrender by the grant of a new lease to a third party would apply to the case of a freehold interest. In *Lynch v. Lynch*² it was held that the doctrine did apply. In that case the original lease was freehold.³ In *Creagh v. Blood*,⁴ LORD ST. LEONARDS, referring to the doctrine of *Thomas v. Cook*, said: "The case of *Lynch v. Lynch* was relied upon as an authority that the doctrine equally applies to a freehold interest like that in this case, and no doubt the point was so decided. But with all my respect for the judges who decided that case, I cannot follow it—I never so understood the law; and the authorities quoted in *Lyon v. Reed* would seem to establish the contrary to be the law. I think the new rule would have a more extensive operation than at first sight would appear. Upon this point, if I were compelled to decide, I should be of opinion that the freehold interest could not be held to be surrendered by operation of law on the ground of an acquiescence in the new lease." The doctrine of *Thomas v. Cook* does not extend to incorporeal hereditaments.⁵

The doctrine of surrender by the grant of a new lease to a third party, with the assent of the original lessee, coupled with a change of possession, as laid down in *Thomas v. Cook*, has been questioned in some later cases, and especially in *Lyon v. Reed*.⁶ There it was decided that the delivery up by a lessee, who had a term of years in a reversion, of his lease, with an assent by him to the grant of a new lease by the owner of the reversion expectant on his term, to a third person, and the grant of such lease did not amount to a surrender by operation of law, as these acts were not such as bound parties by way of estoppel. PARKE, B., said: "If the doctrine of *Thomas v. Cook* should be extended, it may very much affect titles to long terms of years—mortgage terms,

¹ *Turner v. Hardey*, 9 M. & W. 770;
Right v. Cuthell, 5 East, 491.

² 6 Ir. L. R. 131.

³ See 2 Sm. L. C. 7th ed. 857.

⁴ 3 J. & Lat. 133.

⁵ *Lyon v. Reed*, 13 M. & W. 310.

⁶ 13 M. & W. 309.

for instance, in which it frequently happens that there is a consent expressed or implied by the legal termor to a demise from a mortgagor to a third person. To hold that such a transaction could, under any circumstances, amount to a surrender by operation of law, would be attended with most serious consequences. The case of *Thomas v. Cook* has been followed by others, and acted upon to a considerable extent; whatever doubt, therefore, we might feel as to the propriety of the decision that in such a case there was a surrender by act and operation of law, we should probably not have felt ourselves justified in overruling it. And perhaps the case itself, and others of the same description, might be supported upon the ground of the actual occupation by the landlord's new tenants, which would have the effect of eviction by the landlord himself in suspending the rent or compensation for use and occupation during the continuance of that occupation." The case of *Gore v. Wright*¹ was decided on a similar ground, but the point was not raised in *Thomas v. Cook*, and in *Lynch v. Lynch*² the action was brought by the lessees themselves, who had consented to the new lease.³ The doctrine of *Thomas v. Cook* was, as we have seen, also doubted by LORD ST. LEONARDS in *Creagh v. Blood*.⁴ The original term in that case was freehold. His lordship, referring to *Lynch v. Lynch*,⁵ said: "The point came upon me by surprise, and until I heard of the decision I was not aware of any such rule, and, speaking with great deference, I think it will turn out that there is not such a rule of law. Before I would act on it, I should require the question to undergo further consideration; for an estate of freehold cannot, since the statute of frauds, be created or transferred without writing, and where the statute speaks of surrender by operation of law, it certainly alludes to those surrenders where the party, whether by estoppel or otherwise, accepts an estate inconsistent with the estate he has. If I am in possession under a freehold lease, it is not by standing by, while the lessor with my knowledge grants the lands to another person, as if he were entitled to them in possession, that my estate is to be divested. I may, in consequence of

¹ 8 Ad. & El. 118; 3 N. & P. 243.

⁴ 3 J. & Lat. 151.

² 6 Ir. L. R. 131.

⁵ 6 Ir. L. R. 131.

³ See Taylor on Evid. 891, 6th ed.

my conduct, be compelled by a court of equity to transfer my estate, but not being a party to the deed, and not having transferred my estate or parted with the possession, I confess it appears to me that such conduct cannot amount to a surrender by operation of law of the estate so vested in me. . . . The case of *Thomas v. Cook* established a new doctrine, but it proceeded upon the act of the former tenant, who had placed another in possession, and agreed to the latter becoming immediate tenant to the landlord, and it is so explained in *Johnston v. Huddleston*¹ by BAYLEY, J., who joined in the decision in *Thomas v. Cook*. But I entirely concur in the reasons given by PARKE, B., in delivering the judgment of the court in *Lyon v. Reed*. If *Thomas v. Cook* is not to be overruled, the doctrine should not be carried further.”²

But since these cases the Court of Queen's Bench, in *Nickells v. Atherstone*,³ and the Court of Exchequer in *Davison v. Gent*,⁴ have approved of *Thomas v. Cook*. In *Nickells v. Atherstone*, LORD DENMAN said: “If the expression ‘surrender by operation of law’ be properly applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued, it appears to us to be properly applied to the present. As far as the plaintiff the landlord is concerned, he has created an estate in the new tenant which he is estopped from disputing with him, and which is inconsistent with the continuance of the defendant's term. As far as the new tenant is concerned, the same is the case. As far as the defendant, the owner of the particular estate, is concerned, he has been an active party to this transaction, not merely by consenting to the creation of the new relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter.”⁵

SEC. 77. **Surrender may be Presumed, When.** — A surrender may be presumed even where there is no direct evidence of

¹ 4 B. & C. 933; 7 D. & R. 411.

² 3 J. & Lat. 160.

³ 10 Q. B. 944; 16 L. J. Q. B. 371

⁴ 1 H. & N. 744.

⁵ See also *McDonnell v. Pope*, 9 Hare, 705, and the notes to *Doe v. Oliver*, 2 Sm. L. C. 7th ed. 863.

the fact,¹ but such presumption must arise from facts and circumstances independent of length of time which are sufficient to warrant a jury in making it,² and the court will never presume a surrender, but leaves it as a matter of fact to be found by the jury.³ Thus, in an English case,⁴ A, having granted a lease to B for twenty-one years, before the expiration of the term granted another lease of the same premises to C. No surrender in writing of B's interest was shown, but the lease granted to B was produced from A's custody *with the seals torn off*, and it was proved to be the custom to send in the old leases to A's office before a renewal was made; and it was held that this was proper evidence from which the jury might infer that B assented to the lease to C, and to support a consequent presumption of a surrender of B's interest under the lease.⁵ A surrender cannot, however, be presumed to bind the landlord from the naked circumstance that he has received the rent from a third person and not from the original tenant.⁶ Indeed, the general rule may be said to be that a jury may presume a surrender of a term *when it clearly appears that all the purposes for which it was created have been fully satisfied, and that it ought in justice and equity to have been re-assigned or surrendered to the owner of the reversion, especially if there has been any subsequent dealing with the property of such a nature as would not have happened with reasonable means, supposing the term had not been put an end to*, or there is other express evidence beyond the mere lapse of time, from which such a presumption might arise.⁷ But a presumption of a surrender cannot be raised except where a title is shown by the party who calls for the presumption, or the possession is shown to be consistent with the execution of the surrender required to be presumed,⁸ and such presumptions are made *in favor of the possession, and not against it*.⁹

¹ Bridges v. Duke of Chandos, 4 Burr, 1072; Bedford v. Terhune, 30 N. Y. 463.

² Harrop v. Cooke, 6 Bing. 174.

³ Cottrell v. Hughes, 15 Q. B. 532.

⁴ Walker v. Richardson, 2 M. & W. 822.

⁵ Davidson v. Gent, 1 D. & K. 744.

⁶ Copeland v. Watts, 1 Stork. 96.

⁷ Hodson v. Staple, 2 T. R. 684; Garrard v. Tuck, 8 C. B. 231; Syburn

v. Slade, 4 T. R. 682; Rees v. Williams, 2 M. & W. 749; Burdett v. Wright, 2 B. & Ald. 710; Blacknell v. Plowman, 2 B. & Ald. 573; Bowerman v. Sybourn, 7 T. R. 2; Bartlett v. Downs, 3 B. & C. 616; Lloyd v. Pas-singham, 6 id. 305.

⁸ Harrop v. Cooke, 6 Bing. 174.

⁹ Rees v. Williams, *ante*; Brandon v. Calvert, 5 Taunt. 170.

The court will not require positive proof of a surrender in any case where there is sufficient presumption of it.¹ Thus we have seen that the production of a cancelled lease, and evidence that it was the custom to send old leases to the lessor's office before a renewal, has been held evidence to go to the jury, from which they might presume a surrender.² The case of *Doe v. Thomas*³ is not, it is submitted, at variance with this doctrine. In that case the simple production of the lease in a cancelled state was considered not to be *prima facie* evidence of a surrender; whereas in *Walker v. Richardson* there was also the evidence of custom, coupled with the fact that the lease was produced from the custody of the person whose duty it was to cancel the old leases.⁴ The mere receipt of rent by the landlord from a third party is not sufficient to warrant the presumption of a surrender; the *prima facie* presumption being that the rent was paid by the latter as the agent of the original lessee and on his behalf.⁵ Where a mortgagor before mortgage let a farm to P as tenant from year to year, and after the mortgage P let the defendant into possession in his stead, and informed the mortgagor of the fact, and the mortgagor subsequently received the rent from the hands of the defendant, it was held that the tenant's term was still in P, there being no effectual surrender, and consequently that the mortgagee could not maintain ejectment against the defendant without a notice to quit.⁶ But the production of receipts is strong confirmatory evidence of a surrender.⁷ The facts upon which the surrender is to be presumed must be such as make it not unreasonable to believe that the surrender was actually made.⁸ And the presumption, if made at all, must be made by a jury and not by the court.⁹

¹ *Goodtitle v. Duke of Chandos*, 2 Burr, 1072.

² *Walker v. Richardson*, 2 M. & W. 882; 6 L. J. (N. S.) Ex. 229.

³ 9 B. & C. 288; 4 Man. & R. 218.

⁴ And see *Lyon v. Reed*, 13 M. & W. 285; 13 L. J. Ex. 377; *Davison v. Gent*, 1 H. & N. 744.

⁵ *Copeland v. Gubbins*, 1 Stark. 963; *Doe v. Wood*, 14 M. & W. 682;

15 L. J. Ex. 41; *Graham v. Wichelo*, 1 C. & M. 188; 3 Tyr. 201; 2 L. J. (N. S.) Ex. 70.

⁶ *Cadle v. Moody*, 30 L. J. Ex. 385.

⁷ *Woodcock v. Nuth*, 1 Moo. & Sc. 317; 8 Bing. 170; *Lawrance v. Faux*, 2 F. & F. 435.

⁸ *Doe v. Cooke*, 6 Bing. 174.

⁹ *Cottrell v. Hughes*, 15 C. B. 532.

SEC. 78. Effect of Surrender on Rent Due and Accruing.—

Where a lease containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and as to rent previously due is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued due before the surrender.¹ Where the tenant quits the premises either with or without notice, and the landlord accepts possession, he cannot recover rent *pro rata* for the actual occupation of the premises for any period short of the last rent day.² Nor can he recover for the time subsequent to his accepting possession.³ Where the tenant of several houses underlet each of them to different persons, and the landlord gave notice to quit to one of the undertenants, who quitted accordingly, after which the house remained unoccupied some time, and then the tenant underlet it again, **LORD ELLENBOROUGH, C. J.**, held that the landlord could not maintain an action for use and occupation against the tenant for the rent during the time the house remained unoccupied, considering the circumstances as proof of eviction.⁴

In an action for debt for rent, a plea that the landlord and tenant agreed that the tenant should give up and the landlord take possession of the premises, in consideration whereof the tenant was to be discharged from the rent, and that possession was actually given up and accepted accordingly, was held to be a good plea, as the defence set up was merely an executed contract and not a surrender.⁵

SEC. 79. How a Surrender should be Pledged.— In setting up a surrender in a plea, enough should be stated to show that if the matter alleged is true, a surrender has transpired either by virtue of a special contract or by operation of law. If the surrender is by the acceptance of a new lease, it is not sufficient to say that the lessee being possessed of a former

¹ *Att. Gen. v. Cox*, 3 H. L. C. 240.

² *Grimman v. Legge*, 8 B. & C. 324; 2 Man. & R. 438; *Hall v. Burgess*, 5 B. & C. 332; 8 D. & R. 67.

³ *Whitehead v. Clifford*, 5 Taunt. 518; *Walls v. Atcheson*, 3 Bing. 462; 11 Moo. 379; and see *Slack v. Sharp*, 8 A. & E. 366; *Dodd v. Acklom*, 7 Sc. (N. R.) 415; 13 L. J. C. P. 11; 6 M.

& G. 673; *Doe v. Benjamin*, 9 A. & E. 644; 1 P. & D. 440; 8 L. J. (N. S.) 117; *Furnivall v. Grove*, 8 C. B. (N. S.) 496; 30 L. J. C. P. 3.

⁴ *Burn v. Phelps*, 1 Stark. 94.

⁵ *Gore v. Wright*, 8 A. & E. 118; 3 N. & P. 243; *Peter v. Kendal*, 6 B. & C. 703; *Smith v. Lovell*, 10 C. B. 6; *Furnivall v. Grove*, 8 C. B. (N. S.) 496.

lease, the lessor demised to him; but it should be stated that the lessee surrendered, and then the lessor demised, or that the lessor entered and demised,¹ or that before the rent sought to be recovered accrued, or before the breaches alleged, the demised premises and all the residue of the term then to come and unexpired were duly surrendered to the plaintiff by act and operation of law; that is to say, by the defendant then giving up to the plaintiff, and the plaintiff then accepting from the defendant the possession of the demised premises with the intention of then putting an end to the term.² The plea ought to state that the defendant surrendered the estate and land; but if he pleads a surrender of the lease only, it is sufficient to say that he surrendered "the demise aforesaid." If it is not stated that the plaintiff accepted the surrender, while the plea is open to demurrer, yet the defect is cured by verdict.³ It is always best to allege that the plaintiff re-entered; but if it is alleged that he *agreed* to the surrender, it will be presumed that he entered.⁴ In an action of debt for rent where the plea set up an agreement to deliver up the premises, and also stated that they were delivered up and accepted accordingly, it was held good after verdict, not as setting up a surrender of the term, but as a valid excuse for non-payment of the rent.⁵

¹ Com. Dig. tit. Surrender (N.).

⁴ Cannon v. Hartley, 9 C. B. 634.

² Smith v. Lovell, 10 C. B. 6.

⁵ Gore v. Wright, 8 Ad. & El.

³ Colles v. Evason, 10 C. B. (N. S.) 118.

SECTION IV.

GUARANTIES, ETC.

“No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

CHAPTER III.

GUARANTIES. — PROMISE BY EXECUTORS.

SECTION.

80. Must be Consideration.
 81. What is Admission of Assets.
 82. Exceptions.
 83. Requisite to Promise.
 84. What is Sufficient Consideration.
 85. Forbearance to Sue.
 86. Must be Cause of Action when Promise Made.
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 90. When not Necessary to Prove Assets.
 91. Action Lies to Recover Specific Chattel, or on Promise in Consideration of Assets.
 92. Not Necessary to Allege Assets.
 93. Executor not Bound to Plead Statute.
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SECTION 80. **Must be Consideration.** — A promise by an executor *to pay a debt out of his testator's estate is nudum pactum unless there are assets,*¹ and a consideration must be alleged as of assets come to his hands, or of forbearance, otherwise the promise will not be personally binding on him.² The statute of frauds was made for the relief of per-

¹ *Pearson v. Henry*, 5 T. R. 6; *Milcheson v. Hewson*, 7 T. R. 348.

² *Reech v. Kennegal*, 1 Ves. Sen. 126; *Barnard v. Pumfrett*, 5 My. & Cr. 63. In an action on a special promise to pay a debt, due from the estate of a deceased person, whom the defendants represented as administrators, the allegation of forbearance, at the request of the defendants, to pre-

sent such debt against the estate, within the time limited by the court of probate, and the consequent loss of all claim upon said estate for such debt, is a sufficient averment of a consideration for such promise. A verbal promise to pay a debt, due from a deceased person, made to a creditor, in consideration of forbearing to proceed against the estate which the

sonal representatives and others, and did not intend to charge them further than by common law they were chargeable. The words of the statute are merely negative, and say that executors and administrators shall not be liable out of their own estates, unless the agreement upon which the action is brought, or some note or memorandum thereof, is in writing, signed by the party. The common law required a consideration, and the statute added writing.¹ It is not necessary to plead that the promise was in writing, though it must be proved in evidence that it was.²

SEC. 81. What Amounts to an Admission of Assets.—In a case cited in the last note,³ BULLER, J., said: "I only recollect two cases in which the question, what shall be considered an admission of assets, has been discussed,—Barry v. Rush,⁴ and Cleverley v. Brett.⁵ In the last of those the executor had paid interest on a bond due from the testator, which was held on the trial to be an admission of

promisor represents, is not necessarily within the clause of the statute of frauds, which relates to "a special promise [by an executor or administrator] to answer damages, out of his own estate"; but whether or not it is so, depends upon his having, or not having, assets of the deceased. *The possession of assets is not, of itself, sufficient to charge him personally, on such promise, without a new consideration.* In an action on such promise, the defendants pleaded in bar, that neither of the contracts, agreements, and promises contained in the declaration, nor any note or memorandum of them, nor either of them, was ever made by the defendants, and signed by them or either of them, or by any person there lawfully authorized. It was held, that such plea did not constitute a complete defence, without further alleging a want of assets. Where the declaration, in such action, stated that the defendants were the administrators on the estate of the plaintiff's debtor, it was held that such allegation might be treated as surplusage, and did not render it incumbent on the plaintiff also to allege that they

had assets. The clause of the statute which relates to a "special promise [by one person] to answer for the debt, default, or miscarriage of another," was intended to apply only to promises made to the person to whom another is answerable; and therefore, a promise to A, to pay certain debts, which he owed his creditors, being a promise to him, and not to them, is not within this provision of the statute. Pratt v. Humphrey, 22 Conn. 317. See also Stebbins v. Smith, 4 Pick. (Mass.) 97; Smithwick v. Shepherd, 4 Jones (N. C.) L. 196.

¹ Rann v. Hughes, 7 T. R. 350, n. (a); 4 Bro. P. C. 27; and see Hawkes v. Saunders, Cowp. 289; Philpot v. Briant, 4 Bing. 717; 1 M. & P. 754. But see also Herbert v. Powis, 1 Bro. P. C. 355.

² Anon., Salk. 519; Williams v. Leper, 3 Burr, 1890.

³ Pearson v. Henry, ante.

⁴ 1 T. R. 691.

⁵ M. 13 Geo. 3, B. R. In that case LORD MANSFIELD, C. J., said: "To be sure, the evidence eases the creditor from proving assets, and throws the onus on the other side."

assets. But that opinion was overruled in this court, on a motion for a new trial, when it was thought highly unreasonable that because the executor, thinking the demand just, had chosen to pay a part of a demand out of his own pocket, he should be liable for the whole debt; or that, because having enough to pay the interest, he should thereby be concluded to dispute assets for the principal. In the other case, it seems to me that the plea has nothing to do with the case. That was an action of debt on a bond given by the defendant, by which he bound himself, his heirs, etc., for performance of the award, and therefore I said, in deciding that case, that it was a personal engagement by the defendant to perform the award. Another ground has also been mentioned, that the administrator personally promised to pay whatever should be awarded. But that would not avail the plaintiff in this action; for this action is brought against the defendant, *as administrator*, and it is brought against him to recover the plaintiff's demand out of the intestate's effects; and if there were no assets, the personal promise by the administrator would be *nudum pactum*." The giving of a bond by an administrator to the judge of probate, to pay the debts and legacies of the testator, is held to operate as an admission of assets.¹ But an agreement to arbitrate is not,² unless the executor also binds himself to

¹ *Stebbins v. Smith*, 4 Pick. (Mass.) 97.

² *Pearson v. Henry*, *ante*. In this case LORD KENYON, C. J., in delivering the opinion of the court and distinguishing the case from *Barry v. Rush*, said: "With regard to the principal question, in point of justice and conscience, the plaintiffs' demand ought not to extend beyond the assets of the intestate: here it is not pretended that in fact there were assets to the extent of the plaintiffs' demand, but it is said that the defendant precluded himself, by something which he did at the outset of this business, from denying that he had assets, for that every submission to arbitration by an administrator in that character is conclusive evidence against him that he has assets. In many cases an executor or admin-

istrator is desirous of ascertaining whether or not there be any foundation for the demand which is made upon him, without disputing it in an action, and it is frequently advantageous to both parties that the matter in dispute should be referred; but if the reference be attended with this supposed consequence, it will in future prevent every executor or administrator from submitting to arbitration. The case of *Barry v. Rush* was very properly decided, but it does not affect the present. There the defendant submitted in broad terms to pay whatever should be awarded, and the arbitrator did award that he should pay a certain sum; whereas, here, the arbitrator has only ascertained the amount of the debt due from the intestate, but has not directed the de-

pay the award.¹ In an Indiana case,² an administrator orally agreed to submit a claim in favor of the estate, against the plaintiff, to arbitration, with a proviso that, if the award proved satisfactory, each party should pay one-half the costs; but if unsatisfactory, the one objecting should pay *all* the costs. The submission was made, and the administrator objected to the award, and in an action to recover the costs, it was held that the promise was not within the statute, because not a promise to answer for a debt created by the decedent, but by himself. "It must be kept in mind," said ELLIOTT, J., "*that the subject-matter of the contract declared upon grows out of transactions which occurred after the decedent's death.*" The administrator's promise was not to pay some liability his decedent had incurred, nor to fulfil some engagement he had undertaken in his lifetime. In *Mills v. Kuykendall*,³ it was said: "The whole case shows that the object of the plaintiff was to charge the estate of the deceased by obtaining judgment against the administrators *de bonis intestati*. The promise of administrators, on a consideration originating subsequently to their intestate's death, cannot sustain such an action."⁴ In such cases the statute does not apply, because the undertaking is the promisor's original contract.⁵ But in order to charge the executor or administrator *de bonis propriis*, it is not necessary to aver in the declaration that the defendant has assets, for if the promise be in writing, and supported by a consideration, as forbear-

fendant to pay it. It is impossible then to say that the arbitrator decided that the defendant had assets; and the submission to arbitration by an administrator is not of itself an admission of assets. What was said by my brother ASHMEAD in the case of *Barry v. Rush*, respecting the admission of assets, must be taken to refer to the particular case then under discussion, but ought not to be extended further. And indeed he immediately subjoined that the bond given by the defendant to abide by the award was an undertaking to pay whatever the arbitrator should award, without any regard to assets; and my brother BULLER went expressly on that ground." See *Long v. Rodman*, 58 Ind. 58.

¹ *Barry v. Rush*, *ante*.

² *Holderbaugh v. Turpin*, 75 Ind. 84; 39 Am. Rep. 124.

³ 2 Blackf. (Ind.) 47.

⁴ *Carter v. Thomas*, 3 Ind. 213; *Cornthwaite v. First National Bank*, 57 id. 268. *Anderson v. Spence*, 72 id. 315.

⁵ In *Hackleman v. Miller*, 4 Blackf. (Ind.) a person was induced to purchase a note due from an intestate's estate upon the promise of the administrator that it should be paid, and it was held that the promise was not within the statute. But in *Massachusetts* it is held that a promise by an administrator to pay a debt of the estate out of lands sold or to be sold, is within the statute. *Silsbee v. Ingalls*, 10 Pick. (Mass.) 526.

ance to prosecute at the request of the defendant,¹ the plaintiff, by acquiescing in a possible detriment to himself, by his

¹ In William Banes' case, 9 Coke, 93 b, it was clearly held, that the declaration was good enough, without saying that the defendant had assets, for it shall be intended *prima facie* that she had assets. But Coke said, that he conceived the truth to be, that if there had not been any debt, or if there had been a debt, and the executrix had nothing in her hands at the time, she might have given it in evidence. But this last position seems not to be law, according to the cases. See 1 Roll. Abr. 24, pl. 33; 2 Lev. 3; Davis v. Reynier, Yelv. 11; Goreing v. Goreing, 1 Vent. 120; Davis v. Wright, Cro. Eliz. 91; Trewinian v. Howell, 1 Vez. 126; Reech v. Kennegal. But it seems clear enough that the executor must be liable, and that there must be an existing debt, otherwise there will be no consideration. An executor so closely represents the person of the testator, that if a man executes a bond, his executors are bound, though they are not named; therefore, in a declaration against the executor upon the bond of the testator, it is not necessary to say that the obligor bound himself and his executors; but if the suit was against the heir, it would be a material allegation to say that the ancestor bound himself and his heirs, and to prove that he did so in fact; for the heir is not bound by his ancestor's bond, unless he be expressly named. If, therefore, the declaration omits to state that the heir was bound, it is substantially defective; and by the case of Barber v. Fox, 2 Saund. 136, it appears that this is such a defect as a verdict cannot cure; for unless it be shown upon the pleadings, that the heir was bound, there will appear to have been no consideration for his promise, and so no sufficient cause of action. Thus also, if the heir promise to pay a simple contract debt of the ancestor, no action will lie upon this promise, inasmuch as it is without consideration,

for the heir is not chargeable upon such debts of his ancestor. Fish v. Richardson, Cro. Jac. 47. But if an executor promises to pay, in consideration of a consent only by an assignee of a debt not to sue, the promise stands upon a sufficient consideration. 1 Roll. Abr. 20, pl. 11. And so doubtless the heir, under the same circumstances, will be liable, if the debt is founded upon a specialty.

In Forth v. Stanton, 1 Saund. 210, there was no allegation of any undertaking to forbear on the part of the assignees. In this case the plaintiff declared that the defendant's testator was indebted to A, who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use; and that the defendant, in consideration that the plaintiff would accept the defendant for his debtor, promised to pay the debt to the plaintiff. And for want of alleging a sufficient consideration for the promise, the declaration was judged insufficient. Upon the principle of the determination in Barber v. Fox, cited above in this note, it seems that a verdict for the plaintiff could not have cured this radical defect; but in the case of Roe v. Haugh, 1 Salk. 29, which was the converse of the last-mentioned case in its circumstances, and the relative situation of the parties, the verdict was held by four judges against three to have cured the omission to allege a sufficient consideration in the declaration. There, in consideration that the plaintiff would accept C to be his debtor for £20 due to him from A, in the place of A, C promised and undertook to B to pay to him the £20; and this was adjudged good, after a verdict, without express averment that A was discharged; for the majority of the judges in the Exchequer Chamber held, that being after verdict, they ought to do what they could to help it, and that, therefore, they would not

relinquishment of legal proceedings (for he might at least have obtained a judgment of *assets quando acciderint*) has purchased a title of action upon the undertaking of the defendant. But without such special agreement, in which the executor steps out of his representative character, an action cannot be sustained against an executor, otherwise than as an executor; and if the action is brought against him in the character of executor, to recover a demand out of the testator's estate, any special promise to pay the testator's debt is a mere *nudum pactum*, if there are no assets; and if there are any, *the extent of the promise is measured by the extent of the assets*, or, in other words, the promise superinduces no obligation upon the original representative liability. In many of the States by statute, and in others by the decision of the courts, not only must the promise be in writing, but the writing, to be valid, should, in the case of such promise made by an executor, not only state the consideration, whether it be forbearance of suit, or whatever else, in terms, but that the undertaking on both sides should be comprised in the agreement, so as to make it a subject of action to either party; for it was intimated by the chief justice, in this, that "the obligatory part of the transaction was indeed the promise, which will account for the word 'promise' being used in the first part of the clause, but still, in order to charge the party making it, the statute proceeds to require that the *agreement*, by which must be understood the *agreement in respect of which the promise was made*, must be reduced into writing."

SEC. 82. **Exceptions.**—Under some circumstances, however, a mere parol agreement is binding, and specific performance may be decreed. Thus a verbal promise by a person to whom letters of administration are afterwards granted may be binding on him as administrator. Where A promised that if the widow of an intestate would permit him to be joined with her in the letters of administration, he would make good any deficiency of assets to pay debts, it was held that

<p>take it as a promise only on the part of C, because, as such, it could not bind unless A was discharged; but they construed it as a mutual promise,</p>	<p>viz., that C promised B to pay the debt, and B promised in <i>consideratione inde</i> to discharge A.</p>
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the promise was binding, and not within the statute, because at the time it was made A was not administrator, and it was no answer to say that he was administrator afterwards.¹ So an administrator, *de bonis non*, verbally promising to pay an annuity given by the testator's will, does, under certain circumstances, make himself personally liable.²

SEC. 83. **Requisites to Promise.** — It is not necessary to show the cause of the debt,³ but in order that a promise may be binding, *there must be some benefit to the party making it, or some detriment to the party to whom it is made*, otherwise it will be *nudum pactum*, and cannot be enforced; and therefore, if at the time the promise was made there was no person whom the plaintiff could have sued, his forbearance does not amount to a consideration.⁴ So it has been held that where a man who is neither executor nor administrator gives a promissory note, payable at a future day, to a creditor of a deceased person, for the debt, without any other consideration for making it, the payment of the note cannot be enforced by the payee, if at the time of the making thereof there was no personal representative of the debtor.⁵

SEC. 84. **What is Sufficient Consideration.** — A promise in consideration that the plaintiff would forbear to require sureties of the peace is a sufficient consideration.⁶ Where the plaintiff declared in assumpsit that the defendant's testator was indebted to A, who, after the testator's death, assigned the debt to the plaintiff, and appointed him to receive it to his own use, and the defendant, in consideration that the plaintiff would accept the defendant for his debtor, promised to pay it to the plaintiff, it was held that this was not a sufficient consideration to support the promise to charge the defendant *de bonis propriis*.⁷ A promise by an executor to pay a debt of his testator in consideration that more goods

¹ Tomlinson v. Gill, Ambl. 330; and see Griffith v. Sheffield, 1 Eden, 77; Gregory v. Williams, 3 Mer. 590.

² Herbert v. Powis, 1 Bro. P. C. 355.

³ Therne v. Fuller, Cro. Jac. 396; Austen v. Bewley, ib. 548.

⁴ Jones v. Ashburnham, 4 East, 455; and see Marshall v. Burtinshaw, 1 B & P. (N. R.) 172.

⁵ Nelson v. Serle, 4 M. & W. 795; reversing Serle v. Waterworth, ib. 9; Hamilton v. Terry, 21 L. J. C. P. 132; and see Barber v. Fox, 2 Wms. Saund. 420, n. (a).

⁶ Ripon v. Norton, Cro. Eliz. 881.

⁷ Forth v. Stanton, 1 Wms. Saund. 210.

are supplied by the creditor will make the executor liable, *de bonis propriis*, for both debts.¹

Where an attorney delivered up deeds to an executor, which he was not bound to do till his bill was paid, the deeds being of great use to the executor in several suits which he was then carrying on, it was held that there was a sufficient consideration to make the executor liable to the attorney's whole demand, whether there were assets or not.² And if the creditor is induced to hand over a security, given to him by the executor, to a third party, he will be entitled to recover against the third party.³

SEC. 85. Forbearance to sue by Creditor. — If a creditor forbears to sue at the request of an executor, that is considered a sufficient consideration to charge the executor, whether he had assets or not at the time of the promise.⁴ In *Hawes v. Smith*,⁵ HALE, C. J., said that though a bare accounting will not oblige an executor to pay, *de bonis propriis*, yet a promise in consideration of forbearance will. Where the plaintiff having a debt owing to him from the testator on a simple contract, the executor, in consideration the plaintiff would forbear to sue him until such a time, promised to pay, and the plaintiff averred that he did forbear accordingly, this was held to be a good promise; but it was said that if the heir had promised, on forbearance of the suit, to pay this debt, no assumpsit would have laid against him, because without consideration, the heir is not chargeable to any debt without specialty.⁶ If a man declares, on a promise towards an administrator, that the intestate was in debt to him in £20 by obligation, and died, and the defendant being administrator in consideration of the promise and that the plaintiff would spare him till a certain time after, promised to pay him the debt, and avers that he spared him till such time, and that the defendant has not paid him, etc., although he did not say that he would spare him the debt, or to sue him, yet it shall

¹ *Wheeler v. Collier*, Cro. Eliz. 406.

² *Hamilton v. Inledon*, 4 Bro. P. C. 4.

³ *Walker v. Taylor*, 6 C. & P. 752.

⁴ *Barber v. Fox*, 2 Wms. Saund. 423 (n).

⁵ 2 Lev. 122.

⁶ *Fish v. Richardson*, Yelv. 55; 56 S. C. nom; *Fisher v. Richardson*, Cro. Jac. 47.

be so intended, and for that it is a good consideration.¹ So if A (to whom the testator was indebted) comes to the executor and says that he intends to sue for the debt, on which the executor promises, in consideration that the plaintiff will forbear for a reasonable time, he will pay him, and A forbears for a reasonable time to sue him, that is a good consideration to charge the defendant in an action on the case out of his goods without assets, for by this promise it is intended as well to forbear to sue the executor, as to forbear the debt, and forbearance of suit is a good consideration, without assets at the time of the promise.² If a surety pays the debt for the principal, who dies, and his executor promise the surety that if he will forbear to sue him for a certain time, that he will pay, that is a sufficient consideration to support the promise.³ Forbearance to sue by the assignee of a debt is a sufficient consideration to support a promise by an executor to pay.⁴ For it is sufficient in the case of any other debtor whom the assignee of the debtor forbears, at his request, to sue.⁵

SEC. 86. Must be Cause of Action when Promise made. — But forbearance to sue is not a consideration where there was no cause of action before the promise was made. Thus, where a married woman gave a promissory note as *femme sole*, and after her husband's death, and, in consideration of forbearance, promised to pay it, it was insisted in an action against her that she, being under coverture at the time of giving the note, it was voidable for that reason; yet, by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration; but PRATT, C. J., held the contrary, and that the note was not barely voidable, but absolutely void, and that forbearance, where originally there was no cause of action, was no consideration to raise an assumpsit. But he

¹ Gardener v. Fenner, 1 Roll. Abr. pl. 11; Hardr. 74; Russel v. Haddock, 15, pl. 3; Chambers v. Leversage, Cro. 1 Lev. 188.
Eliz. 644.

² Johnson v. Whitchott, 1 Roll. Reynolds v. Prosser, Hadr. 71; Oble v. Dittlesfield, 1 Vent. 153; and see

³ Scott v. Stevens, Sid. 89.

⁴ Pitt v. Bridgewater, Roll. Abr. 20, 209 n. (1)

⁵ 1 Wms. Exors. 7th ed. 782, citing
also Forth v. Stanton, 1 Wms. Saund.

said it might be otherwise where the consideration was but voidable.¹

SEC. 87. Moral Obligation.—A moral obligation may be a good consideration for a promise. Where a *femme covert*, having an estate settled to her separate use, gave a bond for repayment by her executors of money advanced at her request on security of that bond, to her son-in-law, and after her husband's death wrote, promising that her executors should settle the bond, it was held that assumpsit lay against the executors on their promise,² and it was pointed out that *Loyd v. Lee*³ and *Barber v. Fox*⁴ proceeded on the ground that no good cause of action was shown on the pleadings.

SEC. 88. Time of Forbearance.—Forbearance for a reasonable time,⁵ or for a certain time,⁶ is a sufficient consideration. But forbearance for some time,⁷ or for a little time,⁸ is not.

SEC. 89. Promise to pay at a Future Time.—If an executor is indebted to J S in £100, and J S comes to demand the money, in this case the executor is chargeable only in respect of the assets; but if he expressly promise to pay the debt at a day to come, it is made his own debt, and it will have to be satisfied out of his own goods.⁹ Thus, where B having died indebted to G for work and labor done, his executors signed the following memorandum on the back of G's account: "Mr. G having consented to wait for the payment of the within account, we, as the executors of B, engage to pay Mr. G interest for the same at £5 per cent, until the same is settled;" it was held that they were personally liable to pay the debt and interest.¹⁰

SEC. 90. When Not Necessary to Prove Assets of Testator.—Where the executors, by a promissory note given "as executors," jointly and severally promised to pay the same, "on

¹ *Loyd v. Lee*, 1 Str. 94; and see *Barber v. Fox*, 2 Wms. Saund. 427 (n.); *Davis v. Reyner*, 2 Keb. 758.

² *Lee v. Muggeridge*, 5 Taunt. 36.

³ 1 Str. 94.

⁴ 2 Wms. Saund. 427.

⁵ *Johnson v. Whitchcott*, Roll. Abr. 24, pl. 33.

⁶ *Pitt v. Bridgewater*, ib. 20, pl. 11; Hardr. 74; *Semple v. Pink*, 1 Ex. 74.

⁷ *Tilston v. Clarke*, 1 Roll. Abr. 23, pl. 26.

⁸ *Brian v. Salter*, ib. 23, pl. 25.

⁹ *Goring v. Goring*, Yelv. 11; *Trevinian v. Howell*, Cro. Eliz. 91; *Reech v. Kennegal*, 1 Ves. S. 126.

¹⁰ *Bradley v. Heath*, 3 Sim. 543.

demand with lawful interest"; it was held that they were personally liable, *DALLAS, C. J.*, saying: "The promise must depend, not on the words 'as executors,' but on the words of the whole instrument taken together. Take the words 'on demand.' Suppose a demand had been made immediately, do not the executors, by subjecting themselves to such a demand, admit they have assets to satisfy it? If they meant to limit their liability, why did they not add to the words 'as executors' the words 'out of the estate of'? But they promise absolutely, and further add an engagement to pay interest. When, therefore, by the engagement to pay interest, they have induced the plaintiff to suspend his clear and admitted demand, by so doing they make the promise personal and individual."¹ In *Rideout v. Bristow*,² a widow gave a promissory note "for value received by my late husband," and it was held that the note was valid on the face of it. *BAYLEY, B.*, said: "If an administratrix take upon herself to give a security which may have the effect of inducing forbearance and which purports to bind her individually, is it competent for her to say, 'You must prove assets'? To my mind, the act of giving such a security supersedes the necessity of an investigation as to there being assets. It seems to me that the words 'value received by my late husband' do not make the proof of assets necessary; and I go still further, and say that it was not competent for her to show that there were no assets."

An executor giving such a promissory note will be liable out of his own estate, although the testator's estate was insolvent at the time the note was given, of which fact he was ignorant.³ Where, however, an executrix gave an acceptance for a debt, due from her testator, taking an engagement from the drawer to renew the bill from time to time, until sufficient effects were received from the estate of the testator, it was held that this meant sufficient effects in the ordinary course of administration, and that she had not pre-

¹ *Child v. Monins*, 2 Brod. & Bing. 460; 5 Moo. 282; *Barnard v. Pumfrett*, 5 My. & Cr. 71; *Norton v. Ellam*, 2 M. & W. 461; *Serle v. Waterworth*, 4 M. & W. 9.

² 1 Cr. & J. 231. See also *Corn-*

thwaite v. First National Bank, *ante*, where a similar doctrine was held as to the renewal of a note of the intestate by the executor.

³ *Lucas v. Williams*, 3 Giff. 150.

cluded herself from first applying assets to pay £3,000 to trustees for her own use, in discharge of a bond given by her husband before marriage to that effect, before she paid the acceptance.¹

If executors endorse a bill, it is immaterial whether they endorse it as executors or not. If they endorse it at all, they are liable personally, and not as executors, for their endorsement would not give them a cause of action against the effects of the testator.²

SEC. 91. Action lies to Recover Specific Chattel; or on Promise in Consideration of Assets.—An action lies against an executor to recover a specific chattel bequeathed after his assent to the bequest.³ So an action lies upon an express promise by an executor to pay a legacy in consideration of assets,⁴ and an action for money had and received will lie upon admission by the executor that he had assets.⁵

SEC. 92. Not Necessary to Allege Assets.—Where it is sought to charge the executor, *de bonis propriis*, on a promise made on good consideration, it is not necessary to allege in pleading that he had assets.⁶ In Bane's case⁷ it was said that if there be no assets, it shall be given in evidence. But this opinion has since been overruled.⁸ Where it is sought to charge the defendant in his character of executor, and the nature of the debt is such as necessarily makes him personally liable, the judgment will, nevertheless, be *de bonis propriis*.⁹

SEC. 93. Executor, etc., not Bound to Plead Statute.—Neither an executor or administrator is bound to plead the statute of frauds, at the requirement or for the benefit of another, in an action against himself, upon a claim, the obligation or justice of which he admits to be founded in right and good faith.¹⁰

¹ Bowerbank v. Monteiro, 4 Taunt. 844.

² King v. Thom, 1 T. R. 489, per BULLER, J.

³ Doe v. Guy, 3 East, 120.

⁴ Atkins v. Hill, Cowp. 284; Hawkes v. Saunders, ib. 289.

⁵ Gorton v. Dyson, 1 Brod. & B. 219; and see Barnard v. Pumfrett, 5 My. & Cr. 63.

⁶ Bane's Case, 9 Co. 94; Powell v.

Graham, 7 Taunt. 580; 1 Moo. 305; Dowse v. Coxe, 3 Bing. 20; 10 Moo. 272.

⁷ 9 Co. 94.

⁸ See 1 Wms. Saund. n. (1); 2 Wms. Exors. 7th ed. 1778, n. (c).

⁹ Powell v. Graham, 7 Taunt. 585; Wigley v. Ashton, 8 B. & Ald. 101; Corner v. Shew, 3 M. & W. 350.

¹⁰ Ames v. Jackson, 115 Mass. 508; Cahill v. Bigelow, 18 Pick. (Mass.) 369.

CHAPTER IV.

GUARANTIES.

SECTION.

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95. Rule as to Pleading. *Masters v. Marriott.*
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SECTION 94. **Application of the Statute.** — This section does not declare that contracts mentioned in it, if made by parol, shall be void,¹ but simply precludes the bringing of an action thereon to enforce them.² So far as the subdivision of the section which relates to the topic treated in this section is concerned, it will be observed that it applies only to *collateral* undertakings, that is, to promises *to pay a debt which exists against another person*, or to answer for that other's default or miscarriage, and has no application *where the prom-*

¹ But in Alabama, California, Dakota, Michigan, Montana, Nebraska, Nevada, New York, Oregon, Utah, Wisconsin, West Virginia, and Wyoming, the statute provides that such contracts shall be void unless in writing, and in Iowa, that no evidence to establish such contracts shall be re-

ceived unless in writing, while in all the others the provisions of the English statute prevail.

² *Banks v. Crossland*, L. R. 10 Q. B. 99; *Crosby v. Wadsworth*, 6 East, 602; *Bankworth v. Young*, 4 Drew, 1; *Leroux v. Brown*, 12 C. B. 801.

isor is himself the debtor, although he becomes so for the sole benefit of another person. The distinction is obvious. Thus, if A requests B to perform certain services for C, and promises to pay him therefor, A is the debtor, and consequently his promise is original and not collateral, even though C has the entire benefit of B's services.¹ Thus,

¹ *Brown v. George*, 17 N. H. 128; *Arbuckle v. Hawks*, 20 Vt. 538; *Backus v. Clark*, 1 Kan. 303. *Prentice v. Wilkinson*, 5 Abb. Pr. (N. Y.) n. s. 49; *Rand v. Mather*, 11 Cush. (Mass.) 1; *Warnick v. Grosholz*, 3 Grant's Cas. (Penn.) 234; *Devlin v. Woodgate*, 34 Barb. (N. Y.) 252; *Rowe v. Whittier*, 21 Me. 545; *Benedict v. Dunning*, 1 Daly (N. Y. C. P.) 241. And the same rule applies to a promise to pay for services out of funds which the promisor has in his hands belonging to the debtor left with him for that purpose. Thus A agreed with a railroad company to build a portion of their road; he also agreed to pay the laborers he employed, and save the company harmless from their demands, by allowing the company to retain enough in their hands for this purpose. A let out a portion of this work to B, a sub-contractor, and he made the same agreement with A, as A had made with the company. B proceeded with the work, but at length stopped, leaving his laborers unpaid, who then took measures under the statute to enforce their claims against the company; and thereupon, A requested B to obtain from C his bills against the laborers for supplies furnished to them, which he did. A then paid the laborers what B owed them, retaining in his hands what they owed C, which debts he agreed to pay C, the arrangement being assented to both by B and C, and the laborers being discharged from any liability to C. It was held that this was a valid and binding agreement, and did not come within the statute of frauds, and that C might maintain an action against A thereon, for money had and received to C's use, even although A was not originally liable to the laborers. *Beach v. Hungerford*, 19 Barb. (N. Y.) 258.

The rule may be said to be that if the promise springs from a new transaction, or moves to the party promising upon some fresh and substantive ground, of a personal concern to the promisor, the statute does not attach upon such promise, if the consideration is sufficient, though existing in parol only. In other words, promises made on a new consideration, having no immediate relation to the liability of the person on whose account they are made, are not within the provisions of the statute. *Gold v. Phillips*, 10 Johns. (N. Y.) 412; *Myers v. Morse*, 15 id. 425; *Stocking v. Sage*, 1 Conn. 519; *Colt v. Root*, 17 Mass. 229.

Thus, unless the liability of the person to whom, in the case of *Buckmyr v. Darnall*, the horse had been lent, had arisen upon an implied contract to re-deliver him, for which detinue might be brought (which is a species of mixed remedy, resting partly on contract, and partly on tort) the promise of the defendant would have wanted that correspondence with the original liability of the party answered for, which was necessary to bring it within the statute; for it was remarked by *POWELL, J.*, with his usual discrimination, that there must not only be a remedy against the other, but a remedy upon the *same* contract; and, as the council for the plaintiff put it, the question upon the statute is not only whether an action does or does not lie against the party himself upon the contract, but also whether it does or does not lie against him upon collateral respects. If, therefore, the promise is founded upon a new distinct consideration, moving to the party promising, it seems a perfectly

where a father requested an attorney to take charge of certain suits in which his son was interested, and said that if he

established doctrine, upon all the cases, that the statute will not extend to it. In the case of *Castling v. Aubert*, there was a distinct and new consideration, to wit, the giving up of the securities, which were in the hands of the plaintiff. The argument seems, therefore, to have taken much too narrow a ground, when it was contended, if the report states accurately the words of the counsel, that the statute was no bar to the plaintiff's recovery in that case, as it only applied to cases where there was *no consideration* for the promise; for if that had been the only object of the statute, it would have been nugatory in respect to this branch of its provisions, because the promise would have been a *nudum pactum* by the common law, without a sufficient consideration. But the true line of argument was that there was a new and engrafted consideration, moving to the party himself, who made the promise, and not to the party in respect to whose liability the promise was made. The authorities adduced to prove that the existence of a consideration took a case out of the statute, did not prove what is certainly not law, but they proved that this was the consequence of there being a *distinct consideration superadded*. As in *Meredith v. Short*, 1 Salk. 25, where the promise was in consideration of a delivery of a note, under J S's hand, for £50, and so again in *Love's Case*, 1 Salk. 28, where the promise was by a stranger to a sheriff's officer, in consideration that he would restore goods taken on a *feri facias*, to pay the debt of the defendant. Sustaining the doctrine of *Castling v. Aubert*, ante, see *Wolff v. Koppel*, 5 Hill (N. Y.) 458; *Gardiner v. Hopkins*, 5 Wend. (N. Y.) 23; *Olmstead v. Greenly*, 18 John. (N. Y.) 12; *Hindman v. Langford*, 3 Strobb. (S. C.) L. 207; *Allen v. Thompson*, 10 N. H. 32; *French v. Thompson*, 6 Vt. 54.

It appears, from the case of *Tomlinson v. Gill*, Amb. 330, to have been clearly LORD HARDWICKE'S opinion, that *if the consideration of the promise takes its root in a transaction distinct from the original liability*, the case is out of the statute. There the defendant, Gill, promised the widow and administratrix of an intestate, that if she would permit him to be joined with her in the letters of administration, he would make good any deficiency of assets, to discharge the intestate's debts. Thus, also, in *Read v. Nash*, 1 Wils. 305, the consideration of the promise was perfectly distinct from any liability of the original defendant: Tuack, the plaintiff's testator, brought an action of assault and battery against one Johnson; the cause being at issue, the record entered, and first coming on to be tried, the defendant Nash, being then present in court, in consideration that Tuack would not proceed to trial, but would withdraw his record, undertook and promised to pay Tuack £50, and the costs in that suit to be taxed up to the time of withdrawing the record; the statute was pleaded, and the plaintiff demurred, and LEE, C. J., declared the opinion of the court to be, that this promise was an original promise, sufficient to found an assumpsit upon against Nash; Johnson was not a debtor; the cause was not tried; he did not appear to be guilty of any default or miscarriage; there *might* have been a verdict for him, if the cause had been tried, for anything the court could tell; he never was liable to the particular debt, damages, or costs. But in all cases the consideration must be sufficient to support the promise, and must enure to the benefit of the promisor, and it is not enough that the promise gives up some benefit or advantage because of it, and mere forbearance is insufficient. *Curtis v. Brown*, 5 Cush. (Mass.) 491; *Fish v. Thomas*, 5 Grey (Mass.) 45;

would do the business for his son, he would pay him, his promise was held to be an original undertaking, and not

Brightman *v.* Hicks, 108 Mass. 246; Hilton *v.* Dinsmore, 21 Me. 410; Long *v.* Henry, 54 N. H. 57; Myers *v.* Morse, 15 John. (N. Y.) 425; Meech *v.* Smith, 7 Wend. (N. Y.) 315; Taylor *v.* Drake, 4 Strobb. (S. C.) L. 431; Ragland *v.* Wynn, 1 Lit. Cas. (Ala.) 270; Tompkins *v.* Smith, 3 S. & P. (Ala.) 34; Thomas *v.* Delphy, 33 Md. 373; Musick *v.* Musick, 7 Mo. 495; Brown *v.* Barnes, 6 Ala. 694; Harrington *v.* Rich, 6 Vt. 666; Cooper *v.* Chambers, 4 Dev. (N. C.) 261; Carton *v.* Moss, 1 Bailey (S. C.) L. 14; Creel *v.* Ball, 2 J. J. Mar. (Ky.) 309; Templeton *v.* Bascom, 33 Vt. 132.

But the case most illustrative of this distinction between a promise, the only moving consideration for which is the liability of another person, and that which is grounded upon a superadded inducement, is that of Williams *v.* Leper, 3 Burr, 1886. Taylor, a tenant of the plaintiff, being in arrear for rent to the amount of £45, for three-quarters of a year, conveyed all his effects for the benefit of his creditors. They employed Leper, the plaintiff, as a broker, to sell the effects; who, accordingly, advertised a sale. On the morning advertised for the sale, Williams, the landlord, came to distrain the goods in the house. Leper, having notice of the plaintiff's intention to distrain, promised to pay the arrear of rent, *if he would desist from distraining*; and Williams, on the faith of this promise, desisted accordingly. At the trial a verdict was found for the plaintiff, for £45, and on a case reserved, it was contended on behalf of the plaintiff, that this was not such a special promise for the debt of another, as was within the statute of frauds, which only meant to defeat parol promises, where there was *no new consideration* moving from the party making the promise to the party to whom it was made, and that the legislature did not mean to prevent

direct undertakings, but only collateral ones, for the debt, default, or miscarriage of others. It was also insisted that in this case there was a *new consideration*; for the reason that the goods of Leper were, at the time of the promise, liable to the landlord's distress. It was, therefore, a *direct undertaking for himself*, and not for *another*. The plaintiff had a legal interest in these goods, prior to the bill of sale, and was deprived by the defendant of an advantage which he could never have again. The property of the goods was in Leper as a trustee for the creditors, at the time when he made this promise; it was, therefore, an original undertaking, moving upon consideration personal to himself.

It was answered by the counsel for the defendant, that upon this declaration, coupled with the facts given in evidence, the plaintiff had a right to recover this £45 because the declaration expressly charged "that Taylor was indebted to the plaintiff, in £45 for three-quarters of a year's rent; and that the defendant undertook to pay it;" which was directly within the words of the statute of frauds, "a special promise to answer for the debt of another person." That Leper was in possession of the goods of the tenant, who owed the plaintiff three-quarters' rent, and being about to sell them, the landlord came to distrain for this rent in arrear, and Leper promised to pay it, if he would desist from distraining. He promised *absolutely* to pay it, and not to pay it *out of the goods*, or with any other restriction. But LORD MANSFIELD said that the case had nothing to do with the statute of frauds. The *res gestae* would entitle the plaintiff to his action against the defendant. The landlord had a legal pledge. He entered to distrain; he had the pledge in his custody. The defendant agreed that the goods should be sold, and the plaintiff

within the statute.¹ But a promise by A to B that if he will perform certain services for C, he will pay him if C *does not*,

¹ *Hodges v. Hall*, 29 Vt. 209.

paid in the first place. The goods were the fund; the question was not between Taylor the tenant, and the plaintiff the landlord. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien; this has nothing to do with the statute of frauds. *WILMOT* and *YATES, JJ.*, were of the opinion that this was an original promise; and *ASTON, J.*, said, he looked upon the goods to be the debtor, and that Leper was not bound to pay to the landlord more than the goods sold for.—The goods were a fund between both, and on that ground he concurred. *Clark v. Hall*, 10 N. J. Eq. 78; *Woodward v. Wilcox*, 27 Ind. 78; *Alger v. Scoville*, 1 Gray (Mass.) 391; *Stoudts v. Hine*, 45 Penn. St. 30; *Slingerland v. Morse*, 7 John. (N. Y.) 463; *Rogers v. Collier*, 2 Bailey (S. C.) 581; *McCrary v. Madden*, 1 McCord (S. C.) L. 436. A case quite similar to *Williams v. Leper*, *ante*, is *Edwards v. Kelly*, 6 M. & S. 208, and the same rule was adopted. See, also, *Bampton v. Paulin*, 4 Bing. 264. The rule is well established in this country that the relinquishment of a lien or advantage which inures to the benefit of the promisor, makes the undertaking original. *Arnold v. Stedman*, 45 Penn. St. 186; *King v. Despard*, 5 Wend. (N. Y.) 277; *Corkins v. Collins*, 16 Mich. 478; *Burr v. Wilcox*, 13 Allen (Mass.) 269; *Richardson v. Robbins*, 124 Mass. 105; *Krutz v. Stewart*, 54 Ind. 178; *Boyce v. Owens*, 2 McCord (S. C.) L. 208; *Crawford v. King*, 54 Ind. 6; *Luark v. Malore*, 34 id. 444; *Spooner v. Drum*, 7 id. 81; *Conrad v. Sullivan*, 45 id. 180; *Scott v. Thomas*, 2 Ill. 58; *Stewart v. Campbell*, 53 Me. 439.

The case of *Fish v. Hutchinson*, 2 Wils. 94, is plainly distinguishable from the case of *Williams v. Leper*, and *Read v. Nash*, *ante*. In that case

the facts were that *Vickars* was indebted to *Fish* in a sum of money, and *Fish* had commenced an action for it. The defendant promised, that in consideration the plaintiff would stay his action against *Vickars*, he would pay the money which was owing. There was a debt subsisting at the time of the promise, so that the liability of him, on whose behalf it was made, was the moving consideration to the promisor. The liability of the party was so immediately the ground of the promise, that the action could not have been sustained against the promisor, without showing such liability to have been in existence when the promise was made. In *Williams v. Leper*, it was the promisor's *own* liability, which was the immediate ground of the promise, and however that liability might be shown to have originated in the tenant's liability primarily to pay the rent, yet the promise, being immediately moved by the defendant's own liability, by reason of his having possession of the goods, whereon the plaintiff's lien had attached, might in that respect be said to be original. The tenant's liability was in fact removed by the distress upon the goods, and the object of the promisor, in procuring the fund to be released from the plaintiff's claim, was not for the benefit of the tenant, or intended in any way to uphold or sustain his credit. The tenant's liability was sunk in the subsequent proceeding. In *Read v. Nash*, the defendant in the first action had not yet become liable; the period had not arrived, at which any debt, default, or miscarriage could be imputed to him. If judgment had been given in the first action, ascertaining the damages, a promise by a third person to pay these damages would doubtless have been within the statute; for then a specific liability would have arisen. *Tomlin-*

is collateral, and within the statute unless in writing;¹ so if A says to B, "you go on and do the work, and I will see you paid;" or, "if C employs you, I will see you are paid;"² or, "I will be responsible for the pay,"³ are all, *prima facie*, collateral undertakings, because they are contingent upon the failure of the person promised for, to pay. But where the sole credit is rightfully given to the person promising, the undertaking is original, and not within the statute; but if *any* credit is given to the person promised for, such liability is conclusive that the promise is collateral.⁴ If the credit is *jointly* given to the promisor and the person promised for, the promise is within the statute.⁵ But if the credit is given *solely* to the promisor, it is an original undertaking.⁶ In

son v. Gell, 6 Ad. & El. 571. If a benefit or advantage is given up by the promisee, which enures directly to the advantage of the promisor, the promise is original. Laung v. French, 35 Wis. 111; Scott v. White, 71 Ill. 287; Lampson v. Hobart, 28 Vt. 697; Curtis v. Brown, 5 Cush. (Mass.) 491; Nelson v. Boynton, 3 Met. (Mass.) 396; Cross v. Richardson, 30 Vt. 641; Ames v. Foster, 106 Mass. 400; Hodgkins v. Kearney, 15 Minn. 185.

¹ Aldrich v. Jewell, 12 Vt. 125.

² Skinner v. Conant, 2 Vt. 453; Brown v. Webber, 24 How. Pr. (N. Y.) 306; s. c. 38 N. Y. 187. So where a person says to another, whom B is about to employ, "B is good; if not, I am," Steele v. Towne, 28 Vt. 771.

³ Larson v. Wyman, 14 Wend. (N. Y.) 246. But in all cases the question, irrespective of the form of expression used, is for the jury, to say from all the circumstances whether the promisee gave credit to the promisor solely, and had a right to do so. Thus A, under a contract with B, was building a house on lands of C, and said to C, "I want you to agree to pay me for building the house, or I can do no more to it," and C replied, "You go on and finish the house, and I will pay you," and it was held to be a question for the jury whether this new contract was collateral or original. Sinclair v. Richardson, 12 Vt. 33;

Stone v. Walker, 13 Gray (Mass.) 613; Billingsley v. Dempewolf, 11 Ind. 414; Hall v. Wood, 4 Chand. (Wis.) 36. A promise by one to be responsible and stand good for the pay by an employer of the wages of an employee, is a collateral undertaking. Miller v. Niehaus, 51 Ind. 401.

⁴ Ware v. Stephenson, 10 Leigh. (Va.) 155; Read v. Ladd, 1 Edm. (N. Y.) Sel. Cas. 100; Cutter v. Hinton, 6 Rand. (Va.) 509; Kurtz v. Adams, 12 Ark. 174; Kinloch v. Brown, 1 Rich. (S. C.) 223; Cropper v. Pitman, 13 Md. 190; Taylor v. Drake, 4 Strobb. (S. C.) 431; Cahill v. Bigelow, 18 Pick. (Mass.) 369; Hill v. Raymond, 3 Allen (Mass.) 540; Swift v. Pierce, 13 id. 136; Knox v. Nutt, 1 Daly, (N. Y. C. P.) 213; Brown v. Bradshaw, 1 Duer (N. Y.) 199; Walker v. Richards, 39 N. H. 259; s. c. 41 id. 388; Dixon v. Frazer, 1 E. D. S. (N. Y. C. P.) 32; Allen v. Scarff, 1 Hilt. (N. Y. C. P.) 209; Hetfield v. Dow, 27 N. J. L. 440; Brady v. Sackrider, 1 Sandf. (N. Y.) 514; Carville v. Crane, 5 Hill (N. Y.) 483; McDonnell v. Dodge, 10 Wis. 106; Cowdin v. Gottgetreau, 55 N. Y. 650.

⁵ Matthews v. Milton, 4 Yerg. (Tenn.) 576.

⁶ Williams v. Corbett, 28 Ill. 262; Porter v. Langhorn, 2 Bibb. (Ky.) 63; Nelson v. Hardy, 7 Ind. 364; Briggs v. Evans, 1 E. D. S. (N. Y. C. P.) 192; Weyland v. Crichfield, 3 Grant's Cas.

order to make a promise collateral and within the statute, *there must be*, 1. *A liability in the original party to pay the debt*, or to perform some act existing and ascertained at the time when the promise was made.¹ 2. *The consideration of the promise must be immediately connected with the liability*,² and 3. *The promise must be made to the party to whom the original debt is owing, and to do the same thing which the original debtor was liable to do*, because, if there was no liability on the part of the person promised for, or if the promise was made upon a new and independent consideration of benefit or power moving between the promisor or promisee, or if it was made to the debtor himself, or if the original debtor was discharged from the debt, or by virtue of the promise the promisor becomes in fact or in law the purchaser of the debt, the undertaking is original and not within the statute.³

(Penn.) 113; Dunning v. Roberts, 35 Barb. (N. Y.) 463.

¹ Prentice v. Wilkinson, 5 Abb. Pr. (N. Y.) N. S. 49; Mease v. Wagner, 1 McCord (S. C.) 395; Chapin v. Lapham, 20 Pick. (Mass.) 467; Miller v. Long, 45 Penn. St. 350; Connerat v. Goldsmith, 9 Ga. 14; Kimball v. Newell, 7 Hill (N. Y.) 116; Maggs v. Ames, 4 Bing. 470; Thompson v. Blanchard, 3 N. Y. 335; Griffin v. Derby, 5 Me. 476; Johnson v. Noonan, 16 Wis. 687; Lampson v. Swift, 11 Vt. 315; Walker v. Norton, 29 Vt. 226; Peck v. Thompson, 15 id. 637; Merrill v. Englesby, 28 id. 150; Roche v. Chaplin, 1 Bailey (S. C.) L. 419; Douglass v. Jones, 3 E. D. S. (N. Y. C. P.) 551; Mountstephen v. Lake-man, L. R. 7 H. L. 24; Dexter v. Blanchard, 11 Allen (Mass.) 365; Clark v. Levi, 10 N. Y. Leg. Obs. 184; Downey v. Hinchman, 25 Ind. 453; Duffy v. Wunsch, 42 N. Y. 243.

² Simons v. Steele, 36 N. H. 73; Leonard v. Vredenburg, 8 John. (N. Y.) 9; Richard v. DeWolf, 1 Paine (U. S. C. C.) 580; Nelson v. Boynton, 3 Met. (Mass.) 396; Townley v. Sumrall, 2 Pet. (N. S.) 170; Larson v. Wyman, 14 Wend. (N. Y.) 246. There must be some consideration valid in law to support the promise. Crane v. Bullock, R. M.

Charlt. (Ga.) 318; Sears v. Brink, 3 John. (N. Y.) 210; Ware v. Adams, 24 Me. 177; Gillighan v. Boardman, 29 id. 79; Huntress v. Patten, 20 id. 28; Elliott v. Giese, 7 H. & J. (Md.) 457.

³ Booth v. Eighme, 60 N. Y. 238; Stone v. Symmes, 18 Pick. (Mass.) 467; Watson v. Jacobs, 29 Vt. 169; White v. Solomonsky, 30 Md. 585; Allhouse v. Ramsey, 6 Whart. (Penn.) 331; Armstrong v. Flora, 3 T. B. Mon. (Ky.) 43; Watson v. Randall, 20 Wend. (N. Y.) 201; Draughan v. Bunting, 9 Ired. (N. C.) 10; Robinson v. Lane, 22 Miss. 161; Clisk v. McCaffee, 7 Port. (Ala.) 72; Moseley v. Taylor, 4 Dana (Ky.) 542; Yale v. Edgerton, 14 Minn. 194; Haggerty v. Johnson, 48 Ind. 41; Corbett v. Cochran, 3 Hill (S. C.) 41; Dawes v. Young, 40 Ga. 65; Bunting v. Darbyshire, 75 Ill. 408; Cooper v. Chambers; McCaffie v. Radcliffe, 3 Rob. (N. Y.) 445; Rhodes v. Leeds, 3 S. & P. (Ala.) 212; Doyle v. White, 26 Me. 341; Brown v. Curtis, 2 N. Y. 225; Antonio v. Clissy, 3 Rich. (S. C.) L. 201; Arbuckle v. Hawks, 20 Vt. 538; Whitman v. Bryant, 49 id. 511; Aldrich v. Jewell, 12 id. 125; Bushel v. Allen, 31 id. 613; Darlington v. McCann, 2 E. D. S. (N. Y. C. P.) 411; Norris v. Graham, 33 Md. 56; Gibbs

But where the undertaking is collateral, by reason of the existing liability, a special declaration on such promise becomes necessary; and if the undertaking was to pay *upon request*, the declaration must state formally and explicitly that a request was made; nor will the usual allegation in the common counts, that the defendant did not pay, *although often requested*, in such case, be sufficient.¹

SEC. 95. Rule as to Pleading. *Masters v. Marriott*. — Whether such special mode of declaring is necessary or not will depend upon the question, whether the promise was *original* or *collateral*; the point has, therefore, sometimes come under adjudication, not on the statute of frauds, but on the rules of pleading; as in the case of *Masters v. Marriott*,² where the plaintiff declared in an action of *assumpsit*, that the defendant had sold to him a bay gelding for eight guineas, and that he agreed on the sale, that in consideration the plaintiff had paid to the defendant the eight guineas, he, the defendant, promised to the plaintiff, that if he disapproved of the gelding, and delivered it to Barham for the defendant's use, that Barham should repay the said eight guineas, and if Barham did not pay it, that defendant would repay it on request. The declaration then averred that the plaintiff did disapprove of the gelding, and delivered it to Barham, and requested him to pay the eight guineas, which he refused to do upon request. The plaintiff also declared in another count upon an *indebitatus assumpsit* for another eight guineas, had and received to his use, and concluded that the defendant, not regarding his said several promises, had not, *although often requested*, repaid the said sums, to the damage of the plaintiff. On *non assumpsit* pleaded, a verdict was given for the plaintiff, with *entire* damages; and it was moved in arrest of the judgment, and argued several times, that the promise to repay the eight guineas, if Barham did not do it, was a *collateral* promise to pay in default of another, and that the defendant was not a debtor, but only a surety in default of Barham, and that, consequently, a *special request* to the

v. Blanchard, 15 Mich. 292; *ex parte Williams*, 4 Yerg. (Tenn.) 579; *Walker v. Richards*, 39 N. H. 259; *Ruggles v. Gotton*, 50 Ill. 412.

¹ Roberts on Frauds, 215–223.

² 3 Lev. 363; and see 1 Roll. Abr. 27, 30, 32; 1 Roll. Rep. 275–6; Cro. Jac. 386, 500; 3 Bulst. 94; 1 Danv. Abr. 68; 1 Vent. 43, 268, 293, 311; 2 Vent. 30; 1 Salk. 23; 2 Saund. 136.

defendant ought to have been laid, and that *saepius requisitus fuit* was insufficient; that there should have been a notice that Barham had not paid, and a special request to the defendant; for the promise of the defendant was that he would pay it, if Barham did not; and *the damages being entire on the promises in both counts*, it was contended that the plaintiff could not have judgment. But it was held by the court that it was not a collateral promise to pay a debt for another, but that the whole *was one entire contract upon the sale*, and was in effect, that the plaintiff bought the gelding upon the condition that if he did not like him, he should receive back his money, and the defendant received the money upon the same condition; and that when the condition was performed by the disapproval of the gelding, and the returning of it to Barham, the contract was void and at an end, and the money was in the hands of the defendant as a debtor to the plaintiff as for money received to the plaintiff's use, and Barham was no more than a servant to receive the gelding, and to repay the money, and that by *his* not paying it, the plaintiff, as master, was the debtor, and upon this ground judgment was given for the plaintiff upon the *whole* declaration, the count upon the *indebitatus assumpsit* being considered good, and the judgment was afterwards affirmed in error. The statute of frauds was not in question in this case, the undertaking probably having been in writing; but the precise point could not have been more directly raised upon the statute, than it was in this instance upon the principles of pleading.

Sec. 96. **Rule in *Harris v. Huntback*.** — The necessity for the actual liability of the person undertaken for, was the point decided in *Harris v. Huntback*,¹ where the promise appeared

¹ 1 Burr, 371. But it cannot be assumed in an action between third parties that the promisor would set up the statute to defeat his liability. *Downey v. Hinchman*, 25 Ind. 453; *Dexter v. Blanchard*, 11 Allen (Mass.) 365. The protection afforded by the statute may be waived, and the privilege afforded by it being personal, it cannot be set up by a person not privy to the contract. *Fowler v. Burget*, 16 Ind. 341; *Ames v. Jackson*, 115 Mass.

508; *Chicago Dock Co. v. Kenzie*, 49 Ill. 289; *Aicarde v. Craig*, 42 Ala. 311; *Beal v. Brown*, 13 Allen (Mass.) 114; *Crawford v. Woods*, 6 Bush (Ky.) 200; *Sneed v. Bradley*, 4 Sneed (Tenn.) 301; *Hall v. Soule*, 11 Mich. 494; *Houser v. Lamont*, 55 Penn. St. 311; *Dung v. Parker*, 52 N. Y. 494; *Baltzen v. Nicolay*, 53 id. 467; *Garrett v. Garrett*, 27 Ala. 687; *Gadden v. Pierson*, 42 id. 370; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Huffman v.*

to be in writing, but upon the same rule in pleading of showing *specially* the collateral promise, and not relying upon the common *indebitatus assumpsit*, a similar doctrine was established. The cause came before the court upon a case reserved for their opinion in an action upon a general *indebitatus assumpsit*, in which the plaintiff declared upon two counts: the first for money lent and advanced by the plaintiff at the defendant's request; and the second for money laid out and expended by the plaintiff at the defendant's request; and the question upon the case stated was, whether the evidence supported the declaration. On the first count, the evidence produced was a note of the defendant's, in the following words: "3d December, 1751, Then received of Mr. Harris the sum of £19, on behalf of my grandson, which I promise to be accountable for on demand. Witness my hand, S. Huntback."

On the second count, the evidence was that one Davidson, coming to the plaintiff by the defendant's order, for money to pay workmen, the plaintiff refused to pay the money unless the defendant would sign a receipt. Whereupon the defendant wrote the following note: "Mr. Harris, at the earnest request of the gardener, the workmen wanting money greatly for the work at the woodhouses, this is to certify, that at my request you pay to Mr. Davidson, on the account of Master Hillier, for the workmen's use, the sum of £15, as witness my hand, S. Huntback." And a receipt was given by the said Davidson the gardener, to the plaintiff, on the plaintiff's paying him this £15.

It was contended, on behalf of the defendant, that *indebitatus assumpsit* would not lie upon a collateral undertaking; but it was clearly determined by the court, *that as there was no remedy against the infant, it was an original and not a collateral undertaking*; and *Buckmyr v. Darnall*¹ was cited, in which it was held, that *where no action will lie against the party, undertaken for, it is an original promise*.² Accord-

Ackley, 34 Mo. 277; *Kratz v. Stocke*, 42 id. 351. In *Rice v. Manley*, 2 Hun (N. Y.) 492, the plaintiff and one Stebbins entered into a verbal contract for the sale of cheese. The defendant by false representations, and by sending a false telegram in the name of the plaintiff, prevented Steb-

bins from performing the contract. In an action against him therefor, it was held that, unless there was a contract between the parties which could have been enforced, no action would lie against the defendant for his fraud.

¹ 2 Lord Raym. 1085; 6 Mod. 248.

² In such cases the debt is treated

ing to this case, it seems *not only necessary that the party for whom the promise is made should be liable, but that he should be or become liable at the time of the promise being made.* And by the opinions of the court in the same case, it also appears that *the liability and the promise ought to grow out of the same contract.*¹

SEC. 97. **Rule in *Buckmyr v. Darnall*.**—In *Buckmyr v. Darnall*, *ante*, which was an action of *assumpsit*, the plaintiff declared that the defendant, in consideration that the plaintiff, at his request, would let to hire, and deliver to one Joseph English, a gelding of the plaintiff's, to ride to Reading, in the county of Berks, undertook and promised the plaintiff, that the said Joseph would deliver the said gelding to the plaintiff. Upon *non assumpsit* pleaded, the case came to trial before HOLT, C. J., at Westminster Hall; and the counsel for the defendant insisting that the plaintiff ought to produce a note in writing of the promise within the statute of frauds, and the Chief Justice doubting, a case was made and ordered to be moved in court, to have the opinion of the other judges. And it was argued and insisted for the defendant, that the case was within the

as the debt of the promisor. *Walker v. Norton*, 29 Vt. 226; *Chicago &c. Canal Co. v. Liddell*, 69 Ill. 639; *Sanborn v. Merrill*, 41 Me. 467; *Whitcomb v. Kephart*, 50 Penn. St. 85; *Walker v. Hill*, 119 Mass. 249; *Duffy v. Wunsch*, 42 N. Y. 243; *Hull v. Brown*, 35 Wis. 652; *Allaire v. Crawford*, 2 John. (N. Y.) Cas. 52; *Adams v. Densey*, 6 Bing. 506; *Dorwin v. Smith*, 35 Vt. 69; *Goodspeed v. Fuller*, 46 Me. 141; *Stocking v. Sage*, 1 Conn. 518; *Chapman v. Ross*, 12 Leigh. (Va.) 565; *Tarr v. Northey*, 17 Me. 113; *Evans v. Mason*, 1 Lea (Tenn.) 26; *Conkey v. Hopkins*, 17 John. (N. Y.) 113; *Flemm v. Whitmore*, 23 Mo. 430; *Apgar v. Hiler*, 24 N. J. L. 812; *Barry v. Ransom*, 12 N. Y. 462; *Ferrell v. Maxwell*, 28 Ohio St. 383; *Comstock v. Morton*, 36 Mich. 277; *Beamon v. Russell*, 20 Vt. 205; *Baker v. Dillman*, 12 Abb. Pr. (N. Y.) 313; *Kingsley v. Balcom*, 4 Barb. (N. Y.) 131; *Wildes v. Dudlow*, L. R. 19 Eq. Cas. 198; *Hopkins v. Carr*, 31 Ind.

260; *Headrick v. Wiseheart*, 57 Ind. 123; *Tarbell v. Stevens*, 7 Iowa, 163; *Rice v. Barry*, 2 Cr. (U. S. C. C.) 447; *Files v. McLeod*, 14 Ala. 611.

¹ But where the promise arises from a new consideration, moving either from the promisee, *Arnold v. Stedman*, 45 Penn. St. 186; *Burr v. Wilcox*, 13 Allen (Mass.) 369; *Russell v. Babcock*, 14 Me. 138, or the person for whose benefit the promise is made, it is not, as we shall hereafter see, within the statute. *Presbyterian &c. Soc. v. Staples*, 23 Conn. 544; *Colt v. Root*, 12 Mass. 229; *Helms v. Kearns*, 40 Ind. 124; *Balliet v. Scott*, 32 Wis. 174; *Welch v. Kenney*, 49 Cal. 49; *Taylor v. Preston*, 79 Penn. St. 436; *Besshears v. Rowe*, 46 Mo. 501; *Johnson v. Knapp*, 36 Iowa, 616; *Seaman v. Hasbrouck*, 35 Barb. (N. Y.) 151; *Runde v. Runde*, 58 Ill. 232; *Urquhart v. Brayton*, 12 R. I. 169; *Mitchell v. Griffin*, 58 Ind. 159; *Maxwell v. Haynes*, 41 Me. 559.

statute, for it was the promise to answer for the default and miscarriage of the person the horse was lent to. That the very letting out and delivery of the horse to English implied a contract by English to redeliver him, and he was bound by law so to do, and consequently the defendant's promise was to answer for the default of another. And the counsel for the defendant reminded his Lordship of his own ruling, that where an action will lie against the party himself, there, an undertaking by a third person is within the statute; but that where no action will lie against the party himself, it is otherwise.¹ And he said he agreed, that if a man should say to another, do you build a house for J S and I will pay you; that case is not within the statute, because there J S is not liable. But the case is not more than this, if a man should

¹ This is still the rule, and the decisive test as to whether the undertaking is collateral or original, and the statute does not require the promise of a defendant to be in writing where it is in effect to pay his own debt, though that of a third person be incidentally guaranteed: it applies to a mere promise to become responsible, but not to actual obligations. *Malone v. Keener*, 44 Penn. St. 107; *Creel v. Bell*, 2 J. J. Marsh (Ky.) 309; *Alcalda v. Morales*, 3 Nev. 132; *Gold v. Phillips*, 10 John. (N. Y.) 412; *Wolff v. Koppel*, 2 Den. (N. Y.) 368; *Therasson v. McSpedon*, 2 Hilt. (N. Y. C. P.) 1; *Stoddard v. Graham*, 23 How. (N. Y.) Pr. 518; *Phillips v. Gray*, 3 E. D. S. (N. Y. C. P.) 69; *Clymer v. De Young*, 54 Penn. St. 118; *Rollison v. Hope*, 18 Tex. 446; *Barringer v. Warden*, 12 Cal. 311; *Williams v. Little*, 35 Vt. 323; *Story v. Menzies*, 4 Chand. (Wis.) 61; *Cotterill v. Stevens*, 10 Wis. 422; *Cook v. Barrett*, 15 Wis. 596. A promise by a company, or its agent, to pay an account due from the company, which has been assigned to a third person, is not within the statute of frauds, and need not be in writing. *Mt. Olivet Cemetery v. Shubert*, 2 Head (Tenn.) 116. The rule being that if the person on whose account the promise is made is not liable at all, the under-

taking is original, and is valid, although by parol. *Wallace v. Wortham*, 25 Miss. 119; *Mease v. Wagner*, 1 McCord (S. C.) 395; but if any liability for the debt remains against the party for whose benefit the promise was made, it is a collateral undertaking. *Wainwright v. Straw*, 15 Vt. 215; *Perkins v. Goodman*, 21 Barb. (N. Y.) 218; *Blank v. Dreher*, 25 Ill. 331; *Eddy v. Roberts*, 17 id. 505; *Bronson v. Stroud*, 2 McMull. (S. C.) 372; *Clay v. Walton*, 9 Cal. 328; *Dugan v. Cowzleman*, 31 Mo. 424. Thus, in the last case, it was held that where M and S had put to livery a horse which was entrusted to them by C for the purpose of trial before purchasing, and the credit was given to M and S, a subsequent verbal promise of C to pay for the keeping to the liveryman will be within the statute and void. So where A had taken a contract to do a piece of work for B, but not being paid abandoned the work, and afterwards resumed it, and did certain extra work upon the promise of C to pay him, and the evidence showed that he still looked to B for his pay, and not to C, except as guarantor, it was held that such promise was void under the statute of frauds, as not being in writing, both as to the extra work and that done under the contract with B. *Bresler v. Pendell*, 12 Mich. 224.

say, do you let J S have goods, and if he does not pay you, I will: this is within the statute, because an action will lie against J S for the money for the goods; or, if a man shall say, take J S into your service, and if he does not serve you faithfully, or if he wrongs you, I will be responsible, that is also within the statute.¹

Upon the first motion and argument upon the case, the three judges against POWYS, seemed to be of opinion, that the case was not within the statute, because English was not liable under the contract; but if any action could be maintained against him, it must be for a subsequent wrong in detaining the horse, or actually converting it to his own use. And POWELL, J., said that the rule, of what things shall not be within the statute, is not confined to these cases only, where there is no remedy at all against the other, but where there is no remedy against him *on the same contract*. This case is just like that wherein a man says, send goods to such a one, and I will pay you; that is not within the statute, for the seller does not trust the person he sends the goods to. So here, the stable-keeper only trusted the defendant, and an action on the contract will not lie against English, but for a tort subsequent; he may be charged in detinue, or trover and conversion, which are collateral actions.

POWYS, J., said, that there was a trust to English, for the very lending of the horse necessarily implied a trust to the person he was lent to, and consequently the defendant in this case was to answer for the default of another, and was within the statute. POWELL, J., agreed, that if a man should say, lend J S a horse, and I will undertake he shall pay the hire

¹ A naked parol promise to pay the debt of, or to be responsible for the acts of another in whatever form it is made, is within the statute. The question always is whether the promise is collateral or original. If the former, it is not enforceable. *Murphy v. Merry*, 8 Blackf. (Ind.) 295; *Smith v. Stephens*, 3 Ind. 332; *Johnson v. Morris*, 21 Ga. 238; *Bumford v. Purcell*, 4 Greene (Iowa) 488; *Helm v. Logan*, 4 Bibb (Ky.) 78; *Smith v. Fah*, 15 B. Mon. (Ky.) 443; *Elder v. Warfield*, 7 H. & J. (Md.) 391; *Wyman v. Gray*, id. 409; *Elliott v. Giese*, id. 457; *Rose v.*

Johnson, 2 N. J. L. 5; *South v. Toomey*, id. 98; *Ayres v. Herbert*, 3 N. J. L. (2 Pen.) 662; *Caston v. Moss*, 1 Bailey (S. C.) 14; *Hoppock v. Wilson*, 4 N. J. L. 149; *Dilts v. Parke*, id. 219; *Youngs v. Shough*, 15 N. J. L. (3 Green) 27; *Mundy v. Ross*, id. 466; *Jackson v. Rayner*, 12 Johns. (N. Y.) 291; *Clarke v. Russel*, 3 Dall. (Penn.) 415; *Boyce v. Owens*, 2 McCord (S. C.) 208; *Richardson v. Richardson*, 1 McMull. (S. C.) 280; *Campbell v. Findley*, 3 Humph. (Tenn.) 330; *Caperton v. Gray*, 4 Yerg. (Tenn.) 563.

of it; or send J S goods, and I will undertake he shall pay you; that these cases would be within the statute; and agreed with POWYS, that if any trust were given to English, then the case would be within the statute. But a majority of the court held, that there was no credit given to English; and HOLT, C. J., agreed with them, that if there had been, this promise would have been an additional security, and within the statute. And HOLT, C. J., said, that if a man should say, "let J S ride your horse to Reading, and I will pay you the hire," that is not within the statute, any more than if a man should say, "deliver clothes to J S, and I will pay you." He said also that a bailee of a horse for hire is not bound to redeliver him at all events, but if he be robbed of him without fraud in him, he is excused, and that so it was ruled in the case of *Coggs v. Bernard*.¹

The last day of the term, HOLT, C. J., delivered the opinion of the court. He said that the question had been proposed at a meeting of judges, and that there had been a great variety of opinions between them, because the horse was lent wholly upon the credit of the defendant, but that the judges of this court were all of opinion, that the case was within the statute. The objection that was made was, that if English did not deliver the horse, he was not chargeable in an action upon the promise, but in trover or detinue, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered that English may be charged on the bailment in detinue on the original delivery, and detinue is the adequate remedy, and consequently, this promise by the defendant is collateral, and is within the reason and the very words of the statute; and is as much so as where a man is indebted, and J S in consideration that the debtee would forbear the man, promises to pay him the debt; such a promise

¹ Lord Raym. 216. It hardly needs the weight of supporting cases to sustain the rule that, where *any* credit is given to the person for whose benefit the promise is made, the undertaking is collateral, as the proposition is self-evident. *Whitman v. Bryant*, 49 Vt. 512; *Norris v. Graham*, 33 Md. 56; *Welch v. Marvin*, 36 Mich. 59; *Walker v. Richards*, 39 N. H. 259; *Jack v. Morrison*, 48 Penn. St. 113. But where

the circumstances warrant it, and the credit is *jointly* given to both as principals, the undertaking is original as to both, as in such a case neither can be surety for the other. *Swift v. Pierce*, 12 Allen (Mass.) 136; *Wainwright v. Straw*, 15 Vt. 215; *Gibbs v. Blanchard*, 15 Mich. 292; *Eddy v. Davidson*, 42 Vt. 56; *Hetfield v. Dow*, 27 N. J. L. 440; *ex parte Williams*, 4 Yerg. (Tenn.) 579.

is void, unless it be in writing. Suppose a man comes with another to a shop to buy goods, and the shopkeeper should say, "I will not *sell* him the goods, unless you will undertake he shall pay me for them," such promise is within the statute; otherwise, if the promisor had been the person to pay for the goods originally. So here, *detinue* lies against English, the principal; and the plaintiff, having this remedy against English, cannot have an action against the defendant, the undertaker, unless there had been a note in writing.

This case mainly depended on the question, whether, *at the instant of making the promise, there was or was not an existing liability in the party undertaken for*. And it was the opinion of all the judges upon the first argument, except POWYS, that the mere delivery of the horse to English generated no right of action, nor could be regarded as any contract made with him; but that the right of action would arise, if it arose at all, against the deliverer, by some matter subsequent to the agreement, as a demand of the horse and a refusal, affording a ground for the remedy by *trover*, which would depend upon some act of detainment or conversion. But although this could not have been denied if *trover* had been the only remedy, yet, as *detinue* also lay, the gist of which was the original delivery, implying a contract for the redelivery, and this implied contract, and the act of delivery, and also the promise by the defendant, were all coincident in time, there was every circumstance to support the construction of a collateral promise.

SEC. 98. **Form of Promise not Decisive of its Character.**—The form of expression used in making the promise does not in all cases necessarily determine the question as to whether the promise is an original or collateral undertaking,¹

¹ *Skinner v. Conant*, 2 Vt. 453; *Barrett v. McHugh*, 128 Mass. 165. If a promise is collateral to the agreement of another, it is immaterial whether it was made before or after the original contract was entered into, as in either event it is within the statute unless in writing. *Glenn v. Lehnen*, 54 Mo. 45. Where B selected goods of A, and A refused to deliver them to B until he saw C, and C

agreed to pay for them, if delivered to B, in case B did not, it was held that the engagement of C was collateral and void under the statute of frauds, unless in writing, and that there was no joint liability of B and C. *Connolly v. Kettlewell*, 1 Gill (Md.) 260. A promise to make or indorse a note with others to pay a debt of a third person is within the statute: *State v. Shinn*, 42 N. J. L. 138.

nor does the circumstance that the promisee charges the debt to the promisor on his books,¹ determine the question, *but the circumstances attending the transaction at the time when the promise was made* are to be looked to, and from them in connection with the language employed by the promisor, the question as to whether the promisee gave credit *solely* to the promisor, *and had a right to do so*, is to be determined, and in determining this question the intention of the promisee to give credit solely to the promisee, is not material, and he cannot be asked to whom credit was given; but must state the promise and the circumstances attending the making of it, and from these the real intention of the parties are to be found.² It is for the jury to find what the real substance and spirit of the undertaking between the party was, and if there is *any* evidence to sustain their finding, it will be sus-

148. A promise, in consideration that the promisee incurs a liability to a third person, is an original promise and not within the statute of frauds. *Underhill v. Gibson*, 2 N. H. 352; *Doane v. Newman*, 10 Mo. 69.

¹ *Barrett v. McHugh*, *ante*. In *Green v. Disbrow*, 56 N. Y. 334, the goods for which recovery was sought were delivered and charged to the defendant's son, on the books of the plaintiff, and it was claimed that this was conclusive evidence that they were sold on his credit, but the plaintiff claimed that they were furnished at the special instance and request of the defendant and were charged to the defendant's son for convenience, and the court held, 7 Lans. (N. Y.) 389, that, while the fact that the goods were so charged *prima facie* established the fact that the *sole credit* was not given to the defendant, yet that it was not conclusive and might be explained by showing that, while the *sole credit* was given to the defendant, yet they were charged to the son to distinguish the article sold from those sold to the defendant personally. "It is always competent," says MILLER, P. J., "to explain acts of this character, and where satisfactorily done, there is no reason why they should bear a different interpre-

tation from what is authorized by the evidence."

² *Allen v. Scarff*, 1 Hilt. (N. Y. C. P.) 209. In *Hazen v. Bearden*, 4 Sneed (Tenn.) 48, the defendant authorized goods to be sold and delivered to a third person, and agreed to be responsible therefor. The goods were in fact charged to the third person, and the account presented to him for payment. It was held that these facts were not conclusive to discharge the defendant from liability under the statute of frauds, but that the plaintiff might satisfy the jury, if he could, that the credit was nevertheless given to the defendant; and a verdict for the plaintiff was sustained. The construction which the parties themselves place upon an agreement to be responsible for goods delivered to a third person, is important and often conclusive of its true character. If the credit is not given to the person making such agreement, his undertaking is collateral, and must be in writing. *Dixon v. Frazee*, 1 E. D. S. (N. Y. C. P.) 32. An agreement by one partner that goods purchased of the firm may be applied upon the debt of one of the partners is not within the statute. *Rhodes v. McKean*, 55 Iowa, 547.

tained.¹ The effect of the form of expression, in determining whether a promise is collateral or original, is illustrated in an early English case.² In that case, HOLT, C. J., said: "If A promises B, who is a surgeon, that if he will cure C of a wound, he 'will see him paid,'³ this is only a promise to pay *if C does not*, and therefore it ought to be in writing. But if A promise in such a case that he will be B's pay-master, whatever he shall deserve, it is immediately the debt of A, and he is liable without writing. In the case first put it is clear that B will have a double remedy; in the other case the credit is considered as being given solely to A, and even though C, by *subsequent* circumstances should render himself liable for the debt, yet *such liability not having existed at the time of the promise* would have no effect upon A's liability upon his promise.⁴ So if A promises B, that if he will do a certain act, C shall pay him a certain sum, or that, if C does not pay him, he (A) will, *this is not a collateral promise, unless C was privy to the contract*, and recognized himself as debtor also, because A, being the sole debtor, his promise is merely to pay his own debt." It is not possible to lay down any rule in the abstract for the construction of these expressions, but they must go to the jury, together with the attendant circumstances, for them to find to whom the credit was really given. And in determining the intention of the parties, the situation, circumstances, and general responsibility of the party promising will be regarded. But as bearing upon the question to whom credit was given, it is not competent for the plaintiff to show the pecuniary inability of the person in whose behalf the promise was made, as tending to show the improbability of his having given any credit to him, nor that the defendant had paid debts of such person under similar circumstances.⁵

SEC. 99. **Attendant Circumstances to be Regarded.** Rule in **Anderson v. Hayman.** — The doctrine stated *supra* that the attendant circumstances, the situation and general responsibility

¹ Heywood v. Styles, 124 Mass. 275.

⁴ Green v. Disbrow, *ante*.

² Watkins v. Perkins, Lord Raym. 224.

⁵ Anderson v. Hayman, 1 H. Bl. 120; also by Keate v. Temple, 1 B. & P. 158.

³ Green v. Disbrow, 56 N. Y. 334; reversing the ruling on this point, in the General Term, 7 Lans. 389.

of the promisor will be looked at, is well illustrated and fully supported by an English case.¹ In that case the plaintiff was a woollen draper in London, and employed one Biffin as a rider (commercial agent) to receive orders from his customers in the country. The defendant requested Biffin to write the plaintiff, to request him to supply the defendant's son, who traded in the West Indies, with whatever goods he might want, on his, the defendant's credit, saying at the same time, "use my son well, charge him as low as possible, and I will be bound for the payment of the money, as far as £800 or £1000." Biffin accordingly wrote to the plaintiff the following letter: "Mr. Hayman of this town says, his son will call on you, and leave orders; and he has promised me to see you paid, if it amounts to £1000. N.B. If deal for twelve months' credit, and pay in 6 or 8 months, expects discount in proportion." Soon afterwards the son received the goods from the plaintiff to the amount of £800, which were delivered to him in consequence of the engagement of the father above mentioned. The son was debited in the plaintiff's books, and being applied to for payment, wrote an answer to the plaintiff, as follows: "Your favor of the 27th past has been forwarded to me from Ostend, in answer to which I can only say, that I understand your credit for the goods was twelve months, which was also mentioned by your rider to my father. I shall at this rate make you remittances for the different parcels, as they become due."

The son afterwards became a bankrupt, and this action was brought against the father to recover the value of the goods. — HEATH, J., who tried the cause, directed the jury to consider whether the plaintiff gave credit to the defendant alone, or to him *together with his son*; that in the latter case, they should find a verdict for the defendant; in the former, for the plaintiff; being of opinion, that if any credit was given to the son, the promise of the defendant, not being in writing, was void by the statute of frauds. A verdict was found for the defendant, and a rule *nisi* was obtained to set it aside; but the court were clearly of opinion that this promise was within the statute, as it appeared by the letter of Hayman the younger, that credit was given to him, as well

¹ Anderson v. Hayman, 1 H. Bl. 120.

as to the defendant his father, and the rule was accordingly discharged.

SEC. 100. Rule in Keate v. Temple.—In a subsequent case¹ it appears that, in collecting the true state of the transaction, and ascertaining the fact, whether the party promising intended only to come in aid of the liability of the person on whose account he promised, or to become himself immediately responsible, the court will not only consider the expressions used, but will also regard the particular situation of the defendant at the time of his undertaking; and will compare the amount of the sum in question with the circumstances of the party. This action was brought for goods sold and delivered, and work and labor, with the common money counts, to which the general issue of *non-assumpsit* was pleaded. The cause was tried before LAWRENCE, J. It appeared that the plaintiff was a tailor and slopseller at Portsmouth, and the defendant the first lieutenant of his majesty's ship, the *Boyne*. When the ship came into port, the defendant applied to a third person to recommend a slopseller who might supply the crew with new clothes, saying, "he will run no risk, I will see him paid"; the plaintiff being accordingly recommended, the defendant called upon him, and used these words, "I will see you paid at the pay-table; are you satisfied?" The plaintiff answered, "perfectly so." The clothes were delivered on the quarter-deck of the *Boyne*; slops are usually sold on the main-deck; the plaintiff produced samples to ascertain whether his directions had been followed; some of the men said that they were not in want of any clothes, but were told by the defendant that if they did not take them he would punish them; and others, who stated that they were only in want of part of a suit, were obliged to take a whole one, with anchor buttons to the jacket, such as are usually worn by petty officers. The clothing of the crew in general was light and adapted to the climate of the West Indies, where the ship had been last stationed. Soon after the delivery the *Boyne* was burnt, and the crew dispersed into different ships on that occasion. The plaintiff having expressed some apprehensions for himself, the defendant said to him, "Captain Grey (the captain of the

¹ *Keate v. Temple*, 1 B. & P. 158.

Boyne) and I will see you paid; you need not make yourself uneasy." After this the commissioner came on board the Commerce de Marseilles, in order to pay the crew of the Boyne, at which time the defendant stood at the pay-table, and having taken some money out of the hat of the first man who was paid, gave it to the plaintiff; the next man refused to part with his pay, and was immediately put in irons. The defendant then asked the commissioners to stop the pay of the crew, who answered that it could not be done.

The judge in his directions to the jury said, that if they were satisfied on the evidence, that the goods in question were advanced on the credit of the defendant, *as immediately responsible*, the plaintiff was entitled to a verdict; but if they believed *that at the time when the goods were furnished, the plaintiff relied on being able, through the assistance of the defendant, to get his money from the crew*, they ought to find for the defendant.¹ The jury returned a verdict for the plaintiff for £576 7s. 8d., the whole amount of his claim. A rule for a new trial having been obtained, on the ground of the defendant's undertaking being within the statute of frauds, the counsel for the plaintiff contended that the only question in the case had been left to the jury, and decided by them, viz., whether the sailors were liable in the first instance, and the defendant only came in aid of their liability; or whether the defendant was immediately responsible. They said that if the Boyne had been burnt before the delivery of the goods, the plaintiff would have had no communication with the crew, and of course no ground of action against them: if, therefore, they were not liable on the original contract, the subsequent delivery would not shift the credit upon them.

EYRE, C. J., said: "There is one consideration independent of every thing else, which weighs so strongly with me, that I should wish the evidence to be once more submitted to a jury. The sum recovered is £576 7s. 8d., and this against a lieutenant in the navy: a sum so large, that it goes a great

¹ The question to whom the credit was given is for the jury. *Pettit v. Braden*, 55 Ind. 201; *Bloom v. McGrath*, 53 Miss. 249; *Moshier v. Kit-chell*, 87 Ill. 18; *Castleman v. Harnish*, 76 Penn. St. 97; *Dean v. Tallman*, 105 Mass. 443. But this case shows that in determining the question they must regard the circumstances attending the transaction.

way towards satisfying my mind, that it never could have been in the contemplation of the defendant to make himself liable, or of the slopseller to furnish the goods on his credit, to so large an amount. I can hardly think that, had the Boyne not been burnt, and the plaintiff been asked whether he would have the lieutenant or the crew for his pay-master, but that he would have given the preference to the latter. The circumstances of this case create some prejudices against the defendant, but which I think capable of explanation. There is some appearance of harshness in making the men purchase these clothes against their inclination. But it was in evidence, that though they were pretty well clothed, yet their clothes were adapted to a warm climate, rather than to the service in which they were to be engaged. It was therefore the bounden duty of the officer to take some course to oblige the crew to purchase proper necessaries. We all know that a sailor is so singular a creature, so careless of himself, that he cannot, though his life depend upon it, be prevailed upon, without force, even to bring up his hammock upon deck to be aired. We know that he will risk any danger, in order to employ his money in a way that he likes, rather than let it out in that provident method which his situation may require. The whole of the imputation then on the defendant and Captain Grey amounts to this, that when the men were to be clothed, they wished them to be somewhat well-dressed. I do not know but that this circumstance may have had some influence with the jury. But I do not feel the force of it, when opposed to the weight of the evidence on the other side, so as to make the officer liable for so large a sum. From the nature of the case it is apparent, that the men were to pay in the first instance; the defendant's words were, 'I will see you paid at the pay-table; are you satisfied?' and the answer then was, 'perfectly so.' The meaning of which was, that however unwilling the men might be to pay themselves, the officer would take care that they should pay. The question is, whether the slopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund to giving credit to the lieutenant, who, if we are to judge of him by others in the same situation, was

not likely to be able to raise so large a sum. Considering the whole bearing of the evidence, and that the learned judge who tried the cause has not expressed himself satisfied with the verdict, I think this a proper case to be sent to a new trial."

SEC. 101. Statute does not Apply to Guaranty of Specialty Debts.—The statute applies only to promises, and does not apply to instruments under seal.¹ Therefore it has been held that a promise by the vendor of railroad bonds, that if a person will buy them he will guarantee them, is an original undertaking, and not within the statute,² and that a guaranty by one railroad company of the bonds of another is not within the statute, and is enforceable, although it is claimed that such guaranty is *ultra vires*, and that the consideration does not appear.³

SEC. 102. Must be Consideration for the Promise, Instances of.—There must be a sufficient consideration for a promise to pay the debt of another as well as for any other promise, otherwise it will not be binding though reduced into writing. A guaranty must have a consideration to support it. If it is made at the time of the contract to which it relates so as to constitute a part of the consideration of the contract, it is sufficient; but if the guaranty is subsequent to the contract, there must be a distinct consideration to support it,⁴ otherwise it is void.

¹ *Williams v. Springs*, 7 Ired. (N. C.) L. 384; *Ward v. Ely*, 1 Dev. (N. C.) L. 372; *Livingston v. Tremper*, 4 John. (N. Y.) 416.

² *Allen v. Eighme*, 21 N. Y. S. C. 559.

³ *Arnot v. Erie R. R. Co.*, 67 N. Y. 315.

⁴ *Bason v. Hughart*, 2 Tex. 476; *Beebe v. Moore*, 3 McLean (U. S.) 387; *How v. Kimball*, 2 id. 103; *Leonard v. Vredenburg*, 8 John. (N. Y.) 29; *Colburn v. Tolles*, 14 Conn. 341; *Cook v. Elliott*, 34 Mo. 586; *Lines v. Smith*, 4 Flo. 47; *Tennay v. Prince*, 4 Pick. (Mass.) 383; *Joslyn v. Collinson*, 26 Ill. 61; *Ware v. Adams*, 24 Me. 177; *Gilligan v. Boardman*, 29 id. 79; *McKinney v. Guilter*, 4 McCord (S. C.) 409. Where the promise is contempo-

aneous with the making of the contract, the consideration of the contract supports the promise; but where the promise is made subsequently thereto, it is distinct therefrom, and requires a distinct consideration. Thus, a surety for the payment of rent signed an agreement indorsed upon the back of the lease as follows: "I guarantee the payment of the rent, as stipulated by said F, in case of non-payment by him." In an action by the lessor, against the lessee and surety, for the rent, it was held that the undertaking of the guarantor was distinct from that of the principal, and collateral thereto, and that the parties were improperly joined: *Virden v. Ellsworth*, 15 Ind. 144. In such a case, if there is no distinct consideration,

Thus, when A has sold and delivered goods to B, and afterwards C promises A in writing to pay for them, this promise

the promise is within the statute. *Furbish v. Goodnow*, 98 Mass. 296; *Fowler v. Moller*, 4 Bos. (N. Y.) 149. It was held that a promise by the assignee of a lease to the landlord, that if the latter will permit him to remain in possession of the premises, he will pay the arrears of rent due from the lessee, is a collateral promise, and if not in writing, is void by the statute of frauds. In *Leonard v. Vredenburg*, 8 John. (N. Y.) 29, where A applied to B for goods on credit; and B refused to let him have them without security, on which A drew a note for the amount, under which C wrote "I guarantee the above," and the goods were then delivered, it was held that this was a collateral undertaking of C; but that, as the transaction was one and entire, the consideration passing between A and B was sufficient to support as well the promise of C as that of A, and no distinct consideration passing between B and C was necessary. In *Bailey v. Freeman*, 11 id. 221, B, by a written agreement, promised to deliver to A a certain quantity of goods, and also to pay the costs on an execution issued by A against B, which B was to have returned *nulla bona*; and F, at the bottom thereof, signed a written guaranty as follows: "I guarantee the performance of the above agreement," it was held: 1. That the guaranty of F was an original collateral agreement, and not a promise to pay a previously subsisting debt of B. 2. That the agreement and the guaranty formed an entire contract, including the consideration stated in the agreement to which the guaranty referred; and that, if no consideration had been expressed in the principal agreement, it might be shown by parol. In *Wakefield v. Greenwood*, 29 Cal. 597, it was held that a promise by a forwarder of goods to a common carrier to pay any draft on himself by the consignee for the transportation of the goods, was a collateral under-

taking, and within the statute. In *Crane v. Bullock*, R. M. Charl. (Ga.) 818, a married woman drew a bill on A, who accepted the same, payable "when in funds." Afterwards B, who was trustee of the separate property of the drawer under a marriage settlement, wrote upon the bill, "I will have this paid out of the next crop," and signed his name as trustee. In an action by the payee against B, it was held that there was no consideration for the promise, and that it was within the statute of frauds. A writing in this form: "Mr. J S will apply to you for the rent and disposal of your building now in charge of D M; any arrangement he can make with you as regards renting the same I will be responsible for," signed "J D S," is a direct and original promise to pay, if such arrangement should be made, and not collateral: *Bates v. Starr*, 6 Ala. 697. And, generally, a parol agreement of a grantee to pay a debt of the grantor, made as part of the consideration, is not an undertaking to "answer for debt or default of another": *Jennings v. Crider*, 2 Bush (Ky.) 322; *McLaren v. Hutchinson*, 22 Cal. 187; *Ruhling v. Hackett*, 1 Nev. 360; *Berry v. Doremus*, 30 N. J. L. 399; *Seaman v. Hasbrouck*, 35 Barb. (N. Y.) 151; but if made after the debt is contracted, it is collateral. Thus, while the mother of the defendants resided in the plaintiff's house at a stipulated annual rent, the defendants promised, verbally, to pay the rent while she continued to occupy it, it was held that this promise was collateral, and consequently void, because the contract had already been made, and its performance entered upon by the mother and the plaintiff, so that it could not be said that the defendants' promise was based upon the original consideration, or that credit was given solely to him: *Moses v. Norton*, 36 Me. 113.

is a mere *nudum pactum* and void, because it was so at the common law, and the statute makes no alteration.¹ But if C had requested A to forbear to sue B for the debt, and A had forbore accordingly, that was a good consideration at the common law to support such promise,² and is good since the statute if the promise be in writing,³ but not otherwise. Where the contract is in writing, any consideration in the nature of forbearance,⁴ as the continuance of an action⁵ or any postponement of the promisee's remedy is sufficient.⁶ But this does not seem to be the case where the promise is made to secure delay in the enforcement of a final process, as an execution,⁷ although there seems to be no good reason for this distinction. In order that a forbearance of suit may be a good consideration, it must appear that the promisee had an immediate cause of action *at the time when the promise was made*,⁸ and it must also be shown that the promisee *agreed* to forbear, and the mere circumstance that he did so does not suffice,⁹ although actual forbearance is *prima facie* proof of an agreement to do so,¹⁰ and the burden is upon the promisor to show that no such agreement was in fact made.¹¹ Where the promisor is to

¹ *Sadler v. Hawkes*, 1 Roll. Abr. 27 Pl. 49; *Forth v. Stanton*, 1 Wms. Saund. 227; *Barrell v. Trussell*, 4 Taunt. 117; *French v. French*, 2 Man. & Gr. 644; *Boyd v. Moyle*, 2 C. B. 844; *Saunders v. Wakefield*, 4 B. & Ald. 595; *Pillans v. Van Mierop*, 3 Burr. 1663; *Westhead v. Sproson*, 30 L. J. Ex. 265.

² *Sadler v. Hawkes*, 1 Roll. Abr. 27.

³ *King v. Wilson*, Str. 873; *Fish v. Hutchinson*, Bull. N. P. 281; 2 Wils. 94.

⁴ *Harrington v. Rich*, 6 Vt. 666; *Pratt v. Humphrey*, 22 Conn. 317; *Smith v. Finch*, 3 Ill. 321; *Taliaferro v. Roff*, 2 Call. (Va.) 258; *Rann v. Hughes*, 7 T. R. 350; *Thomas v. Croft*, 2 Rich. (S. C.) 113; *Barber v. Fox*, 2 Saund. 136; *Martin v. Black*, 20 Ala. 309; *Farish v. Wilson*, Peake, 73; *Killian v. Ashley*, 24 Ark. 511; *Philpot v. Briant*, 4 Bing. 717; *Kean v. McKinsey*, 2 Penn. St. 30; *McAlvey v. Noble*, 13 Rich. (S. C.) 330; *Sage v. Wilcox*, 6 Conn. 81; *Kershaw v. Whittaker*, 1 Brev. (S. C.) 9.

⁵ *Stewart v. McGuin*, 1 Cow. (N. Y.) 99; *Thomas v. Croft*, 2 Rich. (S. C.) L. 113; *Etting v. Vanderlyn*, 4 John. (N. Y.) 237; *Mapes v. Stanley*, Cro. Jac. 183. But see, holding that a promise to pay if the creditor would *discontinue* an action he had brought against the principal debtor is not sufficient, *Nelson v. Boynton*, 3 Met. (Mass.) 396; *Lieber v. Levy*, 3 Met. (Ky.) 292.

⁶ *Templeton v. Bascom*, 33 Vt. 132; *Bunting v. Darbyshire*, 75 Ill. 408.

⁷ *McKinney v. Guilter*, 4 McCord (S. C.) 409.

⁸ *Martin v. Black*, 20 Ala. 309.

⁹ *Sage v. Wilcox*, 6 Conn. 81; *Breed v. Hillhouse*, 7 id. 523; *McCorney v. Stanley*, 8 Cush. (Mass.) 85; *Walker v. Sherman*, 11 Met. (Mass.) 170; *Crofts v. Beale*, 11 C. B. 172.

¹⁰ *Breed v. Hillhouse*, *ante*.

¹¹ *Watson v. McLaren*, 19 Wend. (N. Y.) 557; *Jones v. Palmer*, 1 Dougl. (Mich.) 379; *Miller v. Cook*, 23 N. Y. 495; *Connecticut & C. Ins. Co. v. Cleveland & C. R. R. Co.*, 41 Barb. (N. Y.)

derive a direct benefit from the forbearance of a person to enforce his claim, it affords a good consideration for the promise. Thus it has been held that a promise made by one creditor to pay the claim of another against their mutual debtor, if the latter would forbear testing the validity of a judgment which the former had obtained against the debtor, is an original undertaking, and not within the statute.¹ So where A, having shipped goods on a vessel which were damaged on the passage, was about to call the port-warden to view the goods in order to charge the ship-owners with the loss, and the agent of the ship-owners promised to pay him the amount of the loss if he would sell the goods at auction without such view, it was held that the promise was not within the statute.² But where the indorser of a note, who had been discharged from his liability thereon by the laches of the holder, promised him to pay the note if he would forbear to sue the maker, it was held that there was no such independent consideration as would take the promise out of the statute.³ A promise in consideration that the creditor will forbear attaching the property of the debtor,⁴ or will stay proceedings on an execution he was about to levy on the debtor's property, is within the statute.⁵ But it has been held that a promise to pay any deficiency, etc., in consideration that a mortgagee would stay the execution of a foreclosure judgment is not within the statute where the party making the promise has an interest to be subserved.⁶ A parol promise of a husband to pay a debt of his wife,⁷ or of a wife to pay a joint bond of herself and her husband, the bond

9; *Caldwell v. McKain*, 2 N. & M. (S. C.) 555; *Woodward v. Pickett*, *Dudley* (S. C.) 30; *Brown v. Bussey*, 7 *Humph. (Tenn.)* 573; *Hall v. Rodgers*, id. 536; *Cooper v. Dedrick*, 22 *Barb. (N. Y.)* 516; *Day v. Elmore*, 4 *Wis.* 100; *Cheney v. Cook*, 7 *Wis.* 413.

¹ *Smith v. Rogers*, 35 *Vt.* 140; *Ferris v. Barlow*, 1 *Aik. (Vt.)* 100; *Templeton v. Bascom*, 33 *Vt.* 132; *Pratt v. Humphrey*, 22 *Conn.* 317; *Fish v. Thomas*, 5 *Gray (Mass.)* 45.

² *Travis v. Allen*, 1 *S. & P. (Ala.)* 192.

³ *Peabody v. Harvey*, 4 *Conn.* 119;

Huntington v. Harvey, 4 id. 124; *Elison v. Wischhart*, 29 *Ind.* 32; *Jones v. Walker*, 13 *B. Mon. (Ky.)* 356; *Turner v. Hubbell*, 2 *Day (Conn.)* 457.

⁴ *Waldo v. Simonson*, 18 *Mich.* 345.

⁵ *Van Slyck v. Pulver*, H. & D. *Supp. (N. Y.)* 47; *Stern v. Drinker*, 2 *E. & G. (N. Y. C. P.)* 401; *Durham v. Arledge*, 1 *Strobh. (S. C.)* 5.

⁶ *Johnson v. Noonan*, 16 *Wis.* 687.

⁷ *Bagley v. Sasser*, 2 *Jones (N. C.)* *Eq.* 350; *Miller v. Long*, 45 *Penn. St.* 350; *Cole v. Shurtliff*, 41 *Vt.* 311.

being void as to herself,¹ is within the statute, and the relation of the parties affords no consideration therefor.

SEC. 103. Consideration Need not Move Directly Between Parties. — It is not necessary, if the promise is a parol or in writing, that there should be a consideration directly moving between the persons giving and receiving the guaranty. *It is enough if the person for whom the guarantor becomes surety has benefit, or the person to whom the guaranty is given suffers inconvenience* as an inducement to the surety to become guarantor for the principal debtor.² If the promise was made upon a consideration which was good at the time the promise was made, the fact that it subsequently fails does not impair the validity of the promise or bring it within the statute.

SEC. 104. Consideration must be New. — The promise must be made on a new consideration; a past or executed consideration is bad.³ But a promise on a future or executory consideration is good, although an existing debt is guaranteed against. Thus, where the defendant gave the following note to the plaintiff which he dated and signed: "I hereby guarantee the present account of Miss H M due to R T S and Co. (the plaintiffs), of £112 4s. 4d., and what she may contract from this date to the 30th September next;" it was held that there was a sufficient consideration.⁴ So also

¹ *Guishaber v. Hairman*, 2 Bibb (Ky.) 320; *Thwaits v. Curl*, 6 B. Mon. (Ky.) 472.

² *Morley v. Boothby*, 3 Bing. 113, *per* BEST, C. J.; and see *ex parte* Minet, 14 Ves. 189; *Pillans v. Van Mierop*, 3 Burr. 1663. The rule, as enunciated by KENT, CH., in *Leonard v. Vredenburg*, 8 John. (N. Y.) 29, is that a parol agreement to pay the debt of another is not within the statute, *if the promise arises from some new consideration of benefit or harm moving between the parties thereto*, and this seems to be the generally recognized rule. *Meeck v. Smith*, 7 Wend. (N. Y.) 315; *Cross v. Richardson*, 30 Vt. 641; *Reed v. Holcomb*, 31 Conn. 360; *Danber v. Blackney*, 38 Barb. (N. Y.) 432; *Dyer v. Gibson*, 16 Wis. 557; *Mason v. Hall*, 30 Ala. 599; *Al-*

len v. Thompson, 10 N. H. 32; *Spann v. Baltzell*, 1 Fla. 301; *Lemmon v. Box*, 20 Tex. 329; *Huber v. Ely*, 45 Barb. (N. Y.) 169; *Small v. Schaeffer*, 24 Md. 143; *Smith v. Finch*, 3 Ill. 321; *Hindman v. Langford*, 3 Strobb. (S. C.) 207; *Todd v. Tobey*, 29 Me. 219; *Oldershaw v. King*, 2 H. & N. 399, 517; *Wynne v. Hughes*, 21 W. R. 628.

³ *Hunt v. Hughes*, *Dyer*, 272 a; *Payne v. Wilson*, 7 B. & C. 423; *Thomas v. Williams*, 10 B. & C. 664; *Tomlinson v. Gell*, 6 A. & E. 564; 1 N. & P. 588; *Eastwood v. Kenyon*, 11 Ad. & El. 438; 3 P. & D. 276; *French v. French*, 2 Man. & Gr. 644; *Johnston v. Nicholls*, 1 C. B. 251; *Broom v. Batchelor*, 1 H. & N. 255.

⁴ *Russell v. Moseley*, 6 Moo. 521; 6 Brod. & B. 211.

the consideration was held to be sufficient on the following guaranty: "In consideration of your agreeing to supply S with goods upon credit, in the way of your trade (the amount to be in your own discretion), I hereby guarantee you the due and regular payment of such sum or sums as he may now, or at any time, and from time to time hereafter, owe to you; my liability under this guaranty is to be limited to principal sum in running account of £ 100.¹ The distinction between the effect of a promise made *before* a debt is contracted and one made *afterwards* is illustrated by a Massachusetts case,² in which it was held that a promise made by one person to pay for a dinner furnished to others, *made while they are in the act of eating it*, was within the statute, and that the circumstance that relying upon such promise the plaintiff forbore to collect the pay for the dinner from the persons who were eating it, gave no additional force to the promise. But a verbal promise made by A *before* a meal is furnished to B, that he will pay for it, is an original undertaking and valid.³ The employment of a third person is a sufficient consideration to support a promise to answer for his default. The party indemnified is not bound to employ the person designated by the guaranty; but if he does employ him, then the guaranty attaches, and becomes binding on the party who gave it.⁴

SEC. 105. Consideration Need not Appear in the Guaranty. — Formerly it was necessary that the consideration for the promise, as well as the promise itself, should appear on the face of a guaranty.⁵ This rule was doubted in several cases,⁶ but was finally settled in *Saunders v. Wakefield*.⁷ It proved, however, to be a grievance to the mercantile community;⁸ and now it is provided in England and several of the States in this country that the consideration need not be stated.

¹ *White v. Woodward*, 5 C. B. 810; and see *Stead v. Liddard*, 1 Bing. 196; *Coe v. Duffield*, 7 Moo. 252; *Chapman v. Sutton*, 2 C. B. 644; *Boyd v. Moyle*, 2 C. B. 644.

² *Tilcston v. Nettleton*, 6 Pick. (Mass.) 509.

³ *Porter v. Langhorn*, 2 Bibb (Ky.) 63.

⁴ *Kennaway v. Treleavan*, 5 M. & W. 498, *per PARKE, B.*; *Newbury v.*

Armstrong, 6 Bing. 201; *Lysaght v. Walker*, 6 Bligh (N. R.) 1; *Offord v. Davies*, 12 C. B. (N. S.) 748.

⁵ *Wain v. Warlters*, 5 East, 10.

⁶ *Ex parte Minet*, 14 Ves. 189; *ex parte Gardom*, 15 Ves. 286; *Phillips v. Bateman*, 16 East, 356; *Goodman v. Chase*, 1 B. & Ald. 300.

⁷ 4 B. & Ald. 595.

⁸ 1 Wms. Saund. 227.

This is the case in Illinois, Indiana, Massachusetts, Michigan, Kentucky, Nebraska, New Jersey, and Virginia, while in Minnesota, Montana, Nevada, New York, Oregon, Utah, and Wisconsin the statute expressly provides that the consideration *must be expressed* in the writing, while in the others no provision in this respect is made, and the matter rests upon the construction of the courts.

These statutes are not retrospective,¹ nor do they exempt guaranties from the application to them of the ordinary rule of evidence with reference to written instruments, except in so far as they allow the terms constituting the consideration to be added by parol. By the ordinary rules of evidence proof of the actual consideration is admissible in cases of patent ambiguity, where the language of the instrument renders it uncertain as to which of two or more matters severally mentioned therein was the consideration upon which it was given.² But, though parol evidence may supply the consideration for a guaranty, it cannot be admitted to explain the promise, which must still be in writing,³ because opposed to the rule that parol evidence cannot be admitted to change the terms of a written contract.

SEC. 106. **Special Consideration not Necessary.** — In the case of guaranties, while a consideration is required to support them, yet they do not necessarily require a special or separate one, CHANCELLOR KENT, in a New York case,⁴ divides the consideration of guaranties into three classes: —

1. *Where the promise is made at the same time that the debt is created.*

2. *Where the promise is made subsequent to the creation of the debt; and*

3. *Where the promise arises out of some new and original consideration of benefit or harm, moving between the promisor and promisee.*

It will not be necessary to consider these matters extendedly here, as they are considered elsewhere in this chapter quite fully, but it may be said as to the first class that the same consideration which supports the principal debt supports the promise. As to the second, a valid consideration beyond

¹ Taylor on Evid. 6th ed. 905.

361; 28 L. J. C. P. 301.

² 1 Sm. L. C. 7th ed. 316.

⁴ Leonard v. Vredenburg, 8 John.

³ Holmes v. Mitchell, 7 C. B. (N. S.) (N. Y.) 29.

that upon which the original debt was created must appear or be shown,¹ while as to the third, the contract being *original* does not come within the statute at all.

SEC. 107. Parol Evidence Admissible to Identify Subject-matter of Promise.—Parol evidence is admissible to identify the subject-matter in respect of which the promise is made; as, for instance, to explain what is meant by “*the promissory note*,” there not being evidence of any other note to which the words could apply.² Where the defendant wrote to the plaintiff’s attorney, who was about to sue one David Williams for a debt due to the plaintiff: “Sir, — The bearer, David Williams, has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid,” — it was held that parol evidence was admissible to identify the amount of the debt.³ Although the guaranty is binding, notwithstanding that the consideration does not appear on the face of it, yet the consideration must be proved.⁴

SEC. 108. Bad Promise not Helped by Statute.—The statute does not make a promise good which was not good before,⁵ nor place the promisor’s liability on any different basis than that of the person promised for, and if the consideration stated is bad, the guaranty will not be helped by the statute.⁶ A promise to answer for the debt of another, even though not within the statute, does not impose any greater liability upon the promisor than existed against the person for whom the promise is made; consequently where the promise is to answer for another upon a contract, no action lies against the promisor while the contract remains unperformed.⁷ This rule is well illustrated by a Vermont case,⁸ in which the defendant while the plaintiff, a physician, was attending his

¹ *Ware v. Adams*, 24 Me. 177; *Crane v. Bulloch*, R. M. Charl’t (Ga.) 318; *Gillighan v. Boardman*, 29 Me. 79; *Huntress v. Patten*, 20 id. 28; *DeWolf v. Robsand*, 1 Pet. (N. S.) 466; *Elliott v. Gresse*, 7 H. & J. (Md.) 457.

² *Shortrede v. Cheek*, 1 Ad. & El. 57; 3 N. & M. 866.

³ *Bateman v. Phillips*, 15 East, 272; add see *Brunton v. Dullens*, 1 F. & F. 450. See further as to the admissibility of parol evidence to vary or

explain a written instrument, *post*, chapter on the Memorandum or note in writing.

⁴ *Glover v. Halkett*, 2 H. & N. 489.

⁵ *Holmes v. Mitchell*, 7 C. B. (N. S.) 361; 28 L. J. C. P. 30, *per BYLES, J.*

⁶ *Wood v. Priestner*, L. R. 2 Ex. 71, *per BRAMWALL, B.*

⁷ *Baker v. Ingersoll*, 39 Mich. 158.

⁸ *Smith v. Hyde*, 19 Vt. 54.

father and mother under a contract with the father that "if there was no cure, there should be no pay," executed to the plaintiff a writing by which he agreed to be "holden" to him "for the payment of his bill for medicine and attendance" upon his father and mother, and it was held that the undertaking of the defendant was collateral merely to the contract between his father and the plaintiff, and could not be enforced against him, unless it could also be enforced against the father under the contract.

SEC. 109. Statement of Consideration. — *If there is a good consideration, it is not necessary that it should appear in express terms; it will be sufficient in any case, if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it that such and no other was the consideration upon which the undertaking was given.*¹ Where the plaintiff, having shipped goods to R S, refused to deliver the bill of lading to him without a guaranty, upon which the defendant enclosed a bill — accepted by R S — in a letter to the defendant, in which he stated that R S having accepted the bill, he gave his guaranty for the due payment of it, in case it should be dishonored, it was held that the consideration was sufficiently expressed upon the guaranty.²

SEC. 110. Amount of Consideration. — *The adequacy of the consideration will not be taken into account, so long as there is any consideration at all.*³ The courts refuse to enforce a contract only where it is *nudum pactum*, that is to say, where there is an absence of consideration, not where the consideration is *inadequate* merely, for the law has nothing to do with the prudence or imprudence of the bargain.⁴ The following memorandum, signed by the defendant, was held to be sufficient to charge him within the statute: "I hereby guarantee

¹ *Hawes v. Armstrong*, 1 Bing. (N. C.) 761; 1 Scott, 661, *per* TINDAL, C. J.; see also *Shortrede v. Cheek*, 1 Ad. & El. 57; *Bentham v. Cooper*, 5 M. & W. 621; *Emmott v. Kearns*, 5 Bing. (N. C.) 559; *Haigh v. Brooks*, 10 Ad. & El. 309; *James v. Williams*, 5 B. & Ald. 1109; 3 Nev. & Man. 196; *Powers v. Fowler*, 4 E. & B. 511.

² *Boehm v. Campbell*, 8 Taunt.

679; 3 Moo. 15; and see *Pace v. Marsh*, 1 Bing. 216; *Oldershaw v. King*, 2 H. & N. 517; 27 L. J. Ex. 120.

³ Roll. Abr. 23, pl. 29; *Edwards v. Baugh*, 11 M. & W. 641; *Semple v. Pink*, 1 Ex. 74.

⁴ *Johnston v. Nicholls*, 1 C. B. 272, *per* ERLE, J.

to you the payment of the proceeds of the goods you have consigned to my brother, J P, of Sydney, and also any future shipments you may make to him, in consideration of the sum of 2s. 6d. paid to me, which I hereby acknowledge to have received," it being a necessary intendment that the consideration was paid by the plaintiff.¹

SEC. 111. Construction of Guaranty: Admissibility of Parol Evidence.—If a guaranty is ambiguous, or primarily imports a past consideration, parol evidence may be admitted to show that the parties intended it to refer to a future transaction.² In an action on the following guaranty: "In consideration of your having this day advanced to our client, Mr. S D, £750, secured by his warrant of attorney, payable on the 22nd of August next, we hereby jointly and severally undertake to pay the same on default, etc.," it was held that the instrument was sufficiently ambiguous to admit of evidence to show that the advance was not a past one, but was made simultaneously with the execution of guaranty.³ Where the defendant gave a guaranty in the following terms: "Gentlemen, as Mr. D informs me you require some person as guaranty for goods supplied to him by you in his business, I have no objection to act as such for payment of your account," it was held that the guaranty was not on its face a guaranty in respect of a past supply, but was to be read as if it were for goods to be supplied.⁴

SEC. 112. Rules for Construing Guaranties.—In construing guaranties, the surrounding circumstances should be taken into consideration.⁵ And in certain cases the principle of construction, *ut res magis valeat quam pereat*, may be applied.⁶ But the maxim in question does not apply in cases where there are extrinsic circumstances, in relation

¹ Dutchman v. Tooth, 7 Sc. 710; and see Edwards v. Baugh, 11 M. & W. 641.

² Haigh v. Brooks, 10 Ad. & El. 309; aff'd. nom. Brooks v. Haigh, ib. 334; Butcher v. Stewart, 11 M. & W. 873; King v. Cole, 2 Exch. 632.

³ Goldshede v. Swan, 1 Exch. 154.

⁴ Hoad v. Grace, 7 H. & N. 494; 31 L. J. (Ex.) 98; and see Mockett

v. Ames, 23 L. T. (N. S.) 729; Way v. Hearn, 13 C. B. (N. S.) 305.

⁵ Newell v. Radford, L. R. 3 C. P. 52; Heffeld v. Meadows, L. R. 4 C. P. 595; Laurie v. Schofield, L. R. 4 C. P. 622; Coles v. Pack, L. R. 5 C. P. 65.

⁶ Broom v. Batchelor, 1 H. & N. 255; 25 L. J. Ex. 299; Steele v. Hoe, 14 Q. B. 431; 19 L. J. Q. B. 89; Newell v. Radford, L. R. 3 C. P. 52.

to which the words used are, in their primary sense, intelligible.¹ A guaranty indorsed on an agreement may be read with the agreement for the purpose of making out a consideration.² If the words of a guaranty, in their ordinary acceptation, are capable of expressing either a past or a concurrent consideration, that construction will be adopted which makes the instrument valid.³ Where the defendant gave the following guaranty: "In consideration of E R & Co. giving credit to D J, I hereby engage to be responsible, and to pay any sum, not exceeding £120, due to the said E R & Co. by the said D J," it was held that the guaranty was good and binding, the words "giving credit" being equally applicable to future as to past advances.⁴ If the guaranty does not import that it is to attach upon future advances, and refers, in fact, to past transactions only, without showing a future consideration, it is void.⁵ Where the defendant gave the following guaranty: "I hereby guarantee Mr J J's account with you for wines and spirits to the amount of £100," it was held that the guaranty was for an existing account, and not for a future supply.⁶

SEC. 113. Instances of Considerations. — Although it is no longer necessary that the consideration should appear on the face of the guaranty in a majority of the States,⁷ yet, as a consideration must exist, it will be convenient to refer to some of the older cases, which turned upon the sufficiency of the consideration. Guaranties for the payment of any goods which the plaintiff should deliver to A,⁸ for the payment of a debt owing by A, if the plaintiff would withdraw a promissory note,⁹ give up a security,¹⁰ or stay an action,¹¹

¹ *Broom v. Batchelor*, 1 H. & N. 255; 25 L. J. Ex. 299, *per* BRAMWELL, B.

² *Coldham v. Showler*, 3 C. B. 312.

³ *Steele v. Hoe*, 14 Q. B. 431; 19 L. J. Q. B. 89.

⁴ *Edwards v. Jevons*, 8 C. B. 436; 19 L. J. C. P. 50; and see *Bainbridge v. Wade*, 16 Q. B. 89; *Brooks v. Haigh*, 10 A. & E. 334; *Colbourn v. Dawson*, 10 C. B. 765.

⁵ *Bell v. Welch*, 9 C. B. 154; 19 L. J. C. P. 184; *Westhead v. Sproson*, 6 H. & N. 728; 30 L. J. Ex. 265.

⁶ *Allnutt v. Ashenden*, 6 Sc. (N. R.) 127; and see *Boyd v. Moyle*, 2 C. B. 644.

⁷ See Chapter on "MEMORANDUM."

⁸ *Stadt v. Lill*, 9 East, 348, S. C. nom.; *Stapp v. Lill*, 1 Camp. 242; see also *ex parte Gardom*, 15 Ves. 286; *Price v. Richardson*, 15 M. & W. 539.

⁹ *Shortrede v. Cheek*, 1 Ad. & El. 57.

¹⁰ *Peate v. Dicken*, 5 Tyr. 116; 1 C. M. & R. 422; *Goodwin v. Bond*, 59 N. H.

¹¹ *Tanner v. Moore*, 9 Q. B. 1.

have been held to be sufficient. So undertakings to see rent paid,¹ to pay goods ordered by A,² and a promise conditional on the plaintiff's accepting a certain offer,³ have been held to be sufficient.

The following memorandums: "To the amount of £100 be pleased to consider me as a security on J C's account,"⁴ and, "I undertake to secure to you the payment of any sums you have advanced, or may hereafter advance, to D on his account with you, commencing 1st November, 1831,"⁵ have been held not to express a sufficient consideration; and where the defendant wrote as follows: "As you have a claim on my brother for £5 17s. 9d. for boots and shoes, I hereby undertake to pay the amount within six weeks from this date," it was held that the consideration, viz., forbearance for six weeks, did not appear, and that the guaranty was bad.⁶ The fact that goods were brought by a third person but for and used by the promisor, does not afford such a moral obligation as will support his parol promise to pay for them, *if he was under no legal obligation to do so when they were purchased*, and a promise to pay for the goods after they were purchased and delivered upon the credit of a third person, is within the statute, unless the original debtor by the agreement of the parties is discharged from the debt.⁷ But where, by the terms of a parol promise, the original debtor is discharged and the promisor is substituted in his place as debtor, the promise is not within the statute, although there is no other consideration therefor than the original debtor's discharge.⁸

SEC. 114. Meaning of the Words "Debt," "Default," "Miscarriage." — The words "debt," "default," or "miscarriage" apply (1) to guaranties for an existing debt, (2) to guaranties for future debts, or for future losses, which may be incurred by the acts of a third party, (3) to some past or

¹ Caballero v. Slater, 14 C. B. 300.

² Jarvis v. Wilkins, 7 M. & W. 410.

³ Powers v. Fowler, 4 E. & B. 511.

⁴ Jenkins v. Reynolds, 6 Moo. 86;

3 Brod. & B. 14.

⁵ Raikes v. Todd, 8 A. & E. 846; and see Cole v. Dyer, 1 Tyr. 304.

⁶ James v. Williams, 3 Nev. & Man. 196; and see Ellis v. Levy, 1 Sc. 669 n. (a).

⁷ Hendricks v. Robinson, 5 Miss. 694.

⁸ Underwood v. Lovelace, 61 Ala. 155.

future default in duty by a third party.¹ The adjective "*special*" describing the kind of promise has no other effect than to distinguish *express* from *implied* promises, and by necessary inference to except the latter from the operation of the statute.² In the case last cited, HOSMER, C. J., in a very able opinion, defined the form of this phrase. He said: "The first expression in the statute is 'that no suit in law or equity shall be brought on any contract or agreement.' The words 'contract' and 'agreement' are used synonymously, and are followed by this phraseology 'whereby to charge the defendant on any special promise.' The expression '*special promise*' most obviously is applied to the same subject, and with the same extent as the preceding words 'contract or agreement.' The word 'special' has no other effect than to show that promises *in fact* were referred to, and not promises *implied by law*, for every *actual* promise is particular or special. The statute, then, comprising the same ideas it now does, might have been thus expressed, '*whereby to charge the defendant on any promise, except a promise in law.*'"³

SEC. 115. Promise Partly Within and Partly Without Statute.

— *Where a promise is entire, and is void from the commencement as to part, for not being in writing, the parts being indivisible, no action can be brought on that part of the promise which is not within the statute, but the whole promise is void.* Thus, where the defendant, in consideration that the plaintiff would not dis-train for rent in arrear, verbally promised to pay him, not only the rent due, but the rent due at the ensuing quarter-day, it was held that the promise to pay the accruing rent was a promise founded on a new consideration, distinct from the demand which the plaintiff had against the tenant, and, therefore, void under the statute; and that the promise being entire, and in the commencement void in part, was void altogether, and that the plaintiff, therefore, could not recover from the defendant the rent due at the ensuing quarter-day.⁴

¹ See De Colyar on Guaranties, pp. 45-49; and Kirkham v. Marter, 2 B. & Ald. 613; Mountstephen v. Lakeman, L. R. 7 Q. B. 197.

² Sage v. Wilcox, 6 Conn. 81.

³ Goodnow v. Gilbert, 9 Mass. 510; Allen v. Pryor, 3 A. K. Mar. (Ky.)

305; Pike v. Brown, 7 Cush. (Mass.) 313.

⁴ A servant was injured by the wrongful act of B. A physician called in by B came to A's house and attended the servant, immediately after which, A told the physician

Where, however, the promise is divisible, an action may be brought upon that part which is not within the statute. Thus, where a guaranty as follows was given: "I, the undersigned, do hereby engage to pay the directors of the Manchester Gas Works, or their collector, for all the gas which may be consumed in the Minor Theatre, and by the lamps outside the theatre, during the time it is occupied by my brother-in-law Mr. Neville; and I do also engage to pay for all arrears which may be now due." It was held that the agreement was void as to the arrears, but that the amount of the gas supplied might be recovered.¹

In *Loomis v. Newhall*,² where the defendant's son had already become liable to the plaintiff for supplies, the plaintiff, at the request of the defendant, continued to furnish the son with supplies, upon the defendant's promise that "for what you have done and for what you may do for my son, I will see you paid," and it was held that the defendant was not liable under this promise for that part of the claim accruing *after* the promise was made because there could be no recovery on that part of the debt which accrued before by reason of

about the accident and that B was responsible for it, and then added, "but, doctor, you need not be alarmed about your bill. I will see that you are paid." The physician continued his treatment until the patient was cured, but it was held that no recovery could be had of A, as his promise was within the statute. *Rose v. O'Linn*, 10 Neb. 364. In a similar case in Illinois, *King v. Edmunston*, 88 Ill. 257, it was held that while the physician could not recover upon the promise for *past* visits, he could recover for those made *after* the promise was made. And a similar rule was adopted in Illinois as to a promise to pay for goods sold to another. *Hartley v. Varner*, 88 id. 661. Where a person is performing labor under an entire contract, as, to erect a house and furnish materials, he is under a legal obligation to complete it; and if, before its completion, he refuses to go on upon the security of the person for whom he is performing the service, and to induce him to perform

his contract a third person tells him to "go on and finish the work, and I will see you paid," upon the faith of which he does complete it, the promise is without consideration and within the statute, even though the promisor has sufficient funds in his hands belonging to the debtor to pay the claim. *Birchell v. Neaster*, 36 Ohio St. 331; *Thomas v. Williams*, 10 B. & C. 664; and see *Lexington v. Clarke*, 2 Vent. 223; *Chater v. Beckett*, 7 T. R. 201; *Mechelen v. Wallace*, 7 Ad. & El. 49; 2 N. & P. 224; *Head v. Baldrey*, 6 Ad. & El. 459; 2 N. & P. 217; *Hodgson v. Johnson*, E. B. & E. 685; 28 L. J. Q. B. 88; *Vaughan v. Hancock*, 3 C. B. 766; *Harman v. Reeve*, 18 C. B. 587; *Cooke v. Tombs*, Ans. 420; *Lea v. Barber*, ib. 425, n.; *Corder v. Drakeford*, 3 Taunt. 382; *Neal v. Viney*, 1 Camp. 471.

¹ *Wood v. Benson*, 2 Cr. & J. 94; 2 Tyr. 93; see also *Earl of Falmouth v. Thomas*, 1 Cr. & M. 101.

² 15 Pick. (Mass.) 159. But see *Robson v. Harwell*, 6 Ga. 589.

it being within the statute, the court proceeding upon the ground that the promise being void in part was void *in toto*. But the doctrine of this case has been overruled,¹ and in a recent case in that State² it was held that an oral promise to pay for past and future board of the child of another at a certain weekly rate, is severable, and that a recovery might be had for the board of the child *after* the promise was made. In *Rand v. Mather*, *ante*, the rule which generally prevails was announced, that if a part of a contract is valid, and the part which is valid can be separated from that which is invalid, it will be given effect to *pro tanto*. In that case the plaintiff contracted to do certain work for B, but quit work because B failed to pay him according to the contract. Thereupon, the defendant told him to finish the work *and he would pay him in full*. It was held that, while no recovery could be had for the work done *before* the promise was made, yet a recovery might be had for that done *after* it was made.³ But where the contract is *entire*, and not divisible, if a part is invalid because within the statute, the whole is invalid. Thus in *Irvine v. Stone*, *ante*, it was held that a contract for the purchase of coal in Philadelphia, and to pay the freight on the same to Boston, was not divisible so that a recovery could be had for the freights. A deed void in part and good in part is void *in toto*. It cannot be held good for part and void as to the remainder.⁴ In *Dowling v. McKinney*,⁵ A orally agreed to convey lands to B and to take in exchange, or payment, a monument, to be of a certain value when finished, and the balance in money. B completed the monument and tendered it to A together with the balance of the money, which he refused to accept. B also performed certain labor in preparing the foundation for the monument. A refused to convey the land, and in an action to recover for the value of

¹ *Rand v. Mather*, 11 Cush. (Mass.) 1. See also *Irvine v. Stone*, 6 id. 508, where, while the case was not referred to, yet a doctrine wholly inconsistent therewith was held.

² *Haynes v. Nice*, 100 Mass. 327. In *Pfeiffer v. Adler*, 37 N. Y. 164, it was held that a verbal promise to sell goods to a responsible party for full value and on the usual terms, forms no consideration for an independent

promise to pay the antecedent debt of a third person.

³ See also *Allen v. Leonard*, 16 Gray (Mass.) 202, where the same rule was adopted under a similar state of facts.

⁴ *Smith v. Kenny*, 1 Mackey (D. C.) 12.

⁵ *Dowling v. McKinney*, 124 Mass. 478.

the monument, it was held that, the contract being entire and within the statute, no recovery could be had therefor, but that, if the foundation was laid on A's land, and was to his benefit, a recovery might be had for the labor so expended. The rule is that, if some of the stipulations of a contract are within the statute and others are not, and those within it have been performed, an action lies upon the other stipulations if they are separate;¹ but if they are not separate, no recovery can be had for either.² In Vermont³ an agreement to convey lands, coupled with a guaranty that a certain piece of it contains a certain number of acres, has been held to be entire, and the same has been held as to a contract to convey lands and pay off the incumbrances,⁴ or to take an assignment of a lease of lands and buy the stock,⁵ or to sell an interest in a mill and all the timbers and irons belonging thereto,⁶ or to let a house and the furniture therefor;⁷ but this rule does not apply when the lease of the house has been actually delivered,⁸ although it is held that even where a valid lease is delivered, legal vitality is not thereby given to a parol agreement to pay a bonus.⁹ The rule in reference to the severability of contracts may be said to be that, if the part to be performed by one party consists of several distinct and separate items, *and the price to be paid by the other is apportioned to each item* to be performed, or is left to be

¹ Page v. Monks, 5 Gray (Mass.) 492; Tunbridge v. Wetherbee, 11 Allen (Mass.) 361; Rand v. Mather, 11 Cush. (Mass.) 1; Pierce v. Woodward, 6 Pick. (Mass.) 206; Mobile &c. Ins. Co. v. McMillan, 31 Ala. 711; Wood v. Benson, 2 C. & J. 94; Littlejohn, *ex parte*, 3 M. D. & DeG. 182; Mayfield v. Wadsley, 3 B. & C. 357.

² McMullen v. Riley, 6 Gray (Mass.) 50; Lexington v. Clark, 2 Vent. 223; Reinbalt v. East, 56 Ind. 538; Thomas v. Williams, 10 B. & C. 664; Chater v. Beckett, 7 T. R. 201. In Biddell v. Leeder, where the defendant agreed to purchase the plaintiff's share in a ship, and to indemnify him from all liability on account of his share, it was held that the contract was entire, and that no recovery could be had upon either branch of it.

Lamb v. Crafts, 12 Met. (Mass.) 353; Dack v. Hart, 7 W. & S. (Penn.) 172; Duncan v. Blair, 5 Den. (N. Y.) 196; Noyes v. Humphries, 11 Gratt. (Va.) 636; Alexander v. Guiselin, 5 Gill. (Md.) 138; Henderson v. Hudson, 1 Munf. (Va.) 510; Crawford v. Morrell, 8 John. (N. Y.) 253; Wood v. Benson, 2 C. & J. 94.

³ Dyer v. Graves, 37 Vt. 369.

⁴ Duncan v. Blair, *ante*; Dack v. Hart, *ante*.

⁵ Lea v. Barber, 2 Anst. 425, n.

⁶ Thayer v. Rock, 13 Wend. (N. Y.) 53.

⁷ Mechelen v. Wallace, 7 Ad & El. 49; Vaughan v. Hancock, 3 C. B. 766.

⁸ Angell v. Duke, L. R. 10 Q. B. 174.

⁹ Sanderson v. Graves, L. R. 10 Exchq. 234.

implied by law, the contract will generally be held severable; and the same rule holds where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. In *Rand v. Mather*,¹ the court lay down the rule as follows: "On principle and according to numerous modern adjudications, the true doctrine is this: If any part of an agreement is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute, provided the statute does not, either expressly or by necessary implication, render the whole void; and *provided*, furthermore, *that the sound part can be separated from the unsound, and be enforced without injustice to the defendant*. . . . In the application of this doctrine, CHANCELLOR KENT says: '*If the part which is good depends upon that which is bad, the whole is void*; and so I take the rule to be, if any part of the consideration be *malum in se*, or the good and the void consideration be so mixed, or the contract so entire that there can be no apportionment.'"²

SEC. 116. **Rule in *Couch v. Meeker*.** — In a Connecticut case,³ where a note was given by A to B for five hundred dollars, upon which there was endorsed a condition as follows: "The condition of this note is such that the said Meeker hath this day bargained his Starr farm (so called) to the said Couch; now, if the said Meeker stands to the bargain, the within note is to be void; if not, then the within note is to stand in full force." In an action upon the note it was held that the statute of frauds did not preclude the plaintiff from proving by parol evidence that the note was delivered as an escrow, whatever the conditions on which it was to take effect, and that they were performed, although the conditions respected a parol contract for the sale of lands; the object of the testimony being, not to support an action upon such parol contract for the sale of lands, but to show that a written contract to pay money had taken effect. SWIFT, C. J., in the course of his opinion, in giving the reason for the decision, said: "The statute only requires that the agreement on which the action is brought

¹ *Rand v. Mather*, 11 Cush. (Mass.) 1.

³ *Couch v. Meeker*, 2 Conn. 302.

² 2 Kent's Com. 6th ed. 467.

should be in writing. This action is brought on a written obligation, complete in itself; and is warranted by a literal construction of the statute. Though it was delivered as an escrow, to take effect on the performance of certain conditions, which amounted to a contract for the sale of lands, yet such conditions are not required by the terms of the statute, or any construction ever given it to be in writing. These conditions are not part of the written contract, but only the terms upon which it was to take effect, or not; the proof of them, then, is necessary only to prove the execution of a written contract. The proof of the execution of a written contract must be by parol; and it might as well be said, that parol proof is not admissible respecting the delivery of a deed conveying lands, as to say it cannot be admitted respecting the performance of the conditions on which such deed is to operate; for in both cases, it is no more than proving the execution of the contract; and it has often occurred, that deeds conveying lands have been delivered as escrows upon parol conditions, and they have never been considered as void by the statute of frauds and perjuries.

It has been argued, that this is in substance an action to recover damages for the breach of a parol contract for the sale of lands, though it is in form an action on a written contract. *Admitting this to be true, there was, in substance, a written contract to pay a certain liquidated sum in damages, in case a parol contract for the sale of lands should not be performed. It is on this written contract that this action is founded; and is, of course, strictly conformable to the requirements of the statute.*

It has been insisted, that a court of equity could not have decreed a specific performance of the parol contract for the sale of the land in question; and that, of course, a court of law cannot give damages for the non-performance of it. It will be conceded that equity could not have interposed, and compelled a specific performance of the bargain for the sale of the farm, for this rested in parol, and the note did not specify the terms of it. But there is no rule that a court of law will not give damages for the breach of a contract respecting the sale of land, which equity cannot enforce. . . . It is said that written conditions were annexed to the note, different from the parol conditions, and that proof

could not be admitted respecting such parol conditions. *But the efficacy of the note depended on the parol conditions on which it was delivered in escrow*; of course it operated when these were performed, and the written conditions were immaterial. And though it was not formally delivered over by the depository to the plaintiff, yet it took effect in his hands the instant the conditions were performed, without any formal act of delivery on his part." The doctrine of this case cannot be successfully questioned, nor is it all obnoxious to the rule that, where part of an *entire* contract is void by the statute, the whole is void.¹ In a Texas case² an action was brought upon a note, as follows: "Thirty days after date I promise to pay J. A. Donathan, or bearer, two hundred and fifty dollars, with five per cent interest per month until paid, for value received. The consideration of the above note is one-half of a certain town lot in the town of Jacksboro, in lot four, in block number three, L. L. Crutchfield." The note was given under a parol agreement for the sale of lands, and the land had not been conveyed at the time when the action was brought; but the plaintiff alleged that he was ready and willing to convey. The court held that, although such a note given under such circumstances may not be such a memorandum as satisfies the statute, the maker cannot avoid the note because he has omitted to bind the vendor.³ In an Illinois case,⁴ in an action upon a note, the defendant alleged the delivery and acceptance of real estate in full satisfaction. The court held that an instruction that a verbal agreement for the sale and delivery of real estate would be void within the statute and could not be set up in defence, was erroneous, as the statute has no application to such case, as, if the plea is sustained, the contract is executed, and, if not sustained, the defence fails.

SEC. 117. Promise to give Guaranty.—A promise to give a guaranty is required to be in writing as much as a guaran-

¹ Van Alstine *v.* Wimple, 5 Cow. (N. Y.) 162; Goodrich *v.* Nickols, 2 Root (Conn.) 498; Patterson *v.* Cunningham, 12 Me. 506; Rice *v.* Peet, 15 John. (N. Y.) 503.

² Crutchfield *v.* Donathon, 49 Tex. 691.

³ Rhodes *v.* Starr, 7 Ala. 347; McGowen *v.* West, 7 Mo. 569.

⁴ Thayer *v.* McEwen, 4 Ill. App. 416.

ty itself.¹ But a promise to procure a guaranty from a third person is not within the statute. This was decided in the case of *Bushel v. Beavan*.² There the plaintiffs, the owners of a ship hired on a charter-party by H. Semphill, refused to let her sail till certain disputes about the freight between them and H. Semphill were settled by H. Semphill's giving security, whereupon the defendant, in consideration that plaintiffs would let H. Semphill sail without giving security, undertook to get P. Macqueen to sign the following guaranty: "Whereas H. Semphill has hired your ship for six months from the 12th July, 1830, and such longer time as his intended voyage may require, and has paid or secured the freight for six months from the 20th August, 1830, and is about to leave England, I guarantee the payment of freight which shall accrue for any portion of the voyage after the said six months." It was held that the guaranty was within the statute, but that the undertaking to procure P. Macqueen's signature was not.

SEC. 118. Offer to Guarantee does not Bind till Accepted.—A mere offer to guarantee is not sufficient to bind the person making it, until he has notice that it is regarded as a guaranty and is accepted, or until he has consented to its being considered as conclusive. Thus, where the defendant gave the following letter to A (to whose house the plaintiffs had declined to furnish goods on their credit alone): "I understand A & Co. have given you an order for rigging, etc., which will amount to about £4,000. I can assure you from what I know of D A's honor and probity, you will be perfectly safe in crediting them to that amount, indeed I have no objection to guarantee you against any loss from giving them this credit;" and this letter was handed over by A to the plaintiffs, with a guaranty from another house which they required in addition, and the goods were thereupon furnished; the letter was considered not to amount to a guaranty, there being no notice given by the plaintiffs to the defendant that they accepted it as such, or any consent of the defendant that it should be a conclusive guaranty.³

¹ *Mallett v. Bateman*, L. R. 1 C. P. 170.

² 1 Bing. (N. C.) 103; 4 Moo. & S. 622.

³ *McIver v. Richardson*, 1 M. & Sel. 557; and see *Coleman v. Upcot*, 5 Vin. 527; *Bird v. Blossie*, 2 Vent. 361; *Hodgson v. Hutchinson*, 5 Vin.

SEC. 119. **Offer may be Withdrawn.**—Until an offer to guarantee has been accepted, it may be revoked by the person who has made it. In *Offord v. Davies*,¹ it was held that a guaranty to secure moneys to be advanced to a third party on discount to a certain extent “for the space of twelve calendar months,” might be countermanded within that time.

SEC. 120. **Implied Acceptance.**—Acceptance of an offer to guarantee may be implied from the action of the parties. Where a guaranty was given in the following terms: “I hereby guarantee to you the sum of £250 in case Mr. P should make default in the capacity of agent and traveller to you;” it was held that the person indemnified was not bound to employ the person designated by the guaranty, but that, if he did employ him, the guaranty attached and became binding on the person who gave it.²

SEC. 121. **Express Acceptance.**—The terms of the offer may, however, show that an express acceptance is expected, and then the guaranty is not conclusive unless it has been expressly accepted. Thus, where the defendant wrote as follows: “F informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as £50. For my reference apply to B of this place;” the memorandum was witnessed by B, and forwarded by him to the plaintiffs, who never communicated their acceptance to the defendant; the court decided that the plaintiffs, not proving any notice of acceptance to the defendant, were not entitled to recover, as the transaction “could not be tortured into a consummate and perfect contract.”³

SEC. 122. **Waiver of References.**—Where a surety is required to give, and gives, references, the creditor may dispense with them, as the condition is for his benefit, but he

522; *Gaunt v. Hill*, 1 Stark, 10; *Symons v. Want*, 2 Stark, 371; *Mozley v. Tinkler*, 1 C. M. & R. 692, 5 Tyr. 416; *Newport v. Spivey*, 7 L. T. (N. S.) 328.

¹ 12 C. B. (N. S.) 748; and see *Grant v. Campbell*, 6 Dow. H. L. C. 239.

² *Kennaway v. Treleavan*, 5 M. & W. 498, *per* PARKE, B.; and see *Offord v. Davies*, 12 C. B. (N. S.) 748, and the judgment of COLERIDGE, J., in *Pope v. Andrews*, 9 C. & P. 564.

³ *Mozley v. Tinkler*, 1 C. M. & R. 692; 5 Tyr. 416.

cannot enforce the guaranty against the surety until he has given him notice of the intended waiver.¹

SEC. 123. Original Debtor's Liability must Continue.—The question whether each particular case comes within this clause of the statute or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.² In *Green v. Cresswell*,³ DENMAN, C. J., said that there did not appear to be any objection to the above test, and it was also approved of by COCKBURN, C. J., in *Fitzgerald v. Dresler*.⁴ There the plaintiffs through D & Co., who were brokers, sold 682 bags of linseed at a certain price per quarter to H, and H afterwards, through the same brokers, sold the linseed at an increased price to the defendant. The time for the defendant's payment of the purchase-money was to arrive before the time fixed for H's payment. The defendant being in want of the linseed to complete a contract he had made, sent one of his clerks to D & Co. for the delivery order, with instructions to follow up the matter and get the order. The clerk was taken by D & Co. to the plaintiffs, from whom he obtained the order only on his promising that the defendant would pay the plaintiffs for the seed, as the plaintiffs required to be paid before they parted with the order. On the following day the defendant sent a check to D & Co. for £900, on account of the seed, which had not been measured at that time, so that the precise quantity of it was not then known. Upon its being measured it was found that the plaintiffs were entitled under their contract with H to receive £971 15s. 6d. In an action by them against the defendant to recover the difference between this amount and £900, the amount of the check, it was ruled that the contract made by the defendant's clerk was not a contract to pay the debt of a third person within the statute, as the linseed, the giving up of which by the plaintiffs was the consideration for such promise, was the property of the defendant subject to the plaintiff's lien for the purchase-money.

¹ *Morten v. Marshall*, 2 H. & C. 305.

² 1 Wms. Saund. 233.

³ 10 Ad. & El. 453, 2 P. & D. 430.

⁴ 7 C. B. (N. S.) 392; 29 L. J. C. P. 118.

SEC. 124. Tests for Determining whether Promise is Collateral or Not. — An important inquiry in determining whether a promise is collateral or not is whether there is any debt or duty to which it can be collateral. The fact that there is, is not decisive of the question, *but the fact that there is not, clearly is*. Thus in an Ohio case,¹ the defendant, who was a stockholder, and also president of a corporation, being desirous to have the stock of the corporation taken, verbally promised the plaintiff that if he would subscribe and pay \$500 into the capital stock of the corporation, he should receive *fifteen* per cent on that amount in one year. It was held that this was not a contract to answer for the debt, default, or miscarriage of another, but an original undertaking, and no dividend having been declared or earned within a year, the defendant was held liable upon his promise, JOHNSON, J., saying: "Was there any debt, obligation, or legal duty, express or implied, owing by the corporation to the plaintiff as a stockholder, for which the defendant undertook to answer upon default of the corporation? The obligations legally imposed upon the corporation, and upon those charged with the duties of managing the corporate business, in favor of the plaintiff as a stockholder, were only such as were common to all stockholders. These corporate authorities were bound to good faith, and to reasonable care, skill, and diligence, with a view to profit in the prosecution of the business of the corporation. If profits thereby accrue, it becomes the duty of these authorities to declare such dividends out of the same, from time to time, as the nature and condition of the business should warrant. The defendant did not undertake to answer for any debt, default, or miscarriage by the corporation, growing out of a failure to perform any of these duties. Indeed, so far as the record discloses, all these obligations in favor of the plaintiff have been faithfully performed by the corporate authorities. Most clearly, therefore, it appears that there was no corporate contract, express or implied, for which defendant made himself responsible. His contract was entirely distinct and independent of the obligation of the corporation to the plaintiff. The corporation had no power to obligate itself in advance to pay to plaintiff as a dividend, or otherwise, the sum which defendant

¹ Moorehouse v. Crangle, 36 Ohio St. 130; 38 Am. Rep. 564.

agreed he should receive on his investment. There was then no corporate debt or obligation, express or implied, to pay to plaintiff any amount or his investment. Defendant's contract was, in legal effect, essentially different from the obligations of the corporation in favor of plaintiff as a stockholder, and the liability created was wholly independent of any default by the corporation. It was not an undertaking to answer for the default of the corporation." If the debt and the promise are cotemporaneous, then the inquiry is, to whom was the credit given? If given *solely* to the promisor, then he is the original debtor, the debt is his debt, and the undertaking is original.¹ But if *any* credit was given to the person in whose behalf the promise is made, then the undertaking is collateral, and within the statute,² and in all cases the question as to whether there is a debt or duty to which the promise can be collateral, or as to whether the promise was collateral in fact, is for the jury.³ Another important inquiry is whether, although the promise is to pay the debt of another, *it was made upon consideration of the discharge of the original debtor from the debt*, and if so, whether he was in fact discharged therefrom; and if such was the consideration, and the debtor was discharged because of the promise, *then the undertaking is not collateral, because the promisor was*

¹ McCaffi v. Radcliffe, 3 Rob. (N. Y.) 445. In Proprietors of the Upper Locks v. Abbott, 14 N. H. 157, S having agreed to transport lumber down the Connecticut River, caused it to enter the head of a canal, on which were the plaintiff's locks. At this place it was the custom to exact the tolls. The plaintiff's agent refused to permit the lumber to pass through the locks on the credit of S; and the defendant thereupon promised, that if the agent would permit it to pass through the locks, he would be responsible for the tolls, and would see them paid, and the lumber was permitted to pass. It was held that the defendant's promise was an original and not a collateral undertaking, and was not within the statute of frauds.

² Jack v. Morrison, 48 Penn. St. 113; Whitman v. Bryant, 49 Vt. 512;

Newhall v. Ingraham, 15 id. 422; Steel v. Towne, 28 id. 771; Bushel v. Allen, 31 id. 613; Caperton v. Gray, 4 Yerg. (Tenn.) 563; Cahill v. Bigelow, 18 Pick. (Mass.) 369; Read v. Ladd, Edm. Sel. Cas. (N. Y.) 100; Tilleston v. Nettleton, 6 Pick. (Mass.) 509; Hall v. Wood, 4 Chand. (Wis.) 36; Puckett v. Bates, 4 Ala. 396; Taylor v. Drake, 4 Strobb. (S. C.) L. 431; Peabody v. Harvey, 4 Conn. 124; Bresler v. Pendell, 15 Mich. 224; Chase v. Day, 17 John. (N. Y.) 114; Walker v. Richards, 39 N. H. 259; Leland v. Creyon, 1 McCord (S. C.) L. 100; Boykin v. Dohlond, 1 Sel. Cas. (Ala.) 502; Connally v. Kettlewell, 1 Gill. (Md.) 260; Norris v. Graham, 33 Md. 56; Blake v. Perlin, 22 Me. 395; Moses v. Norton, 36 id. 113.

³ Moorehouse v. Crangle, *ante*; Anderson v. Hayman, 1 H. Bl. 120.

*substituted as debtor, and the debt became his own.*¹ If the promisor was *jointly* liable with another, his promise is not collateral, because before the promise he was liable for the whole debt, as in case of a promise by one partner to pay the firm debt,² or indeed a promise made by a person in *any* capacity who was, before the promise was made, liable for the debt³ where the promisor promises to pay out of the debtor's funds, or the proceeds of the debtor's property in his hands for that purpose, the promise is original.⁴ So when there is some

¹ *White v. Solomonsky*, 30 Md. 585; *Booth v. Eighmie*, 60 N. Y. 238; *Gleason v. Briggs*, 28 Vt. 135; *Watson v. Jacobs*, 29 id. 169; *Curtis v. Brown*, 5 Cush. (Mass.) 492; *Allhouse v. Ramsay*, 6 Whart. (Penn.) 331; *Haggerty v. Johnson*, 48 Ind. 41; *Parker v. Heaton*, 55 id. 1; *Moseley v. Taylor*, 4 Dana (Ky.) 542; *Click v. McAfee*, 7 Port. (Ala.) 62. The statute has no application where the promise is to pay a debt of another, if the debtor is discharged therefrom, because upon the debtor's discharge the promisor becomes the debtor, and the discharge of the original debt affords a sufficient consideration. *Andre v. Badman*, 13 Md. 241. Thus, in *Mead v. Keyes*, 4 E. D. S. (N. Y. C. P.) 510, the holder of certain notes overdue, having sent them to his agent for collection, took in satisfaction thereof the notes of his debtor's brother, giving a receipt for his claims against the debtor, and an order on his agent for the original notes. It was held that the transaction was a transfer of the original debt, and that the notes were not within the statute. See also *Cooper v. Chambers*, 4 Dev. (N. C.) L. 261. So, where a chattel was purchased by one of a firm which was about to be formed, for the use of the firm, and was used by the firm, and the firm agreed to take it from the purchasing partner when he retired from the firm, and the note originally given for the chattel was surrendered to the purchasing partner, it was held not to be a contract within the statute of frauds, but that the old contract was ended by the surrender of the note,

and that a new one was made by the other members of the firm, on which they were liable. *Shaver v. Adams*, 10 Ired. (N. C.) L. 13. But a promise to pay the debt of another, the original debt not being released, is within the statute of frauds, and will not sustain an action. *Britain v. Thrailkill*, 5 Jones (N. C.) L. 329. S. P. *Stone v. Symmes*, 18 Pick. (Mass.) 467; *Brown v. Hazen*, 11 Mich. 219; *Shoemaker v. King*, 40 Penn. St. 107; *Gunnels v. Stewart*, 3 Brev. (S. C.) 52; *Newell v. Ingraham*, 15 Vt. 422; *Waggoner v. Gray*, 2 Hen. & M. (Va.) 603; *Noyes v. Humphries*, 11 Gratt. (Va.) 636. Thus, where a father promised the creditor of his son that, if he would go to a distant place and become the bail of his son, so as to release him from imprisonment, he would pay the debt which the son owed him. It was held that, notwithstanding the performance of the service, yet, *as the debt against the son was still in force*, it was a contract within the statute, and therefore void. *Rogers v. Rogers*, 6 Jones (N. C.) L. 300.

² *Hopkins v. Carr*, 31 Ind. 260; *Durham v. Manrow*, 2 N. Y. 541; *Filies v. McLeod*, 14 Ala. 61; *Rice v. Barry*, 2 Cr. (U. S. C. C.) 447; *Aikin v. Duren*, 2 N. & McC. (S. C.) 370; *Stephens v. Squire*, 5 Mod. 205; *Hawes v. Martin*, 1 Esp. 162.

³ *Hendricks v. Wiseheart*, 57 Ind. 129; *Fish v. Thomas*, 5 Gray (Mass.) 45; *Orrell v. Coppock*, 26 L. J. Ch. 269.

⁴ *Welch v. Kenney*, 49 Cal. 49; *Berry v. Doremus*, 30 N. J. L. 399; *Crosby v. Joralemon*, 37 Ind. 264;

liability of the promisor's property independent of his express promise, *and he derives a direct and immediate benefit therefrom*, the promise is original, as a promise made by the part owner of a vessel to pay a debt for labor and materials furnished for her construction, if the creditor will forbear enforcing his lien upon the vessel therefor,¹ or where the creditor has, by reason of the promise, relinquished some lien, benefit, or advantage for securing or recovering his debt, *and by means of such relinquishment the same interest or advantage has enured to the promisor*,² the promise is original; and this is the rule in all cases *where the promise is made upon a new and independent consideration, of benefit or harm, moving between the parties*,³ or *where the promisor may be treated as the purchaser of the debt*,⁴ or *where the promise is made to the debtor himself upon a sufficient consideration*,⁵ or *where there is no liability on the part of the person promised for*.⁶ These rules cover the general exceptions to the statute, but as they are treated fully under each separate head elsewhere in this chapter, it is not necessary to say more in reference to them in this place.

In California and Dakota, by an express provision of the statute, a promise to pay the debt of another is deemed original :

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise, *or* by one who has received a discharge from an obligation, in whole or in part, in consideration of such promise.

2. Where the creditor parts with value or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal

Crim. v. Fitch, 53 id. 214; Runde v. Runde, 58 Ill. 232; Balliet v. Scott, 32 Wis. 174; Buchanan v. Paddleford, 43 Vt. 64.

¹ Fish v. Thomas, 5 Gray (Mass.) 45.

² Curtis v. Brown, 5 Cush. (Mass.) 488; Ames v. Foster, 106 Mass. 400. But both must concur. The mere fact that the creditor relinquished his lien is not sufficient, but such relinquishment must also inure to the direct and immediate advantage of the promisor.

³ Farley v. Cleaveland, 4 Cow. (N. Y.) 432; Young v. French, 32 Wis. 111; Burr v. Wilcox, 13 Allen (Mass.) 269; Wills v. Brown, 118 Mass. 137.

⁴ Anstey v. Marden, 1 B. & P. 133; Castling v. Aubert, 2 East, 325.

⁵ Spadam v. Reed, 7 Bush. (Ky.) 450; Colt v. Root, 17 Mass. 229; Soule v. Albee, 31 Vt. 142; Eastwood v. Kenyon, 11 Ad. & El. 438.

⁶ Drake v. Fleurellen, 33 Ala. 106; Harris v. Huntbach, 1 Burr, 373; Dunscomb v. Lickridge, Aleyn, 94.

debtor, and the person in whose behalf it is made his surety.

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration, accepting the new promise as a substitute therefor; or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person.

4. Where a factor undertakes for a commission to sell merchandise and guarantee the sale.

5. Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

The wisdom of incorporating these exceptions into the statute is not doubtful, as they are mainly such as have been adopted by the courts, and the result of incorporating them into the statute is to give permanency to those doctrines which have been held by the better class of courts under the statute when no such exceptions exist. Of course, under the rule for the construction of statute, where certain exceptions are expressly made, no other exception can be made by the courts, and thus the law is definitely settled so that parties with certainty can know and understand what their rights and liabilities are under this head of the statute.

SEC. 125. Promise Must be to the Person Guaranteed.—The statute only contemplates a promise made to the person to whom another is already, or is to become liable: therefore *a promise by the defendant to the plaintiff to pay A B a debt due from the plaintiff to A B, is not within the statute.*¹ *It must be a promise to be answerable for a debt of, or a default in some duty by that other person towards the promisee.*² The

¹ *Eastwood v. Kenyon*, 11 Ad. & El. 438; 2 P. & D. 376; see observations on this case, Sm. Merch. Law, 8th ed. 457; and see also *Gregory v. Williams*, 3 Mer. 582.

² *Hargreaves v. Parsons*, 13 M. & W. 561, *per* PARKE, B.; *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Thomas v. Cook*, 8 B. & C. 728. In *Hargreaves v. Parker*, *ante*, PARKE, B., said:

rule adopted in this class of cases is that an agreement to pay and discharge the debt of another *made with the debtor or some person on his behalf, if founded upon a new and valid consideration*, is an independent undertaking, and does not come within the letter or spirit of the statute.¹ But in Kentucky it is held

"The statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person *towards the promisee*. This was decided, and no doubt rightly, by the Court of Queen's Bench, in *Eastwood v. Kenyon*, 11 Ad. & El. 438; 3 P. & D. 276; and in *Thomas v. Cook*, 8 B. & C. 728; 3 Man. & R. 444. In this case Parker had not contracted with the *plaintiff*, nor was it intended that he should; there was no privity between them; the non-performance of Parker's contract with the *defendant* would be no default towards the plaintiff, and, consequently, the undertaking by the defendant was no promise to answer for the default or miscarriage of Parker in any debt or duty towards the plaintiff. It was an original promise that a certain thing should be done by a third person."

¹ *Brown v. Brown*, 47 Mo. 130; *Britton v. Angier*, 48 N. H. 420; *Hubon v. Park*, 116 Mass. 541; *Gaetz v. Foos*, 17 Minn. 265. The rule generally adopted is that the promise must be made to the creditor to be within the statute; and that a promise to the debtor to pay his debt to the creditor, or to a surety to indemnify him for becoming surety for a third person to a fourth, is an original and not a collateral undertaking when the promisee acts solely on the promise of the promisor. *Tibbetts v. Flanders*, 18 N. H. 284; *Cailleux v. Hall*, 1 E. D. S. (N. Y. C. P.) 5; *Jones v. Hardestry*, 10 G. & J. (Md.) 404; *Barker v. Bucklin*, 2 Den. (N. Y.) 45; *Jennings v. Webster*, 7 Cow. (N. Y.) 256; *Maxwell v. Haynes*, 41 Me. 559; *Kutzmeyer v. Ennis*, 27 N. J. L. 371; *Decker v. Schaffer*, 3 Ind. 187; *Flemm v. Whitmore*, 23 Mo. 430; *Perkins v.*

Littlefield, 5 Allen (Mass.) 370; *Howard v. Coshaw*, 33 Mo. 118; *Hubon v. Parks*, 116 Mass. 541; *Wild v. Nichols*, 17 Pick. (Mass.) 538; *Preble v. Baldwin*, 6 Cush. (Mass.) 549; *Fiske v. McGregory*, 34 N. H. 414; *Soule v. Albee*, 31 Vt. 142; *North v. Robinson*, 1 Duv. (Ky.) 71; *Morin v. Murtz*, 13 Minn. 191; *Vogel v. Melms*, 31 Wis. 306; *Aldrich v. Ames*, 9 Gray (Mass) 76; *Alger v. Scoville*, 1 id. 391, 395; *Pike v. Brown*, 7 Cush. (Mass.) 133, 136; *Chapin v. Lapham*, 20 Pick. (Mass.) 467; *Blake v. Cole*, 22 id. 97; *Beaman v. Russell*, 20 Vt. 205, 216; *Harrison v. Sawtel*, 10 Johns. (N. Y.) 242; *Chapin v. Merrill*, 4 Wend. (N. Y.) 657; *Staats v. Howlett*, 4 Den. (N. Y.) 559; *Barry v. Ransom*, 12 N. Y. 462, 467; *Conkey v. Hopkins*, 17 Johns. (N. Y.) 113; *Reed v. Holcomb*, 31 Conn. 360; *Johnson v. Gilbert*, 4 Hill (N. Y.) 178. In such a case the debt becomes the debt of the promisor. *Robinson v. Gilman*, 43 N. H. 435; *Smith v. Sayward*, 5 Me. 504, 507; *Tarr v. Northey*, 17 Me. 113; *Dunn v. West*, 5 B. Mon. (Ky.) 376; *Thomas v. Cook*, 8 B. & C. 728; *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Hargreaves v. Parsons*, 13 M. & W. 560, 580; *Reader v. Kingham*, 13 C. B. (N. S.) 344; *Cripps v. Hartnall*, 4 B. & L. 414; *Wilson v. Bevans*, 58 Ill. 233; *Ellenwood v. Fufts*, 63 Barb. (N. Y.) 321. The statute does not apply where, although the promise is in form to pay the debt of another if the promisor's intent be not merely to pay such debt, but also to subserve a purpose of his own, so as to bring it under the head of an original undertaking. *McCreary v. Van Hook*, 35 Tex. 631; *Dickinson v. Coulter*, 45 Ind. 445; *Cross v. Ballard*, 46 Vt. 415; *Armstrong v. Baldwin*, 3 T. & C. (N. Y.) 443; *Runde v. Runde*, 59 Ill. 98; *Johnson v. Krupp*, 36 Iowa, 616;

that such agreements are only enforceable by the creditor in equity,¹ and in Vermont it is held that a *debtor* cannot rely upon a parol agreement of another to pay his debt, such agreement being within the statute of frauds; *but he must show in addition an actual substitution of the third person for himself by an agreement of all the parties*, or an actual compliance with the terms of the agreement. Willingness to pay as agreed by the third person, and to receive payment from him by the creditor, is not sufficient.² In most of the States *the creditor may sue upon such a promise* as well as where funds or property have been by the debtor placed in the hands of the promisor with which to pay his debts, upon the ground that, as the promise is made *for his benefit*, and upon a valid consideration, the law will imply the necessary privity.³ But in England,⁴ as well as in several of the States of this country, this rule does not prevail, and it is held that no one can sue upon a contract to the consideration of which he is a stranger.⁵ As to the right of the debtor himself to sue for the breach of such a contract made by him upon a good consideration, there can be no question.

Where A, at the request of B, entered into a bond with him and C to indemnify D against certain debts due from C to D, and B promised to save A harmless from all loss by reason of the bond, it was held that the promise was binding, although not in writing. "If the plaintiff," said PARKE, J., "at the request of the defendant had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same."⁶

Again, in a case where the defendant and one Parker agreed for the sale by Parker to the defendant of the "put" or "call"

Conrad v. Sullivan, 45 Ind. 180; Darst v. Bates, 95 Ill. 493. In Mathers v. Carter, 7 Ill. App. 225, A surrendered to B a bond for a deed which he held against him, in consideration of B's verbal promise that he would pay to C the amount of a note which C held against him, and it was held that the statute did not apply and that it was a new and independent contract upon which C might maintain an action in his own name.

¹ Hodgkins v. Jackson, 7 Bush. (Ky.) 324.

² Buchanan v. Paddleford, 43 Vt. 64.

³ Lawrence v. Fox, 20 N. Y. 268; Urquhart v. Brayton, 12 R. I. 6 Reporter, 601.

⁴ Tweddle v. Atkinson, 1 B. & S. 393; Jones v. Robinson, 1 Exchq. 456.

⁵ Clapp v. Lawton, 31 Conn. 95; Halstead v. Francis, 31 Mich. 113; Exchange Bank v. Rice, 107 Mass. 37; Brice v. King, 1 Head. (Tenn.) 152; Campbell v. Findley, 3 Humph. (Tenn.) 330; Rice v. Carter, 11 Ired. (N. C.) 298.

⁶ Thomas v. Cook, 8 B & C. 728.

of fifty foreign railway shares, at a certain price per share premium, at any time on or before the 18th of February, 1844, and before that day the defendant agreed to resell the option to the plaintiff, and to guarantee the performance of the agreement by Parker, and on the 16th of February the plaintiff "called" the shares (*i.e.* required the delivery of them pursuant to the agreement), but it was at the same time verbally agreed between him and the defendant and Parker, that they should be delivered to the plaintiff not on the 18th of February, but on the 2d of March, at Paris; it was held that this was not an agreement by the defendant to be answerable for the default of Parker, but an original promise by him for the delivery of the shares by Parker, for which a note in writing was not required by the statute, PARKE, B., saying: "In this case Parker had not contracted with the plaintiff, nor was it intended that he should; there was no privity between them; the non-performance of Parker's contract with the defendant would be no default towards the plaintiff, and consequently the undertaking by the defendant was no promise to answer for the default or miscarriage of Parker in any debt or duty towards the plaintiff. It was an original promise that a certain thing should be done by a third person."¹ In a Missouri case² the defendants were creditors of the husband of Laura S. Brown, and being in failing circumstances, he proposed to execute to their use a trust deed of valuable real estate belonging to him. Mrs. Brown declined to release her dower, and claims to have consented to do so only upon the agreement by defendants to pay a certain debt from her husband to said Clardy, which had not been otherwise provided for. The defendants, having bid in the property at trustees' sale, refused to pay the Clardy debt, and this suit was brought to enforce their agreement to do so. The defendants denied the agreement, but judgment was obtained against them for the amount of the debt, which was affirmed by the Supreme Court. Upon the trial the defendants insisted that, as a matter of law, the contract could not be enforced because it was a verbal agreement to pay the debt of another, and within the statute of frauds. BLISS, J., said:

¹ Hargreaves v. Parsons, 13 M. & W. 561.

² Brown v. Brown, 47 Mo. 130; 4 Am. Rep. 330.

“The provision that no action shall be brought to charge any person upon a promise to answer for the debt of another, unless it is made in writing, is construed to apply to promises made *to the creditor*, and hence it is always held that while the creditor cannot recover upon a collateral parol agreement made with him to pay his debtor's obligation, yet if such agreement be net made with the creditor, it can be enforced if otherwise good, though not evidenced by any note or memorandum in writing.¹ It is held that a parol contract with the creditor to pay the debt of another can in general only be enforced when the original debt is cancelled, and the third person is alone looked to for the debt. It then becomes an independent agreement to assume the debt. It is not a collateral promise, for the original debt is discharged. It becomes the debt of the promisor alone, and is no longer the debt of another, and hence it is not within the statute. So, also, an agreement to pay and discharge the debt, made with the debtor or some person interested for him, if founded upon a new and valid consideration, is an independent undertaking, and does not come within the letter or object of the statute. It is neither uncommon nor is it unreasonable for a debtor to make provision by contract for the payment of his obligations; and if a purchaser of property, instead of paying the whole consideration, should assume to pay certain liabilities of his vendor, and be able to escape his obligation and retain the property, the statute would be one of frauds in a new sense. No such construction has ever been given it, and the courts of New York go so far as to hold that, though not a party to this independent agreement, the creditor may avail himself of it and sue in his own name.”²

So where the plaintiff, the bailiff of a county court, being about to arrest one H under a warrant of contempt for non-payment of a judgment debt, the defendant, in consideration that he would forbear to execute the warrant, promised to pay the plaintiff £17 on a given day or surrender H, it was held that this was not an agreement by the defendant to be

¹ Howard v. Coshaw, 33 Mo. 118; 45; Pratt v. Humphrey, 22 Conn. 317; Hargreaves v. Parsons, 13 M. & W. 561; Alger v. Scoville, 1 Gray, 391; Perkins v. Littlefield, 5 Allen (Mass.) 370. Eastwood v. Kenyon, 11 Ad. & El. 488; Westfall v. Parsons, 16 Barb. 645; Barker v. Bucklin, 2 Den. (N. Y.)

² Barker v. Bucklin, *supra*.

answerable for the debt or default of H, but an original promise by him to pay the money or surrender H.¹

SEC. 126. If the Person Promised for Liable at all, Promise must be in Writing.—Formerly a distinction was made between promises to pay for goods sold, made before delivery of the goods, and promises made after the goods were delivered. In the former case the undertaking was considered original, and not within the statute; in the latter, collateral, and within the statute.² But this distinction has been overruled,³ and the

¹ Reader v. Kingham, 13 C. B. (N. S.) 344; and see Hodson v. Anderson, 3 B. & C. 842; 5 D. & R. 735.

² Mowbray v. Cunningham, cited 2 T. R. 80; Jones v. Cooper, Cowp. 227; Lofft. 769.

³ In Matson v. Wharam, 2 T. R. 80, BULLER, J., said: "I argued the case in Cowper (Jones v. Cooper, Cowp. 227) the facts of which were, that a person who was going abroad, wished to make some provision for his mother-in-law, in his absence, and said to a baker, you must supply my mother-in-law with bread, and I will see you paid; that case was tried before NARES, J., at Bristol. I was for the plaintiff, and cited the case of Mawbray v. Cunningham, in which LORD MANSFIELD said: 'This is a promise made *before* the debt accrues; and what is the reason of the tradesman's requiring that promise? It is because he will not trust the person for whose use the goods are intended;' and the plaintiff obtained a verdict. But NARES, J., overruled this determination, and non-suited the plaintiff, and this court afterwards refused to grant a new trial."

But notwithstanding what was said by BULLER, J., it does not appear that the case of Jones v. Cooper overruled the determination in Mawbray v. Cunningham, for although in both cases the promise was made *before* the delivery of the goods, yet in the case determined by LORD MANSFIELD, the promise was simply to see the goods paid for; whereas, in Jones v. Cooper, the promise was expressly conditional,

thus, "I will pay you if Smith will not;" and *Smith was entered the debtor in the plaintiff's books.* And upon this distinction, the new trial was refused, and LORD MANSFIELD observed that the general distinction was a clear one: meaning, as he afterwards made it appear, the distinction between an undertaking *before* the delivery of the goods, and *afterwards*; but he said, "there may be a nicety where the undertaking is *before* delivery, and yet *conditional*; and upon this sub-distinction between promises conditional and promises unqualified, made before delivery, it appears that the case of Jones v. Cooper was in reality decided. But the distinction upon which Mawbray v. Cunningham was decided by LORD MANSFIELD, was directly overruled by the case of Matson v. Wharam, which was an action for goods sold and delivered, and tried before WILSON, J., when a verdict was found for the plaintiffs, subject to the opinion of the court on the following case: the defendant, Wharam, applied to Matson, one of the plaintiffs, and asked him if he was willing to serve one R C of Pontefract, with groceries; he answered, that he dealt with nobody in that part of the country, and did not know R C; to which the defendant, Wharam, replied, "*if you don't know him, you know me, and I will see you paid.*" Matson then said, he would serve him; and Wharam answered, he is a good chap, *but I will see you paid.* A letter was afterwards received by the plaintiffs from R C containing an order for goods, to the

rule now is, that *if the person to whom the goods are supplied is liable at all*, the promise must be in writing.¹ This rule was well illustrated in a Tennessee case,² in which it appeared that the defendant and another person were in a store together, and the defendant told the plaintiff that he would pay for all the goods which the other person might buy, and thereupon, and in reliance upon such promise, the plaintiff sold such person several articles, *and charged them to him and the defendant jointly*; and the court held that the defendant's promise was collateral and within the statute. In an Indiana case,³ the defendant verbally agreed with the plaintiff that if he would sell C a certain horse, he would make good any agreement about it. In an action to recover the price of the horse, the judge left it for the jury to say whether the plaintiff primarily gave credit to C for the horse, and they having so found, it was held that the promise was collateral and within the statute. In all cases where the question is whether a promise by the defendant is collateral or original, the question is for the jury, whether the sole credit was given to the promisor,⁴ and if the jury finds that *any* credit was given to the third person in whose behalf the promise was made, so that there is *any* liability on his part to pay the debt, the promise is collateral, and the verdict must be for the defendant.⁵ Thus, a promise to pay the debt of another, if it is

amount of £7, and the goods were sent according to the order. The plaintiffs made R C the debtor for these goods in their books. They afterwards applied to R C by letter, for the payment of the debt, and receiving no answer, they then applied to the defendant, Wharam, who refused to pay, and there having been no promise in writing, according to the statute of frauds, judgment was given for the defendant. In this case, although the promise was not conditional in expression, yet the circumstances sufficiently imported an understanding among all the parties, that both the party for whose use the goods were delivered, and the party expressly promising to pay, were to become liable. Such liability, therefore, of the person on whose account

the promise is made, is an essential point of inquiry, and must be gathered from the circumstances of the case.

¹ *Matson v. Wharam*, 2 T. R. 80; *Colman v. Eyles*, 2 Stark. 62; *Peckham v. Faria*, 3 Doug. 13; *Parsons v. Walter*, ib. 14, n. (c).

² *Matthews v. Milton*, 4 Yerg. (Tenn.) 576.

³ *Billingsby v. Dempewolf*, 11 Ind. 414. Where the evidence shows that sales were made wholly upon the credit of a promisor upon either a written or verbal promise, the statute is not applicable. *McLenden v. Frost*, 57 Ga. 448.

⁴ *Doyle v. White*, 26 Me. 341; *Homans v. Lombard*, 21 id. 341.

⁵ *Read v. Ladd*, 1 Edm. (N. Y.) Sel. Cas. 100; *Hill v. Raymond*, 3

not paid by him,¹ or "to be responsible and stand good" for another's debt,² or to indemnify a surety against loss or liability,³ or to "see that the debt is paid,"⁴ unless when the latter form of expression is used, it is shown that credit was given solely to the promisor,⁵ or to accept an order for another's debt,⁶ or of a member of a corporation to pay its debts,⁷ and generally any promise which is conditional upon the debtor himself not paying,⁸ or which shows an intent that the promisor should merely occupy the position of a surety for the debt, is collateral and within the statute. Indeed, in all cases where the undertaking of a party is *to further secure* an existing debt between the regular parties to a note or other obligation, it is a collateral contract within the statute; and in New Jersey it is held that a simple indorsement of a note in blank, before the name of the payee, is not such a writing as will satisfy the statute.⁹ Where A, having com-

Allen (Mass.) 540; First National Bank v. Bennett, 33 Mich. 520; Wood v. Patch, 11 R. I. 445.

¹ Gilfillan v. Snow, 51 Ind. 305.

² Miller v. Nehaus, 51 Ind. 401.

³ First National Bank v. Bennett, 33 Mich. 520.

⁴ Petit v. Braden, 55 Ind. 201; Bloom v. McGrath, 53 Miss. 249. A promise made by A to B that if C employs him, A "will see him paid" is a collateral undertaking and within the statute. Skinner v. Conant, 2 Vt. 453; In Chase v. Day, 17 John. (N. Y.) 114, A inquired of B the terms on which he would let C have newspapers to sell; and, on being told the terms, said: "If C calls for the papers, I will be responsible for the papers he shall take," and it was held that this was an original and absolute contract on the part of A, and not within the statute of frauds.

⁵ Wagner v. Hallock, 3 Col. 176. But in Petit v. Braden, *ante*, it was held that those words import a *collateral undertaking*, and that the circumstance that the creditor relied solely upon the promisor's liability does not change the rule. But the court may have placed stress upon the circumstance that the goods had al-

ready been sold to the vendee, but delivery was withheld until he obtained *security* for the price.

⁶ Benson v. Walker, 5 Harr. (Del.) 110. In Morrison v. Baker, 81 N. C. 76, it was held by the court that an *unconditional* promise to pay for goods *to be furnished to another* is not within the statute. Evidence to change a contract relation between a plaintiff and a third party and to prove a promise to pay the debt of another as a new and original undertaking and not as a contract of suretyship must be clear and satisfactory, or it will fall within the statute. Haverly v. Merian, 78 Penn. St. 257; Palmer v. Haggard, 78 Ill. 607.

⁷ Quin v. Hanford, 1 Hill (N. Y.) 82; Trustees v. Flint, 13 Met. (Mass.) 539.

⁸ Dufalt v. Gorman, 1 Minn. 301. A promise to pay the debt *if he does not*, in reliance upon which the promisee permitted the debtor to leave the state, taking his property with him, is within the statute. Gillfillan v. Snow, 51 Ind. 305. A parol contract to answer *in part* for another's debt is within the statute. Luer v. Zeile, 53 Cal. 54.

⁹ Hayden v. Weldon, 43 N. J. L. 128.

menced certain business for B, which he had undertaken, refused to proceed without a promise from C to pay the further expenses, it was held that C was not liable on such a promise without a note in writing.¹ So, where the defendant verbally promised the plaintiff that if he would supply goods to A, drawing upon him at one month, and would allow him (the defendant) three per cent upon the amount of the invoice, he would pay the plaintiff cash to take A's bill "without recourse," in other words, buy the bill of him, it was held that there was a contract to answer for the debt or default of another which, not being in writing, could not be enforced.²

SEC. 127. Guarantor must not be Liable.—The statute does not apply to a case where the party giving the guaranty is himself liable to the demand which he is purporting to guarantee, *it must be exclusively the debt, default, or miscarriage of another person*. In *Arden v. Rowney*,³ a check for £100 was drawn upon the defendant, and the plaintiff, who was asked to cash it, sent to the defendant to know whether it was good. The defendant replied that it would be honored, as he was indebted to the drawer of it in £200. The check was void, as being post-dated; but it was held, nevertheless, that the plaintiff could recover, on the ground of the sum due to the drawer being appropriated. LORD ELLENBOROUGH said: "If this had been an agreement to pay an amount of any money which the plaintiff might advance to Alder (the drawer), and no specific sum of money had been mentioned,

An unwritten agreement of suretyship is void under the statute. *Ingersoll v. Baker*, 41 Mich. 48; *Bonine v. Denniston*, 41 id. 292, and so is any agreement merely collateral to answer for the debt of another. *Thatcher v. Rockwell*, 4 Cal. 375; *Anderson v. Hayman*, 1 H. Bl. 120. In *Bugbee v. Kendrickson*, 130 Mass. 437, it was held that in the sale of goods, if *any credit at all* is given to the person to whom the goods are delivered, the promise is collateral and within the statute. See also *Bloom v. McGrath*, 53 Miss. 249. In *Petit v. Braden*, 55 Ind. 201, this rule

was applied where a seller of goods had refused to deliver them to the purchaser without security therefor, and the defendant orally promised that if he would deliver the goods he would "see that he got his pay." The court held that the promise was collateral and within the statute because the vendee still remained liable for the goods. *Smith v. Montgomery*, 3 Tex. 199.

¹ *Barker v. Fox*, 1 Stark, 270.

² *Mallett v. Bateman*, L. R. 1 C. P. 163, affg. S. C. 16 C. B. (N. S.) 530.

³ 5 Esp. 254.

which was to be so advanced, I should have thought this a case within the statute of frauds; but it appears to me that this is an appropriation of £100, part of the money which the defendant said he owed to Alder, amounting to £200, and that the plaintiff may recover."

Where the testator appointed his son, Alfred Orrell, and three other persons his executors and trustees, and Alfred Orrell disclaimed and renounced probate, and afterwards purchased a portion of the testator's estate, the other legatees raised a claim for losses incurred by the trustees, and Alfred Orrell's solicitor wrote, on his behalf, to the claimants, agreeing to pay £3,000 in satisfaction of the alleged losses, it was held that this letter was not within the statute, as an agreement to answer for the debt, default, or miscarriage of another, as Alfred Orrell was himself liable for the debt.¹

¹ Orrell v. Coppock, 26 L. J. Ch. 269; and see Coutourier v. Hastie, 22 L. J. Ex. 97; Hodgson v. Anderson, 5 D. & R. 735; 3 B. & C. 942; Batson v. King, 4 H. & N. 739; Fitzgerald v. Dressler, 7 C. B. (N. S.) 374. The operation of the statute is not confined to collateral undertakings to be answerable for a *subsisting* liability, debt, or duty, but extends as well to undertakings made *before* the debt accrues or the duty arises, and a guaranty consequently, which a tradesman requires from a third person before he sends out goods sold on credit, because he does not like to trust the person for whose use the goods are intended, is within the statute if the latter has been treated by the tradesman as his debtor. Jackson v. Covert, 5 Wend. (N. Y.) 139; Crookshank v. Burrell, 18 John. (N. Y.) 58; Peckham v. Faria, 3 Doug. 13; Parsons v. Walter, 3 id. 14 n. (c). Thus where the plaintiff having commenced business for one Fox, refused to go on with it, without a promise by the defendant to pay the further expenses to be incurred, it was holden that this promise was within the statute. Barber v. Fox, 1 Stark, 270. But the sale may be to one man, although the goods are to be delivered to another, and a person may promise to pay for goods

supplied to, or for work done at his request, or by his directions for a third party, as the real debtor, and not in the character of a surety, and if he has been treated by the person who has furnished the goods and done the work, as the party liable, and credit has been given to him, his promise or undertaking to pay is not a collateral promise to answer for the debt of another, and the statute consequently is out of the case. Hargreaves v. Parsons, 13 M. & W. 561, 570; Graham v. O'Neill, 2 Hall (N. Y.) 474; Hilton v. Dinsmore, 20 Me. 410; Colt v. Root, 17 Mass. 229; Perley v. Spring, 12 Mass. 297; Corbett v. Cochran, 3 Hill (S. C.) 41; McKenzie v. Jackson, 4 Ala. 230; Durham v. Arledge, 1 Strobb. (S. C.) 5; Hall v. Rogers, 7 Humph. (Tenn.) 536; Arbuckle v. Hawks, 20 Vt. 538; Proprietors v. Abbott, 14 N. H. 157; Blount v. Hawkins, 19 Ala. 100. If two come to a shop, and one buys, and the other to gain him credit promises the seller "if he does not pay you, I will," this is a collateral undertaking, void without writing, by the statute. But if he says, "let him have the goods, I will be your paymaster," or "I will see you paid," this is an undertaking as for himself, and he is regarded as the buyer. Birkmyr v.

Of course, if the promisor was before the making of the promise liable to pay the debt, his promise is not within the

Darnell, 1 Salk. 27; 6 Mod. 250; Watkins v. Perkins, Raym. 224; Seaman v. Price, 1 C. & P. 586; 10 Moore, 34; 2 Bing. 437. Where the defendant, in consideration that the plaintiff, at the request of the defendant, would provide a workman with materials for his work, promised the plaintiff to pay him a reasonable sum for such materials, out of such moneys received by him, as should become due to the workman in respect of the work, it was held that this was not a promise by a surety to answer for the debt or default of another, within the meaning of the statute, but an original independent contract. Andrews v. Smith, 2 C. M. & R. 627; Sweeting v. Asplin, 7 M. & W. 173; Gerish v. Chartier, 1 C. B. 13. Whether the contract of one who engages to be responsible for another is to be regarded as original and joint, or collateral, must depend upon the intention of the parties, to be ascertained from the nature of it, and the language used. Norris v. Spencer, 18 Me. 324; Homans v. Lombard, 20 Me. 308; Sinclair v. Richardson, 12 Vt. 33; Doyle v. White, 26 Tenn. 341. If goods are furnished to an infant at the request of the defendant, the defendant's undertaking or promise to pay for them is not a collateral promise to answer for the debt of another, because the infant is not liable to pay for them and cannot be indebted by reason of his minority. Harris v. Huntback, 1 Bur. 373; Duncombe v. Tickeridge, Ayleyn, 94; 1 Wms. Saund. 211 d. And if the original debt is discharged and extinguished by the substitution in lieu thereof of a new contract to pay the amount of that debt, such new contract is not a collateral promise to answer for the debt or default of another. Hodgson v. Anderson, 5 D. & R. 746, 747; 3 B. & C. 855, 866; Lacy v. McNeile, 4 D. & R. 7; Taylor v. Hilary, 1 C. M. & R. 743; 3 Dowl. 461. The contract of a

factor binding him in the term implied by a *del credere* commission is not within the statute of frauds. The contract is the factor's own contract, and the debt of another comes in incidentally only as a measure of damages. Wolf v. Koppel, 5 Hill, N. Y. R. 458; Coutourier v. Hastie, 8 Exch. 56. Where a debtor being taken in execution by the plaintiff, the defendant, in consideration that the plaintiff would discharge his debtor out of custody, promised the plaintiff to pay him the debt, it was held that this was not a collateral promise to answer for the debt of another, the debt being extinguished by the discharge of the debtor. Goodman v. Chase, 1 B. & Ald. 297; Butcher v. Steuart, 11 M. & W. 857; 12 Law J. Exch. 391; Lane v. Burghart, 1 Q. B. 937; Anderson v. Davis, 9 Vt. 136; Cooper v. Chambers, 4 Dev. (S. C.) 261. So, where the plaintiff had issued execution against one Lloyd, and afterwards, with the assent of all the parties interested, Lloyd conveyed all his property to the defendant, he undertaking to satisfy Lloyd's creditors; and, thereupon, it was agreed between the plaintiff Lloyd and the defendant, that the plaintiff should relinquish the execution against Lloyd (which he did), and should look to the defendant as his debtor instead of Lloyd; it was held, that the defendant's undertaking to pay the plaintiff was not a promise to answer for the debt of a third person; for that Lloyd was discharged from the debt, and would have had a good answer by plea, if the plaintiff had sued him, or by *audita querela*, if the plaintiff had issued execution. Bird v. Gammon, 5 Sco. 213; 3 Bing. (N. C.) 883. And where a purchaser of goods, being unable to pay for them, transferred and delivered them to the defendant, and the latter promised the vendor to pay for them, it was held, that this was a substitution of a new contract

statute, although other persons were equally liable with him, as in that case the promise is merely to pay his own debt, and therefore a promise by one partner to pay a firm debt is valid;¹ but not if the promise is to pay the individual debt of another partner,² nor is a verbal promise made by a

of sale and a new purchaser, in lieu of the original contract of sale, that the original purchaser was discharged from all liability in respect of the goods, and his debt being extinguished, the promise was not a promise to be answerable for the debt of another. *Browning v. Stallard*, 5 Taunt. 450. The agreement of a factor to account for the amount of sales made by him, under a *del credere* commission, is not within the statute a promise to answer for the debt of another. *Wolf v. Koppel*, 2 Den. (N. Y.) 368.

And a contract or promise, although made concerning the debt or default of a third party, may yet be an original contract not within the statute. If the plaintiff, for example, has a lien upon the goods and chattels of his debtor in his possession, or if he holds securities for the payment of his debt, and is induced either to give up his lien upon the goods, or to part with his securities upon the faith of a promise, made by the defendant, to pay the amount of the plaintiff's claim thereon, the promise so made is not within the mischief intended to be provided against by the statute of frauds, although the amount promised to be paid, as the consideration or inducement for the abandonment of the lien or the surrender of the securities, may be the subsisting debt of a third party, due to the plaintiff, and the performance of the promise may have the effect of discharging that debt. *Barker v. Birt*, 10 M. & W. 61; *Baigg v. Brooks*, 10 Ad. & El. 309; *ib.* 335; *Barrel v. Trussell*, 4 Taunt. 117; *Meredith v. Short*, Salk. 25; *Castling v. Aubert*, 2 East, 325; *Walker v. Taylor*, 6 C. & P. 752. Where the plaintiff had distrained upon his tenant for rent in arrear, and afterwards delivered up the goods

and chattels to the defendants, for the use of the tenant upon the faith of an undertaking signed by the defendants in the following terms: "We, the undersigned, hereby agree and undertake to pay to Thomas Edwards (the plaintiff) all such rent as shall appear to be legally due to him from Edward Kelly, tenant, etc., up to the twenty-fifth day of December, 1815;" it was held that the undertaking was not within the mischief intended to be provided against by the statute. *Edwards v. Kelly*, 6 M. & S. 204; *Williams v. Leper*, 3 Burr. 1887; *Hampton v. Paulin*, 12 Moore, 497; *Houlditch v. Milne*, 3 Esp. 86; 1 Wms. Saund. 211 *d*, 211 *e*, ed. 1845. The landlord, having distrained the goods, held them in his hands as a pledge for the rent; the debt in respect of such rent was for the time suspended, and the promise founded upon the relinquishment by the landlord of his lien upon the goods, was an original independent contract, and not a mere promise to answer for the debt of another. In these cases the plaintiff must so shape his case, as not to show or admit that there is a principal debtor or that the defendant's promise is a promise to pay the debt of another. *Clemay v. Piggott*, 2 Ad. & El. 473; *Slingerland v. Morse*, 7 John. (N. Y.) 463.

¹ *Hopkins v. Carr*, 31 Ind. 360; *Files v. McLeod*, 14 Ala. 611; *Rice v. Barry*, 2 Cr. (U. S. C. C.) 447; *Aiken v. Duren*, 2 N. & McCord (S. C.) 370; *Durham v. Munrow*, 2 N. Y. 541; *Stephens v. Squires*, 5 Mod. 205; *Homes v. Martin*, 1 Esp. 162; *Oliphant v. Patterson*, 56 Penn. St. 368.

² *Wagner v. Clay*, 1 A. K. Mar. (Ky.) 257; *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; *Georgia Co. v. Castleberry*, 49 Ala. 104.

member of a corporation to pay its debts, binding upon him.¹ But where any liability for the debt existed against the promisor when the promise was made, it is not within the statute; and under this rule it is held that a promise by one of several owners of a ship to pay for materials, etc., for which the ship was liable,² or of one trustee to reimburse a *cestui que trust* for the default of his co-trustees,³ are not within the statute, because the promisor was liable before, and when the promise was made; and the rule is well established that the statute has no application where the promise is in effect to pay the promisor's own debt, *although that of a third person is thereby incidentally guaranteed*.⁴ It is under this rule that the verbal acceptance of an order drawn by one upon his debtor is held valid,⁵ or a promise by a debtor to pay the debt to a person to whom it has been assigned.⁶ But it has been held that where, from any cause, a person's liability upon a promise to pay the debt of another has been discharged, his promise to pay it made *after* such discharge is within the statute, as the pre-existing liability does not afford any consideration therefor;⁷ but in several States it has been held that, as the indorser of a note has the power to waive

¹ *Quin v. Hanford*, 1 Hill (N. Y.) 62; *Trustee v. Flint*, 13 Met. (Mass.) 539; *Wyman v. Gray*, 7 H. & J. (Md.) 409; *Rogers v. Waters*, 2 G. & J. (Md.) 64; *Searight v. Payne*, 2 Tenn. Ch. 175.

² *Fish v. Thomas*, 5 Gray (Mass.) 45; *Headrick v. Wisheart*, 57 Ind. 129.

³ *Orrell v. Coppock*, 26 L. J. Ch. 269; *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374; *Coutourier v. Hastie*, 22 L. J. Exchq. 97.

⁴ *Malone v. Keener*, 44 Penn. St. 107; *Cook v. Barrett*, 15 Wis. 596; *Creel v. Bell*, 2 J. J. Mar. (Ky.) 309; *Barring v. Warden*, 12 Cal. 311; *Williams v. Little*, 35 Vt. 323; *Alcalda v. Morales*, 3 Nev. 182; *Balliet v. Scott*, 32 Wis. 144; *Rollison v. Hope*, 18 Tex. 446; *Gold v. Phillips*, 10 John. (N. Y.) 412; *Phillips v. Grey*, 3 E. D. S. (N. Y. C. P.) 69; *Wolfe v. Koppel*, 2 Den. (N. Y.) 368; *Barker v. Bucklin*, 2 id. 61; *Buchanan v.*

Paddleford, 43 Vt. 64; *Dearborn v. Parks*, 5 Me. 81; *Cram v. Fitch*, 53 Ind. 214; *Crosby v. Joralemon*, 37 id. 264; *Helms v. Kearns*, 40 id. 124; *Scaman v. Hasbrouck*, 35 Barb. (N. Y.) 151; *Welch v. Kearney*, 49 Cal. 49; *Rowe v. Whittier*, 21 Me. 545; *Bearshears v. Rowe*, 46 Mo. 501; *Berry v. Doremus*, 30 N. J. L. 399; *Johnson v. Knapp*, 36 Iowa, 316; *Taylor v. Preston*, 79 Penn. St. 436; *Meyer v. Hartman*, 72 Ill. 442; *Sweetman v. Parker*, 49 Miss. 19; *Robberman v. Wyskamp*, 54 Ill. 159; *Tisdale v. Morgan*, 7 Hun (N. Y.) 583; *Mitchell v. Griffin*, 58 Md. 554; *Maxwell v. Haynes*, 41 Me. 559; *Brown v. Strait*, 19 Ill. 88.

⁵ *Shields v. Middleton*, 2 Cr. (U. S. C. C.) 205; *Mt. Olivet Cemetery v. Shubert*, 2 Head (Tenn.) 116.

⁶ *Presbyterian Society of Greene Farm v. Staples*, 23 Conn. 544; *Colt v. Root*, 17 Mass. 290.

⁷ *Peabody v. Harvey*, 4 Conn. 119.

the technical bar, which a neglect to protest the note affords, a promise to pay *after* he is discharged of such neglect amounts to a waiver, and keeps the original liability on foot.¹ Where a guaranty is executed after the debt is contracted; but in pursuance of an agreement to guarantee the debt made *before* it was contracted, upon the faith of which the creditor trusted the principal, the consideration is sufficient.² The leaving of a demand with an attorney for collection, is a sufficient consideration for a guaranty of the debt made by him at that time;³ but a guaranty made subsequently is invalid, unless supported by a new and good consideration. Thus, A became bound for the delivery of goods to a constable, which were taken by him in execution against B. C claimed the goods and prevented the delivery, and after suit commenced against A by the constable, or ally, promised A to indemnify him from all costs and damages in consequence of not delivering the goods. It was held that the promise of C was not binding, it being for the default of another; and that, admitting that the moral obligation of C to protect and save B, who was the father of C, harmless (which is denied), and was a sufficient consideration, yet the consideration of the promise, being past, is not valid.⁴ Where the consideration of a guaranty is sufficient when the guaranty is made, the guaranty does not fail by the subsequent loss of value of the consideration.⁵

SEC. 128. Credit given to Guarantor. Promise not within the Statute.—*If goods are supplied to, or work is done for, a third person at the instance of the guarantor, and credit is given to him and he is treated as the real debtor, then the promise is direct, and not collateral, and the case is not within the statute. The rule is that if the promise is of such a character as to make it an original undertaking on the part of the promisor, it is not within the statute, although it is for the exclusive benefit of another.*⁶ Where the

¹ Uhler v. Farmer's Nat. Bank, 64 Penn. St. 406; Ashford v. Robinson, 8 Ired. (N. C.) L. 114; United States Bank v. Southard, 17 N. J. L. 473.

² Standley v. Miles, 36 Miss. 434.

³ Gregory v. Gleed, 33 Vt. 405.

⁴ Nixon v. Vanhise, 5 N. J. L. 491. See also Weed v. Clark, 4 Sandf. (N. Y.) 31.

⁵ Mordecai v. Gadsden, 2 Spears (S. C.) 566.

⁶ Cook v. Barrett, 15 Wis. 596; Malone v. Keener, 44 Penn. St. 107; Crul v. Bell, 2 J. J. Mar. (Ky.) 309; Story v. Menzies, 4 Chand. (Wis.) 61; Alcaldia v. Morales, 3 Nev. 132; Gold v. Phillips, 10 John. (N. Y.) 412; Williams v. Little, 35 Vt. 323; Cot-

promise was as follows: "If L S shall go through the purchase, my brother will give you a handsome gratuity for the trouble and pains you shall be at in transacting the affair, which I promise and assure you shall not be less than £300. My meaning is, you shall be paid when the conveyances shall be executed;" it was held that the defendant was personally liable, and LEE, C. J., said that there was a difference between a conditional and an absolute undertaking, as if A promise to pay B such a sum if C does not: there A is but a security for C. But if A promise that C will pay such a sum, A is the principal debtor, for the act done was on his credit, and no way on C.¹ Where a mother took her son to school, and saw the master, but no evidence was given of what passed at the time, and afterwards a bill was delivered to the boy's uncle, who said it was quite right to deliver the

trell *v.* Stevens, 10 Wis. 423; Clymer *v.* De Young, 54 Penn. St. 118; Wolf *v.* Koppel, 2 Den. (N. Y.) 368; Barringer *v.* Warden, 12 Cal. 311; Therason *v.* McSpeedon, 2 Hilt. (N. Y. C. P.) 1; Rollinson *v.* Hope, 18 Tex. 446; Stoddard *v.* Graham, 23 How. Pr. (N. Y.) 518; Phillips *v.* Gray, 3 E. D. S. (N. Y. C. P.) 69; Mount Olivet Cemetery *v.* Shubert, 2 Head (Tenn.) 116; Weyland *v.* Crichfield, 3 Grant's (Penn.) Cas. 113; Rhodes *v.* Leeds, 3 S. & P. (Ala.) 212; Nelson *v.* Hardy, 7 Ind. 364; Briggs *v.* Evans, 1 E. D. S. (N. Y. C. P.) 192; Porter *v.* Langhorn, 2 Bibb. (Ky.) 63; Brown *v.* George, 17 N. H. 128; Arbuckle *v.* Hawks, 20 Vt. 538; Backus *v.* Clark, 1 Kan. 303; Hodges *v.* Hall, 29 Vt. 209; Prentice *v.* Wilkinson, 5 Abb. (N. Y.) Pr. 49; Tompkins *v.* Smith, 3 S. & P. (Ala.) 54; Brittain *v.* Thrailkill, 5 Jones (N. C.) L. 329; Noyes *v.* Humphries, 11 Gratt. (Va.) 636; Waggoner *v.* Gray, 2 H. & M. (Va.) 603; Stone *v.* Symmes, 18 Pick. (Mass.) 367; Gunnels *v.* Stewart, 3 Brev. (S. C.) 52; Shoemaker *v.* King, 40 Penn. St. 107; Brown *v.* Hazen, 11 Mich. 219. In Rogers *v.* Rogers, 6 Jones (N. C.) L. 300, a father promised a creditor of his son that if he would go to a distant place and go bail for his son, he (the father) would

pay him the debt which his son owed him. The creditor did so, but the court held that this did not render the father liable, *because the debt against the son was still in force*, and therefore the promise was merely collateral and within the statute. White *v.* Solomonsky, 30 Md. 585. In Birchell *v.* Neaster, 36 Ohio St. 331, A let a contract to B for furnishing materials and building a house for a stipulated sum, B employed C to furnish materials and to perform the labor of plastering. When the building was completed, except a small part of the plastering, C, in the absence of B, informed A that he would not finish the plastering unless A would agree to pay him; and A replied, "Finish the plastering and I will see you paid." The obligation of B to complete the house and pay C not being released, it was held:—

1. That the verbal promise of A to see C paid was within the statute, and the fact that there was due from A to B, at the time the promise was made, a sum sufficient to pay the balance to C, did not take it out of the statute.

2. That, in suit on such promise, A might rely upon the statute, under the general denial.

¹ Gordon *v.* Martin, Fitzg. 302.

bill to him, for he was answerable, it was held that the statute of frauds did not apply, and that it was proper to leave it to the jury to say under the circumstances whether the original credit was given to the uncle or not.¹ Where the defendant gave the following guaranty: "I hereby undertake to Mr. T. Edge to see him paid for the gas apparatus he has put up and furnished for Mr. J. Brunton according to the work, to be performed in a scientific manner, as shall be thought necessary and approved by Mr. Evans, the superintendent of the gas works in Peter Street," and the defendant had given orders about the work before and after the guaranty was given, ABBOTT, C. J., left it to the jury to determine whether the defendant, although he had no interest in the theatre in which the apparatus was to be put up at the period in question, was not one of the persons who had originally given orders for the gas apparatus; for if he was, a verdict might be recovered upon his own personal liability, without regard to the guaranty.²

Where the defendant employed a builder to erect some houses, and gave a guaranty for a supply of materials to the builder to a certain amount, and afterwards an order for a further supply to a certain amount, and more materials were supplied on the order of the builder, the defendant being constantly on the premises, it was held that it was for the jury to say whether he had so acted as to lead the plaintiff to believe that the latter supply was to be on his credit.³

In *Simpson v. Penton*,⁴ one Simpson introduced Penton to Ovenston, an upholsterer, and in Penton's presence asked Ovenston if he had any objection to supply Penton with some furniture, and that if he would, "he would be answerable." Ovenston asked Simpson how long credit he wanted, and Simpson replied "he would see it paid at the end of six months." Ovenston agreed to this, and Simpson gave him the order; and the goods were supplied accordingly. At the end of six months, Penton not having paid the amount, Ovenston applied to Simpson for payment, and he paid the

¹ *Darnell v. Trott*, 2 C. & P. 82.

³ *Smith v. Rudhall*, 3 Fos. & Fin.

² *Edge v. Frost*, 4 D. & R. 243; and 143; see also *Taylor v. Hilary*, 1 C. see *Scholes v. Hampson*, cited De M. & R. 741.

Colyar on Guaranties, 94; *Fell on Guaranties*, 2d ed. 27. ⁴ 2 C. & M. 430.

money. The entry in Ovenston's books was: "Mr. Penton per Mr. Simpson." It was held that the jury were warranted in finding that the undertaking on the part of Simpson was not a collateral undertaking.¹

In the recent case of *Mountstephen v. Lakeman*,² the question as to whether credit was given to the guarantor personally was fully discussed. There the plaintiff had been employed to construct a main sewer by a local board of health, of which the defendant was chairman. When the sewer was nearly completed the board gave notice, under the statute, to the occupiers of the adjoining houses to connect their drainage within twenty-one days, or the board would do it at their expense. Before the twenty-one days had expired the plaintiff, having completed the sewer, was about to leave the place with his carts, etc., when the defendant sent after him, and the following conversation took place. The defendant said, "What objection have you to making the connections?" The plaintiff replied, "I have none, if you or the board will order the work, or become responsible for the payment." The defendant replied, "*Go on and do the work, and I will see you paid.*" The plaintiff accordingly did the work under the superintendence of the surveyor of the board, and sent in his account to the board, debiting them with the amount. The board refused to pay, on the ground that they had not authorized the order. The Court of Queen's Bench held that the conversation did not amount to an undertaking by the defendant to be primarily liable for the work, but only to a promise that if the plaintiff should do the work on the credit of the board, the defendant would pay, if the board did not, and that this was a promise to be answerable for the debt of another person, which, not being in writing, could not be enforced. The Court of Exchequer Chamber, however, held that there was evidence on which the jury might have found that the defendant agreed to be primarily liable, and this decision was affirmed by the House of Lords.³

¹ And see *Austen v. Baker*, 12 Mod. 250; *Bateman v. Phillips*, 15 East. 272; *Dixon v. Hatfield*, 2 Bing. 439; 10 Moo. 42; *Clancy v. Piggott*, 2 Ad. & El. 473; *Hargreaves v. Parsons*, 13 Q. B. & W. 561.

² L. R. 7 Q. B. 196, affd. L. R. 7

H. L. 2

³ L. R. 10 L. 24.

SEC. 129. Rule when Original Debtor is Discharged.—*When by the agreement of the parties the original debtor is discharged*, the promise is treated as original, and not within the statute, and the promisor is substituted as debtor,¹ and this rule applies to an executor's promise to pay a debt of the testator. *If the estate is discharged*, his promise is not within the statute,² nor is a promise to pay a debt, where a debtor has been taken upon a *ca sa*, if the creditor will discharge him, where such discharge operates as a discharge of the debt,³ and the same is also held where the promise is made in consideration that the creditor will discharge the debtor,⁴

¹ *Stone v. Symmes*, 18 Pick. (Mass.) 467; *Watson v. Jacobs*, 29 Vt. 169; *Booth v. Eighmie*, 60 N. Y. 238; *Gleason v. Briggs*, 28 Vt. 135; *Curtis v. Brown*, 5 Cush. (Mass.) 492; *Anderson v. Davis*, 9 Vt. 136; *White v. Solomonsky*, 30 Md. 585; *Andre v. Badman*, 13 id. 241; *Watson v. Randall*, 20 Wend. (N. Y.) 201; *Cooper v. Chambers*, 4 Dev. (N. C.) 261; *Yale v. Edgerton*, 14 Minn. 194; *Griswold v. Griswold*, 7 Lans. (N. Y.) 72; *Mead v. Nuges*, 4 E. D. S. (N. Y. C. P.) 510; *Armstrong v. Flora*, 3 T. B. Mon. (Ky.) 43; *Allhouse v. Ramsay*, 6 Whart. (Penn.) 331; *Haggerty v. Johnson*, 48 Ind. 41; *Wood v. Corcoran*, 1 Allen (Mass.) 405; *Lord v. Davison*, 3 id. 131; *Click v. McAfee*, 7 Port. (Ala.) 63; *Parker v. Heaton*, 55 Ind. 1; *Eddy v. Roberts*, 17 Ill. 505; *Quintard v. DeWolf*, 34 Barb. (N. Y.) 97; *Watson v. Jacobs*, 29 Vt. 169; *Gleason v. Briggs*, 28 id. 135; *Day v. Cloe*, 4 Bush. (Ky.) 563; *Warren v. Smith*, 24 Tex. 484; *Corbett v. Cochran*, 3 Hill (S. C.) 41; *Shaver v. Adams*, 10 Ired. (N. C.) L. 261. But while the original debtor remains liable unless the promise is founded on an independent consideration, the promise is within the statute. *Newell v. Ingraham*, 15 Vt. 422; *Britain v. Thrackill*, 5 Jones (N. C.) 329; *Noyes v. Humphries*, 11 Gratt. (Va.) 636; *Brown v. Hazen*, 11 Mich. 219; *Shoemaker v. King*, 40 Penn. St. 107; *Gunnels v. Stewart*, 3 Brev. (S. C.) 52; *Butcher v. Stuart*, 11 M. & W. 557.

² *Harrington v. Rich*, 6 Vt. 666; *Mosley v. Taylor*, 4 Dana (Ky.) 542; *Robinson v. Lane*, 17 Miss. 161.

³ *Lane v. Burghart*, 1 Q. B. 933; *Goodman v. Chase*, 1 B. & Ald. 297.

⁴ *Cooper v. Chambers*, 4 Dev. (N. C.) 261; *Butcher v. Stewart*, 11 M. & W. 857. In *Griswold v. Griswold*, 7 Lans. (N. Y.) 72, the owner of a mortgage made a verbal agreement with the mortgagor to satisfy it if he would discharge a disputed claim of an estate of which the mortgagor was the sole beneficiary by will, against one Parley. The mortgagor, with the approval of the executor of the estate, gave a receipt for the claim and released the executor from, and indemnified him against, all liabilities of the estate. The mortgagor, with the promise was not within the statute, and that the mortgage was discharged. *MULLIN, P. J.*, said: "The undertaking of Manly was not to assume or pay the debt of any person, but it was to satisfy the mortgage held by himself against the defendant upon a new and sufficient consideration moving between him and the defendant, upon the faith of his promise to satisfy the mortgage. The executor at the request of the defendant discharged the claim which he and his wife owned as legatees against Parley. It is true that the executor never executed any technical discharge, and the legatees entitled to the debts, did, with his assent and approval, agree to release Parley and Parley, and the other heirs released

or to convert a separate into a joint debt, because thereby a new debt is created, and the former extinguished ;¹ and if the original debtor is discharged, by an entry to that effect upon the books of the creditor, or by giving up the evidence of the debt, the promisor is substituted as debtor, and becomes liable as such, notwithstanding the statute ;² but a promise made to pay the debt if the creditor will submit it to arbitration is within the statute, as the agreement to arbitrate does not extinguish the debt.³ Instances may exist where the promise is not within the statute, even though the debtor is not discharged ; but this condition can only arise when the promise is based upon *a new and independent consideration moving between the parties, and from which the promisor derives a direct benefit*, in which case the promisor becomes the debtor, and there is no debt of another to which his promise can be collateral.⁴ The question whether each particular case comes within the statute or not depends on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.⁵ If no liability exists against the person promised for, when the promise is made, and credit is given solely to the promisor, the undertaking is not collateral, but original ; but if another has already become liable, although the liability is not completed, the undertaking is collateral.⁶

the executor from any claim they or either of them might have against him for the property of the estate. *This was done because it was understood that Parley was released.* This was an accord and satisfaction. *Palmerton v. Huxford*, 4 Den. (N. Y.) 166 ; *Farmer's Bank of Amsterdam v. Blair*, 44 Barb. (N. Y.) 641 ; *Neary v. Bostwick*, 2 Hilt. (N. Y. C. P.) 514. In view of these facts, no court would permit either the executor or legatee to recover against Parley. This being so, there was no debt remaining due from Parley to which the undertaking of Manly could be collateral. If the plaintiff can be said to have anything to do with that debt, he assumed an amount of its equal to his bond and mortgage, and agreed to pay it. Such

an undertaking is in no sense collateral. The substance and effect of the arrangement was, that Manly promised to cancel and discharge his bond and mortgage in consideration that the defendant would discharge the debt due Parley. This was a sufficient consideration in law to sustain the promise."

¹ *Ex parte Lane*, 1 De Gex, 300.

² *Langdon v. Hughes*, 107 Mass. 272 ; *Corbett v. Cochran*, 3 Hill (S. C.) 41 ; *Harris v. Young*, 40 Ga. 65.

³ *Harrington v. Rich*, 6 Vt. 666.

⁴ *McCaffli v. Radcliffe*, 3 Rob. (N. Y.) 445.

⁵ *Forth v. Stanton*, 1 Wms. Saund. 211 b.

⁶ *Booker v. Tally*, 2 Humph. (Tenn.) 308 ; *Rhodes v. Leeds*, 3 S. & P. (Ala.)

SEC. 130. Question to Whom Credit Given is for the Jury.—

It is very often the subject of inquiry to whom the credit was given, and such nice distinctions have been taken on the wording of the promise, as to make it impossible to lay down any precise rule of construction, but the jury must determine to whom the credit was given,¹ in view of all the circumstances of the case as the extent of the undertaking, the expressions used, the situation of the parties, and all the circumstances of the transaction.² The form in which the promise is given, as "I will see you paid," or "I will pay you,"³ are of importance in determining the question; but, even though the promise is absolute, the question after all recurs, To whom was the credit given? and if not given entirely to the promisor, then he is not liable upon his promise.⁴ The circumstance that the goods were charged to the promisor or the debtor upon the plaintiff's books is material in determining the question, but by no means conclusive, as it may be shown that they were so charged for convenience,⁵ or by mistake. Nor is the fact that the bill was made out in the name of the debtor,⁶ and presented to him for payment,⁷ conclusive evidence that credit was given to him, although, if unex-

212; *Antonio v. Clipey*, 3 Rich. (S. C.) L. 201; *Arbuckle v. Hawks*, 20 Vt. 538; *Tileston v. Nettleton*, 6 Pick. (Mass.) 509.

¹ 1 Wms. Saund. 230. See *Anderson v. Hayman*, 1 H. Bl. 120.

² *Elder v. Warfield*, 7 H. & J. (Md.) 397; *Warwick v. Grashalz*, 3 Grant's Cas. (Penn.) 234; *Blodgett v. Lowell*, 33 Vt. 174; *Sinclair v. Richardson*, 12 id. 33; *Billingsley v. Dempewolf*, 11 Ind. 414; *Hazen v. Bearden*, 4 Sneed. (Tenn.) 48; *Turton v. Burky*, 4 Wis. 119; *Payne v. Baldwin*, 14 Barb. (N. Y.) 570; *Chase v. Day*, 17 John. (N. Y.) 114; *Smith v. Hyde*, 19 Vt. 54; *Hetfield v. Dow*, 27 N. J. L. 119; *Prosser v. Allen*, Gow. 117; *Simpson v. Penton*, 2 C. & M. 436; *Keate v. Temple*, 1 B. & P. 158; *Gill v. Herrick*, 111 Mass. 501; *Jefferson Co. v. Hogle*, 66 Penn. St. 202; *Haverly v. Mercur*, 76 id. 97; *Clifford v. Luhning*, 69 Ill. 401; *Rawson v. Springstein*, 6 T. & C. (N. Y.) 611.

³ *Bates v. Starr*, 6 Ala. 697; *Briggs v. Evans*, 1 E. D. S. (N. Y. C. P.) 192; *Thwaites v. Curl*, 6 B. Mon. (Ky.) 172.

⁴ *Blake v. Parlin*, 22 Me. 395; *Moses v. Norton*, 36 id. 113.

⁵ *Barrett v. McHugh*, 128 Mass. 165; *Swift v. Pierce*, 13 Allen (Mass.) 136; *Walker v. Hill*, 119 Mass. 249; *Burkhatter v. Farmer*, 5 Kan. 477; *Ruggles v. Gatton*, 50 Ill. 412; *Myer v. Griffin*, 31 Md. 350; *Champion v. Doty*, 31 Wis. 190.

⁶ *Houlditch v. Milne*, 3 Esp. 86. But see *Leland v. Crayon*, 1 McCord (S. C.) 100; *Dixon v. Frazer*, 1 E. D. S. (N. Y. C. P.) 32; *Connally v. Kettlewell*, 1 Gill (Md.) 260; where the fact that the goods were charged to the debtor was held sufficient to show the promise to be collateral.

⁷ *Pennell v. Pentz*, 4 E. D. S. (N. Y. C. P.) 639; *Larson v. Wyman*, 14 Wend. (N. Y.) 246.

plained, such facts are sufficient to make the promise collateral. The fact that the plaintiff charged the goods to the promisor, or presented the bill made out in his name to him for payment, is not conclusive evidence that he gave credit solely to him,¹ and the jury, in spite of that circumstance, may, where the circumstances warrant it, find that the whole credit was given to the debtor.² The fact that the goods were bought for and used by the promisor, does not necessarily fix his liability for the debt,³ but, as previously stated, the question is for the jury in view of all the circumstances, and if there is *any* evidence to sustain their finding, it is conclusive.⁴ Where the plaintiff, who carried on the trade of a tailor, being applied to by one Foster to be supplied with certain clothes made by the plaintiff, and still in his possession, was unwilling, and refused to deliver them to Foster upon his credit, but delivered them at the special request of the defendant, who undertook and promised to pay, it was held that the case was not within the statute, that the whole credit was given to the defendant, and that he was liable.⁵

In *Rains v. Story*,⁶ A applied to B for goods; B asked for a reference; A referred him to C; C on being applied to inquired the amount of the order, and on what terms the goods were to be furnished, and, on being told, said: "You may send them, and I'll take care they are paid for at the time." He was afterwards written to to accept a bill for the amount, to which he replied that he was not in the habit of accepting bills, but that the money would be paid when due. After this, B (the seller) wrote to C about the goods, and spoke of them in his letter as goods which C had "guaranteed," and the attorney of B's assignees (when he had become bankrupt) wrote to A for the money; but this letter was a circu-

¹ *Hardman v. Bradley*, 85 Ill. 162; *Cutter v. Hinton*, 6 Rand. (Va.) 509; *Poultney v. Ross*, 1 Dall. (Penn.) 238; *Walker v. Richards*, 41 N. H. 383; *Kinloch v. Brown*, 1 Rich. (S. C.) L. 223; *Noyes v. Humphrey*, 11 Gratt. (Va.) 636; *Eshleman v. Harnish*, 76 Penn. St. 97.

² *Scudder v. Wade*, 4 N. J. L. 249.

³ *Hendricks v. Robinson*, 56 Miss. 694.

⁴ *Petitt v. Braden*, 55 Ind. 201; *Dean v. Tallman*, 105 Mass. 443; *Bloom v. McGrath*, 53 Miss. 249; *Cowdin v. Gottgetreu*, 55 N. Y. 656; *Glenn v. Lehman*, 54 Mo. 45; *Moshier v. Kitchell*, 87 Ill. 18; *Eshleman v. Harnish*, 76 Penn. St. 97.

⁵ *Croft v. Smallwood*, 1 Esp. 121; and see *Keate v. Temple*, 1 B. & P. 158.

⁶ 3 C. & P. 130.

lar, written in pursuance of a list made out for him by B, and without any knowledge of the circumstances under which the debt was contracted. It was held that on this evidence C was not primarily liable, but only as a guarantor of the debt of A.¹

SEC. 131. Evidence as to Whom Credit Given.—*The tradesmen's books should be produced, in order to show to whom credit was given.* In *Austen v. Baker*,² HOLT, C. J., said that if B desires A to deliver goods to C, and promises to see him paid, there assumpsit lies against B; though, in that case, he said, at Guildhall he always required the tradesman to produce his books, to see whom credit was given to. But if, after goods delivered to C by A, B says to A, "You shall be paid for the goods," it will be hard to saddle him with the debt. And in *Storr v. Scott*,³ it was held that when a tradesman makes out an account for goods in the name of a particular person, it must be taken that they were furnished on the credit of such person, *unless it can be shown by unequivocal evidence that the credit was in fact given to another.*

SEC. 132. Must be Principal Debtor.—In order to bring a case within the statute, *it must be shown that the parties to the transaction intended that there should be a principal debtor, either at the time the promise was made, or at some future time.* The leading case upon this point is *Birkmyr v. Darnall*.⁴ There the declaration stated as follows: That in consideration the plaintiff would deliver his gelding to A, the defendant promised that A should redeliver him safe, and evidence was given that the defendant undertook that A should redeliver him safe; and this was held a collateral undertaking for another, for where the undertaker comes in aid only to procure a

¹ See also *Darnall v. Tratt*, 2 C. & P. 82; *Simpson v. Penton*, 2 C. & M. 430; *Andrews v. Smith*, 2 C. M. & R. 627; *Cross v. Williams*, 7 H. & N. 675.

² 12 Mod. 250; *Dixon v. Frazer*, 1 E. D. S. (N. Y. C. P.) 32; *Leland v. Creyon*, 1 McCord (S. C.) 100; *Rugles v. Gallon*, 50 Ill. 412; *Swift v. Pierce*, 13 Allen (Mass.) 136; *Conally v. Kettlewell*, 1 Gill. (Md.) 260; *Walker v. Hill*, 119 Mass. 249; *Burkhalter v. Farmer*, 5 Kan. 477; *Myer v. Griffin*, 31 Md. 350; *Larson v. Wyman*, 14 Wend. (N. Y.) 246; *Champion v.*

Doty, 31 Wis. 190. But the fact that the creditor charged the goods to the defendant is not conclusive evidence that he gave credit to him alone: *Scudder v. Wade*, 4 N. J. L. 249; *Poultney v. Ross*, 1 Dall. (Penn.) 238; *Walker v. Richards*, 41 N. H. 388; *Noyes v. Humphrey*, 11 Gratt. (Va.) 636; nor is the circumstance that he charged the goods to the debtor: *Swift v. Pierce*, 13 Allen (Mass.) 136; *Champion v. Doty*, *ante*.

³ 6 C. & P. 241.

⁴ 1 Salik. 27.

credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements; but where the whole credit is given to the undertaker, so that the other party is but as his servant, and there is no remedy against him, this is not a collateral undertaking. But it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment against the original hirer, as well as assumpsit upon the promise against this defendant. *Et per cur.* "If two come to a shop, and one buys, and the other, to give him credit, promises the seller, 'If he does not pay you, I will,' this is a collateral undertaking, and void, without writing, by the statute. But if he says, 'Let him have the goods, I will be your paymaster,' or, 'I will see you paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act but as his servant."¹ The case of Watkins

¹ And see the judgment given at greater length, *Ld. Raym.* 1087. *Hall v. Wood*, 4 *Chand. (Wis.)* 36; *Ware v. Stephenson*, 10 *Leigh. (Va.)* 155; *Doyle v. White*, 26 *Me.* 341; *Homans v. Lombard*, 21 *id.* 308; *Williams v. Corbett*, 28 *Ill.* 262; *Kurtz v. Adams*, 12 *Ark.* 174; *Kinloch v. Brown*, 1 *Rich. (S. C.)* 223; *Taylor v. Drake*, 4 *Strobh. (S. C.)* 431; *Olmstead v. Greenly*, 18 *John. (N. Y.)* 12; *Weyand v. Critchett*, 3 *Grant's Cas. (Penn.)* 113; *Nelson v. Hardy*, 7 *Ind.* 364; *Cahill v. Bigelow*, 18 *Pick. (Mass.)* 369; *Flanders v. Crolius*, 1 *Duer (N. Y.)* 206; *Cropper v. Pitman*, 13 *Md.* 190; *Cutter v. Hinton*, 6 *Rand. (Va.)* 509; *Hill v. Raymond*, 3 *Allen (Mass.)* 540; *Swift v. Pierce*, 13 *id.* 136; *Rhodes v. Leeds*, 3 *S. & P. (Ala.)* 212; *Briggs v. Evans*, 1 *E. D. S. (N. Y. C. P.)* 192; *Dunning v. Roberts*, 35 *Barb. (N. Y.)* 463; *Carville v. Crane*, 3 *Hill (N. Y.)* 483; *Walker v. Richards*, 39 *N. H.* 259; *Hetfield v. Dow*, 27 *N. J. L.* 440. In *Gardiner v. Hopkins*, 5 *Wend. (N. Y.)* 23, where a printer had printed a book for a bookseller, and delivered all the work, except a few signatures (eight sheets) when the bookseller having failed, and the printer assigned the book to the defendant, who promised the printer that if he would deliver

the balance of the work to him he would pay him the balance of his bill, the promise was held to be original. But in *Payne v. Baldwin*, 14 *Barb. (N. Y.)* 579, where the Star Insurance Company had entered into a contract with E S to do the mason work on some houses which the company was building, and E S made a contract with the plaintiff to furnish plaster and marble, but E S refusing to make a payment when demanded, the plaintiffs declined to furnish such materials, and the president of the company told him to go on and furnish the stuff and he would see him paid, it was held that the promise was collateral and within the statute. In *Pennell v. Pentz*, 4 *E. D. S. (N. Y. C. P.)* 639, the defendant agreed to become surety, provided the principal debtor would assign to him the contract about which the materials to be purchased were to be used. This having been done, the defendant directed the vendor to furnish the materials, and promised to pay him, "as no other person could draw the money on the contract but himself," assuring him that a written agreement was not necessary. It was held that the credit was given to the defendant, and that the contract was not within the stat-

*v. Vince*¹ is to the same effect. There it was said that if A promises B (being a surgeon) that if B will cure D of a wound, he will see him paid, this is only a promise to pay if D does not, and it ought, therefore, to be in writing by the statute. But if A promises in such case that he will be B's paymaster, whatever he shall deserve, it is immediately the debt of A, and he is liable without writing.²

Unless there was, at the time when the promise was made, a principal debtor, there is no debt to which the promise could be collateral. "There could be no suretyship," says LORD SELBORNE,³ "unless there be a principal debtor, who, of course, may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time; *but until there is a principal debtor*, there can be no suretyship.

SEC. 133. To Constitute Guaranty, must be Debt to Guarantee.—Nor can a person guarantee anybody else's debt, unless there is a debt of some other person to be guaranteed;⁴ and this rule applies in all cases where the debt was created upon the *sole* credit of the promisor. Thus, where a land-owner, whose land had been taken for the construction of a railroad, and who had presented a petition to the county commissioners for his damages therefor, had afterwards fixed by a written agreement with the railroad company the sum to be assessed on his petition, with a provision that, if satisfactory to the commissioners, this sum might be entered upon their records, without a view, and other proceedings had thereon, as if

ute. See also *Fallmer v. Dale*, 9 Penn. St. 83, where a promise to pay for land if the grantor would convey it to another, which he did, was not within the statute. So in *Nelson v. Dubois*, 13 John. (N. Y.) 175, where a horse was sold to another *at the request of the defendant*, and on his promise to guarantee the payment of such person's note therefor, the promise was held not to be within the statute; and the defendant having indorsed the note in blank, it was held that the plaintiff might write a guaranty over it.

¹ Ld. Raym. 224.

² And see *Seaman v. Price*, 1 C. & P. 586; 10 Moo. 34; *Turner v. Phil-*

lips, 1 Roll. Abr. 20, pl. 14; and the judgment of WILLES, J., in *Mountstephen v. Lakeman*, L. R. 7 Q. B. 196.

³ In *Mountstephen v. Lakeman*, L. R. 7 H. L. 24.

⁴ *Thompson v. Blanchard*, 2 N. Y. 335; *Sanborn v. Merrill*, 41 Me. 467; *Peck v. Thompson*, 15 Vt. 637; *Chicago & C. Coal Co. v. Liddell*, 69 Ill. 639; *Griffin v. Derby*, 5 Me. 476; *Merrill v. Englesby*, 28 Vt. 150; *Sampson v. Swift*, 11 id. 315; *Walker v. Norton*, 29 id. 226; *Douglass v. Jones*, 3 E. D. S. (N. Y. C. P.) 551; *Jepher-son v. Hunt*, 2 Allen (Mass.) 417; *Read v. Nash*, 1 Wils. 305; *Duffy v. Wunsch*, 42 N. Y. 243.

there had been a view, an oral promise, for a sufficient consideration, by a third person, to pay to him the interest on that sum until the circumstances of the railroad company shall enable them to pay the amount, was held not within the statute, if in fact the sum so fixed had not been adopted or acted on by the commissioners, and the promise is made with knowledge of that fact, because there was no debt to which the promise could be collateral.¹ This is also the case where the original debtor is discharged, and the promisor is substituted as debtor.² Thus, where the defendant took his nephew to the house of another, and requested him to provide clothing, board, and other necessities for the nephew, and promised to pay for the same; it was held an original undertaking upon which a recovery could be had upon the common counts for goods furnished and services rendered.³ So where a per-

¹ Jepherson v. Hunt, 2 Allen (Mass.) 417.

² In Jolley v. Walker, 26 Ala. 690, the plaintiff having agreed with S and P, who were mail contractors, to keep their drivers and horses at a stipulated sum per annum, payable quarterly, and during the last quarter, on their becoming insolvent, having refused to keep their drivers and horses without security, thereupon, defendant, at the request of S and P, wrote to plaintiff, saying: "I will see you paid for this quarter, as their time then expires, payable when due, in Alabama bank-notes"; plaintiff kept the drivers and horses until the expiration of the quarter, and the agent of S and P afterwards closed their account by giving the note of the surviving partner, payable one day after date, which was filed as a claim against the estate of the deceased partner; it was held that defendant's promise was an original undertaking, upon a new and sufficient consideration, which, upon its acceptance by plaintiff, discharged the debt of S and P, and bound defendant to pay, at the expiration of the quarter, in Alabama bank-notes. In Hill v. Wells, 17 Ill. 88, the declaration alleged that A had been in the employment of B, and that money was due him from B on that account;

that B being in failing circumstances, A refused to work longer for him, and that C, thereupon, in consideration that A would go on, promised to pay A what was due him, by reason of such employment, from B. The statute was held a good plea to this, because A was bound to perform his contract, and there was no consideration for C's promise. But where a contractor is discharged from his contract because of the failure of the other party to perform a promise made by a third person will not be within the statute. Thus, A contracted to do certain work for B, but suspended labor because of B's failure to pay according to the contract. C told A to finish the contract, and he would pay him in full. A did so, relying upon C's promise. Held that A could recover of C for the work performed after such promise, but not for that before. Rand v. Mather, 11 Cush. (Mass.) 1. But see Bresler v. Pendell, 12 Mich. 224, where a contrary doctrine was held. A request to one to work for the benefit of a third party, and a promise to pay, form an original, not a collateral promise. Brown v. George, 17 N. H. 128; Backus v. Clark, 1 Kan. 303; Arbuckle v. Hawks, 20 Vt. 538.

³ Ford v. Rockwell, 2 Cal. 73. Where A sold goods to B on credit,

son promised to pay the debt of another, and requested the creditor to charge the amount to him, it was held that the debt thereby became his own.¹ Where an indorser of a note payable to a bank, who was discharged from payment by a failure of the bank, to properly protest the note, promised the bank that if they would continue to discount his paper as before, he would pay the note, which the bank did, it was held that this was not a promise to pay the debt of another, and was not within the statute.² A writing executed by A to B, which, after reciting that B was about to appoint C his agent for the purchase of grain, and to furnish him money for that purpose, contained a provision as follows: "I hereby become responsible to said B, and agree to pay him all money that he may so advance to C, and that may be due him from C from time to time, by reason of such advances," was held to create an absolute liability against A, and not collateral.³ Where a contract was let to a contractor to erect a courthouse for a county, and the contractor being unable to obtain brick therefor on his own credit, the commissioners of the county told the plaintiff to furnish the brick and they would see him paid, it was held that the undertaking was original and not within the statute.⁴ A land-owner, who had made arrangements with a cropper upon his land to make him certain advances, promised a third person that if he would make advances to the cropper, he (the defendant) would be responsible for them, and it was held that his undertaking was original and not within the statute.⁵ If a person who is benefitted by the consideration of a note signed by other parties promises them to join in the note, but does not, it is held that his promise is an original undertaking, and not within the statute.⁶ So is a promise made upon consideration that if another will sign a note for another, the person promising will pay it.⁷ An agreement made *before* work is performed

and charged them to him, and afterwards C called upon A with B, and told A, in B's hearing, that he (C) was in debt to B, and that if A would release B, and charge the amount to him (C), he would pay it, which A did, it was held that C's undertaking was original and not within the statute. *Harris v. Young*, 40 Ga. 65.

¹ *Graham v. O'Neil*, 2 Hall (N. Y.) 474.

² *Uhler v. Farmers' Nat. Bank*, 64 Penn. St. 406.

³ *Dickinson v. Colter*, 45 Ind. 445.

⁴ *Jefferson County v. Slagle*, 66 Penn. St. 202.

⁵ *Neal v. Bellamy*, 73 N. C. 384.

⁶ *Doe v. Downs*, 50 Iowa, 310.

⁷ *Godden v. Pierson*, 42 Ala. 370.

for another, that if the person to whom the promise is made will render the service, the promisor will see that he is paid therefor, is not within the statute, being an original undertaking.¹ But a promise made to one who has performed certain work for another, that if he will complete it, the promisor will pay him not only for the services which he shall thereafter render, but also for those which he has rendered, the statute applies as to the amount due for the services which had been rendered *before* the promise was made, but not to those to be thereafter rendered.² But where a gross sum is to be paid to a person for certain services *at their completion*, and the contract is not divisible, the rule has been held to be otherwise; and the promisor, if a beneficiary under the contract, would be treated as the original debtor for the entire sum accruing under the contract. Thus, where a mechanic who had been employed by a contractor was about to quit work, because he was afraid that he would not get his pay, and the owner told him to go on and complete the work, and he would see him paid, it was held that the debt was thereby made his own, and the statute did not apply.³ But while this was formerly the rule in New York,⁴ it is now held that such a promise is collateral, as to services already rendered, unless the original debtor is discharged.⁵ Where, in the usual course of business between banks, promissory

¹ *Sinclair v. Bradly*, 52 Mo. 180; *Hodges v. Hall*, 29 Vt. 209; *Prentice v. Wilkinson*, 5 Abb. Pr. (N. Y.) N. L. 49.

² *Hite v. Wells*, 17 Ill. 88; *Rand v. Mather*, 11 Cush. (Mass.) 1.

³ *Warwick v. Grosholz*, 3 Grant's Cas. (Penn.) 234; *Quintard v. DeWolf*, 34 Barb. (N. Y.) 97; *Devlin v. Woodgate*, 34 id. 252; *Benedict v. Dunning*, 1 Daly (N. Y. C. P.) 241; *Stilwell v. Otis*, 2 Hilt. (N. Y. C. P.) 148; *Darlington v. McCann*, 2 E. D. S. (N. Y. C. P.) 414. Thus, B contracted with H to build a house for the latter, and employed S to do the plastering. When the work was ready for the plastering, B had become of doubtful credit, and S applied to H to know whether he had funds of B under the contract to pay for the plastering, and was assured by H that there would be

funds of B retained in H's hands to pay for the work to be done by S, and also gave his verbal promise that if S would go on and do the work, H himself would pay for it if B did not. S, thereupon, went on and did the plastering; but when he called on H for the money, H denied that he had any money of B under the contract. It was held that H was estopped to deny that he had funds to pay for the work, and that the promise was an original contract with S, not void under the statute of frauds, as a verbal promise to pay the debt of another. *Hiltz v. Scully*, 1 Cinc. (Ohio) 555.

⁴ *King v. Depard*, 5 Wend. (N. Y.) 277; *Chesterman v. McCostlin*, 6 N. Y. Leg. Obs. 212; *Quintard v. DeWolf*, 34 Barb. (N. Y.) 97.

⁵ *Brown v. Weber*, 38 N. Y. 187.

notes of customers who are in funds on presentment, instead of being actually paid, are certified as good and settled for in the exchanges of the next day, such certificate is an original promise, and not within the statute.¹ So where a bank guaranteed to a trust company the final collection of certain instalments, to become due upon a bond and mortgage assigned by a debtor of the bank to the trust company by him, and upon which the trust company advanced money, to be applied by the debtor in the payment of his debt to the bank, and he did so apply it, it was held that the undertaking was original, and that the bank was bound by its guaranty.²

SEC. 134. **Rule when there is a New and Independent Consideration.**—In California and Dakota a verbal promise to pay the debt of another, predicated upon a *new* consideration, is excepted from the operation of the statute,³ and in nearly all the states, such promises are held not to be within the statute, *where there is a new, valuable, and independent consideration moving between the creditor and the promisor, upon which the promise is predicated, from which the promisor derives any benefit or advantage, so that, instead of being a promise to be responsible for, it amounts to a purchase of, the debts by the promisor.*⁴ Where a surviving partner, holding a policy of insurance upon the life of the deceased partner, in pledge for his partnership indebtedness to him, surrenders such policy upon the promise of the widow of the decedent to pay the debt of her deceased husband, whereby she is enabled to collect money to be applied upon her specific allowance as widow, her promise, though not in writing, is not within the statute of frauds, but is an original undertaking.⁵ Where the plaintiff, in consideration of the promise, has relinquished some lien, benefit, or advantage for securing or recovering his debt, *and where, by means of such relinquishment,*

¹ Mead v. Merchants' Bank, 25 N. Y. 143.

² Talman v. Rochester City Bank, 18 Barb. (N. Y.) 123.

³ See Appendix "California, Dakota."

⁴ In Sampson v. Hobart, 28 Vt. 697, it was held that an absolute contract, in which the debtor is not interested,

and from which the benefit accrues chiefly to the new party, amounts to a sale of the debt, and is not within the statute.

⁵ Wilson v. Bevans, 58 Ill. 232; Meyer v. Hartman, 72 id. 442; Clifford v. Luhring, 69 id. 401; Emerson v. Slater, 22 How. (U. S.) 28.

the same interest or advantage has inured to the benefit of the defendant, — in such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and *the substance of the contract is the purchase by the defendant of the plaintiff, of the lien, right, or benefit in question.* But where the original debt still subsists, and where the plaintiff has relinquished no interest or advantage which has inured to the benefit of the defendant, it is not an original contract, but a contract to pay another's debt, and must be in writing.¹ In cases of this character the debt is kept on foot after payment, by the party promising, and is transferred to him as purchaser. In other words, he becomes assignee of the debt. This doctrine is well illustrated in an early English case,² in which the declaration alleged a breach of a promise in not replacing certain stock which had been sold out by the plaintiff for the defendant, and the produce whereof had been paid to the defendant. The defendant pleaded the general issue, also specially, that the plaintiff ought not recover more than £525, because the defendant was on a certain day indebted to the plaintiff, by virtue of the said several promises and undertakings in the said declaration mentioned, in the sum of £976 2s. 6d., and no more, and that the defendant afterwards, and before the commencement of the suit, was also indebted to several other persons, to wit, James Greenwood, etc., in certain large sums respectively, and the defendant being so indebted, the defendant was unable to pay his creditors the full amount of the several debts, whereof the plaintiff and the several other creditors of the defendant then and there had notice; and that it was thereupon computed and agreed, upon an investigation had by the plaintiff and the several other creditors of the defendant, that the estate and effects of the defendant would not extend to pay 10s. in the pound, on the amount of the debts due and owing by the defendant, whereupon it was then and there proposed and agreed, between and amongst the plaintiff and the several other creditors of the defendant, and also by Thomas Weston, by the procurement of the defendant, and at the request of the plaintiff, that Thomas Weston should and would pay

¹ Curtis v. Brown, 5 Cush. (Mass.) 497; Borchsensius v. Canutson, 100 Ill. 82.

² Anstey v. Marden, 1 B. & P. 130.

out of his own moneys to the plaintiff, and the several other creditors of the defendant, a sum of money equivalent to 10s. in the pound, on the amount of their respective debts, *in full satisfaction and discharge thereof*; which sum the plaintiff and the several other creditors of the defendant would accept and receive *in full satisfaction and discharge of their respective debts*. The plea then states the mutual promise to perform the agreement, and that Weston, before the commencement of the suit, tendered and offered to pay, for and on the behalf of the defendant, to the plaintiff, the sum of £525 being so much as amounted to 10s. in the pound, upon the sum of £976 2s. 6d., the amount of the debt, which sum the plaintiff refused to accept.

On the trial of the cause, the CHIEF JUSTICE expressed a doubt whether that could be properly said to be a promise within the statute, by the very terms of which the debt was supposed to be discharged, and that he did not seem to adhere to this doubt in the sequel. In the opinion of CHAMBRE, J., as delivered by him in the same case, great stress was laid upon the circumstance, that the *intent* of the contract was not to *discharge* the party indebted, *but to keep the debts on foot*; which, indeed, was the feature of the case which gave to it the character of a *purchase*. And he stated that it appeared to him to be perfectly clear, that the transaction in substance was a contract to *purchase* the debts of the several creditors, instead of being a contract to *pay* or *discharge* the debts owing by Marden, and that if the contract had been that which it was represented to have been, on the special pleas, he should have it a case within the statute of frauds.

Upon the same principle of considering the transaction in the light of a purchase, the case of *Castling v. Aubert*¹ was determined by the Court of King's Bench to be entirely clear of the statute. In that case the plaintiff, who was the policy broker for one Grayson, had policies of insurance in his hands, belonging to his principal, which were securities on which he had a lien for the balance of his account, and on the faith of those he agreed to accept bills for the accommodation of his principal. One of these bills became due, and

¹ *Castling v. Aubert*, 2 East, 325.

actions were brought against the plaintiff as acceptor, and against Grayson as drawer. It was desirable that the policies should be given up by the plaintiff to the defendant, to whom Grayson had at that time transferred the management of his insurance concerns, in order to enable him to recover the money for the losses incurred from the underwriters; and the defendant undertook, upon condition that the policies were made over to him, to settle the acceptances due, and to lodge money in a banker's hands for the satisfaction of the remainder, as they became due. This transaction was considered in the light of a purchase by the defendant of the plaintiff's interest in the policies. And not in that of a mere promise to the creditor to pay the debt of another due to him; for it was in truth a promise by the defendant to pay what the plaintiff would be liable to pay, on condition of having the securities put into his, the defendant's, hands, as the means of enabling him to indemnify the plaintiff; or, as LE BLANC, J., put the case: "One man having a fund in his hands, which was adequate to the discharge of certain incumbrances; another person undertook that, if the fund was delivered up to him, he would take it with the incumbrances."

In the case of *Castling v. Aubert*, *ante*, the CHIEF JUSTICE laid considerable stress upon the circumstance that the *defendant* had not the discharge of Grayson principally in his contemplation, but the discharge of *himself*. That was his moving consideration, though the discharge of Grayson would eventually follow; which is an illustration of MR. JUSTICE CHAMBRE's reasoning, in the case of *Antsey v. Marden*, except that the contract there was not only not made in contemplation of the discharge of the original debtor, *but with the direct purpose of keeping his debt on foot*. In *Antsey v. Marden*, the contract was a purchase of debts, or rather of the right of recovering debts for the promisor's own benefit; in *Castling v. Aubert*, the promisor took upon himself to answer for the payment of money, to which the promisee was liable, in consideration of having the fund transferred to him, out of which was to come his indemnity. The *object* of the promise was in neither case the *discharge* of the original debtor, though in the one case that discharge would follow

eventually from the undertaking. The principle of the transactions in both cases was the same, though the consequences were dissimilar.¹ LORD ELLENBOROUGH, in *Castling v. Aubert*, *ante*, illustrated the distinction between a discharge which arises collaterally, and eventually, and that which follows as the direct purpose of the undertaking, by the case of a bill of exchange upon which several persons are liable. "In such a case," said he, "if it be agreed to be taken up by one, eventually others may be discharged; *but the moving consideration is the discharge of the party himself*, and not of the rest, although that also ensues." And he treated such an undertaking *by a party already liable*, as not being within the statute.² The statute does not apply to a promise to

¹ See *Allen v. Thompson*, 10 N. H. 32; *Doolittle v. Taylor*, 2 Bos. (N. Y.) 306; *French v. Thompson*, 6 Vt. 54; *Hindman v. Langford*, 3 Strobh. (S. C.) L. 207; *Gardner v. Hopkins*, 5 Wend. (N. Y.) 23; *Olmstead v. Greenly*, 18 John. (N. Y.) 12. In *Allen v. Thompson*, *supra*, the plaintiff had procured the account books as a pledge to secure a debt, and the defendant, in consideration that the plaintiff would deliver the books to a person designated by him for collection, promised to pay the plaintiff's debt in case enough should not be collected for that purpose. The court held that the promise was not within the statute as the delivery of the books to the third person was the same as a delivery to the defendant himself.

² In *Stephens v. Squire*, 5 Mod. 205, this rule was adopted. In that case an action had been brought against Squire, an attorney, and two others, for appearing for the plaintiff without a warrant; and that the defendant promised, that in consideration the plaintiff would not prosecute the action, he would pay £10 and the costs of suit. An action was brought against the defendant upon this promise; but the court were of opinion, that it could not be said to be a promise for another person, but for his own debt, and, therefore, not within the

statute. According to the report of the same case in *Comberbach*, 362, the CHIEF JUSTICE observed, that it was an original promise, and the party himself liable. Upon which, SIR BARTHOLOMEW SHOWER asked his LORDSHIP whether it would not have been plainly within the statute, if the promisor had not been a party. But HOLT desired him to put that case when it came. Here, said he, he appears to be a party concerned in the former action. It is to be observed, that the defendant in the case just mentioned was not only liable, but had actually been sued, and that his promise therefore had a direct view to his own discharge, though it would operate eventually in discharge of third persons; which brings it within the doctrine so satisfactorily stated in *Castling v. Aubert*, *ante*. *Watson v. Turner*, B. N. P. 281, seems to be grounded on the same doctrine.

In this case the £10 undertaken for was not the debt of any other person, but offered by the defendant as a compensation for damages; therefore, that part of his undertaking which related to the costs came more properly into question upon the statute; as to which, upon the ground of his being a party, and liable himself, according to the doctrine just stated, the case seemed to be out of the statute. But suppose the defendant had expressly

pay the debt of a third person, where by the receipt of an adequate consideration the debt has become also the party's own debt,¹ nor to a promise made in consideration that the promisee incurs a liability to a third person.²

· SEC. 135. **Promise to Pay Broker.**—A promise by a third party to pay a broker put in possession of goods on which a distress for rent has been levied, his charges must be in writ-

said to the plaintiff, Go to J S (being one of the other persons concerned in doing that which was the subject of the action) and ask him to pay the costs, and if he will not, I will be personally and wholly responsible for the amount; perhaps a promise *expressed in these terms*, though made under those circumstances, would be considered as falling within the statute. Such appears to be the doctrine of *Winckworth v. Mills*, 2 Esp. 484, in which it was held by LORD KENYON, *at nisi prius*, that a promise by the indorser of an unpaid note, to indemnify the holder, if he would proceed to enforce payment against the other parties to the note, must be in writing, or it would be void under the statute of frauds. In the case of *Anstey v. Marden*, *ante*, the CHIEF JUSTICE in his opinion stated, that it had rather struck him at the trial, that the promise being only to pay 10s. in the pound, and not to pay the *whole* debt, it was an *original* agreement, and, therefore, not within the statute. But he afterwards admitted, that *Chater v. Beckett* 7 T. R. 201 (and see *Lexington v. Clark*, 2 Vent. 223) was a decisive authority the other way.

¹ *Robinson v. Gilman*, 43 N. H. 485. In *Shook v. Vanmater*, 22 Wis. 532, where the defendant in consideration that C and S would surrender to B certain securities which they held to indemnify them as accommodation makers of a note with B, gave his *written* guaranty against such liability "if they would permit B to manage the matter himself," it was held that his promise was an original undertaking and not within the statute. In *Winfield v. Potter*, 10 Bos. (N. Y.) 226,

where persons holding a contract for the supply of certain merchandise to the government which was to be subject to inspection, delivered a part of the goods, and pledged the government receipts therefor, to the plaintiff, as security for a debt due to him, and subsequently assigned the contract to the defendant, in consideration, among other things, of his assuming to pay all their debts, and the defendant, in order to obtain the receipts pledged, so that he might effect a settlement with the government, gave to the plaintiff a written promise that he would pay the amount of the debt whenever he received certificates from the government for the payment of so much upon the contract, in consideration that the plaintiff should aid in procuring the inspection and acceptance of the goods, without charge, and the plaintiff at the same time gave to the defendant a written promise to assist him accordingly without charge, it was held that the promise to pay the plaintiff was not void under the statute of frauds. In *Beatty v. Grim*, 18 Ind. 131, it was held that a verbal contemporaneous agreement made by the sellers of a contract to deliver hogs, to the effect that they will perform its stipulation if the original contracting parties fail to do so, is not within the statute. And in *Huntington v. Wellington*, 12 Mich. 10, it was held that the statute did not apply to a verbal warranty of certain notes and a mortgage that the makers of the notes were good, and that the land was ample security for the debt, and the title unencumbered.

² *Underhill v. Gibson*, 2 N. H. 352; *Doane v. Newman*, 10 Mo. 69.

ing, as the landlord who has authorized the distress is liable for the necessary expenses.¹

SEC. 136. To Pay a Debt to be Transferred.—A promise in writing to pay a debt to be transferred from the promisor's account to that of a third party (his agent) is valid, as a guaranty.²

SEC. 137. Promise by Execution Creditor.—Where, in an action against the sheriff for taking the plaintiff's goods in a *fiery facias* against a third party, the sheriff failed on the trial, and the execution creditor then employed an attorney to apply for a new trial, and on obtaining a rule for a new trial, to act as attorney on the second trial, it was held that the attorney might recover his bill against the execution creditor, although there was no memorandum in writing, as the execution creditor was the person primarily liable to him; but if the attorney had in the first place been employed by the sheriff, it would be otherwise.³

SEC. 138. Promise in Consideration of Percentage.—A and Co. bought certain wools of B and Co., payable by bearers, acceptance at eight months; but before the sale was completed B and Co., requiring some security, in consideration of £1 per cent, obtained the following instrument from C, signed by him: "Gentlemen,—In consideration of £1 per cent, I hereby guarantee the due and correct payment of one-half the amount of 136 bales of wool sold to Messrs. A and Co., as per contract;"—it was held that the instrument was a guaranty.⁴

SEC. 139. Promise to Pay out of the Funds of Another.—If the defendant contracts not to pay A's debt out of his own funds, but only *faithfully to apply A's funds for that purpose, when they shall come to his hands*, that contract will not be within the operation of the statute. Thus, where the defendant promised the plaintiff, in consideration that he would

¹ Colman v. Eyles, 2 Stark, 62.

² Brunton v. Dullens, 1 F. & F. 450.

³ Noel v. Hart, 8 C. & P. 230.

⁴ *In re Willis*, 4 Exch. 530; *Rowland v. Bull*, 5 B. Mon. (Ky.) 146

But see *Sharp v. Emmet*, 5 Whart. (Penn.) 288, where it was held that the receipt of such percentage does not create a guaranty of a bill purchased *bona fide* in the usual course of business and remitted to the principal.

deliver such materials as Hill (a workman employed to do certain work) should require, that he would pay him for them out of such moneys received by him as should become due to Hill; the promise was considered to be original and not within the statute.¹ In *Dixon v. Hatfield*,² W undertook to complete the carpenter's work in H's house, and find all the materials: W being delayed for want of credit or funds to procure timber, it was supplied by M on H's signing the following guaranty: "I agree to pay M for timber to house in A C out of the money that I have to pay W, provided W's work is completed;" and it was held that this was not a guaranty to pay if W should fail, but a direct undertaking to pay when the work should be completed. So where the defendants promised the plaintiffs that, if they would deliver goods to a value named to A, which goods were required for the building of a church, and were to be paid for by a bill of exchange to be drawn by the plaintiffs on A, the said bill should be paid at maturity out of money to be received from the church; it was held that the promise was within the statute.³ This principle applies to the case of a verbal acceptance of a bill of exchange or a verbal promise to accept, when the person promising has funds of the drawer out of which to pay it.⁴ But in an English case⁵ LORD MANSFIELD said: "The true reason why the acceptance of a bill of exchange shall bind is

¹ *Andrews v. Smith*, 2 C. M. & R. 631. Where notes or other securities are placed in the hands of a person for collection and the person receiving them promises the debtor to pay the proceeds to the creditor of such person, the promise is not within the statute, and the creditor may sue the promisor therefor in his own name. *Clark v. Hall*, 11 N. J. L. 78; *McCrary v. Madden*, 1 McCord (S. C.) 486; *Prather v. Vineyard*, 9 Ill. 40; *Farley v. Cleaveland*, 4 Cow. (N. Y.) 432. In *Antonio v. Clissey*, 3 Rich. (S. C.) 201, A being indebted to B, and B being indebted to C, by agreement between the three A sold C a gig and B was to give a credit for the price on his note. It was held that the promise was not within the statute.

² 2 Bing. 439; 10 Moo. 42.

³ *Morley v. Boothby*, 3 Bing. 107; and see *Sweeting v. Asplin*, 7 M. & W. 165; *Gerish v. Chartier*, 1 C. B. 13; *Walker v. Roston*, 9 M. & W. 411.

⁴ *Spaulding v. Andrews*, 48 Penn. St. 411; *Nelson v. First National Bank of Chicago*, 48 Ill. 36; *Raberg v. Peyton*, 2 Wheat. (U. S.) 385; *Grant v. Shaw*, 16 Mass. 341; *Lawnsley v. Sunwall*, 2 Pet. (N. S.) 170; *Shields v. Middleton*, 2 Cr. (U. S. C. C.) 205; *Leonard v. Mason*, 1 Wend. (N. Y.) 522; *Pike v. Irvin*, 1 Sandf. (N. Y.) 14; *Strabecker v. Cohen*, 1 Speers (S. C.) L. 349; *O'Donnell v. Smith*, 2 E. D. S. (N. Y. C. P.) 124; *Wakefield v. Greenwood*, 29 Cal. 597; *Quin v. Hanford*, 1 Hill (N. Y.) 82; *Morse v. National Bank*, 1 Holmes (U. S. C. C.) 209.

⁵ *Pillows v. Microp*, 3 Burr. 1672.

not on account of the acceptors having or being supposed to have effects in hand, *but for the convenience of trade and commerce. Fides est servanda.* An acceptance for the honor of the drawer shall bind the acceptor; so shall a verbal acceptance. But upon a previous hearing of this case¹ that learned judge expressed views quite inconsistent with those given above, and in accordance with the statement in the text.

SEC. 140. Property Deposited with Promisor Charged with the Payment of the Debt. — A parol promise to pay the debt of another out of property placed by the debtor in the hands of the promisor, who converts the same into money, is not within the statute of frauds. It is an original and independent promise founded upon a new consideration, and the property is treated as a fund in the hands of the promisor charged with the payment of the debt, and the promisor is trustee for the creditor.² In construing this statute it may be laid down as a general rule that a promise to answer for the debt, default, or miscarriage of another, for which that other remains liable, must be in writing; but the rule is otherwise where the other does not remain liable. There are numerous exceptions to this rule. In cases where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties, the statute does not apply.³ The reason

¹ 3 Burr. 1666.

² Exchange Bank v. Rice, 107 Mass. 45; Townsend v. Long, 77 Penn. St. 143; Fullam v. Adams, 37 Vt. 391; Urquhart v. Brayton, 12 R. I. 169; Perry v. Swasey, 12 Cush. (Mass.) 36; Lawrence v. Fox, 20 N. Y. 268; Warren v. Batchelder, 16 N. H. 580; Connor v. Williams, 2 Rob. (N. Y.) 46; Brewer v. Dyer, 7 Cush. (Mass.) 337.

³ Leonard v. Vredenburg, 6 John. (N. Y.) 20. In Cook v. Moore, 18 Hun (N. Y.) 31, S, after employing C to work upon a house which S was building for M, abandoned the work with M's consent, leaving in M's hands sufficient money to pay C's claim, which M promised both S and C to pay. It was held that the

placing of this fund in M's hands amounted to a new consideration, and was not within the statute. GILBERT, J., said: "The defendant did not undertake or promise for Stansbury, but for himself. Nor was the promise one that Stansbury should pay out of the money due to him from the defendant, but that the defendant would do so. Consequently Stansbury never had assumed, nor had he put himself in a position to become liable in the first instance to do that which the defendant undertook and promised to do. Stansbury left in the defendant's hands sufficient funds to pay the plaintiff's claim, and directed the defendant to make such application. The defendant promised Stansbury that he would do so. Subsequently

is that the promise is made upon a *new and independent* consideration, and it matters not whether the original debt

the same promise was made to the plaintiff. The case, I think, is not within the statute of frauds, but rather falls under the third class of promises stated by Comstock, J., in *Mallory v. Gillett*, 21 N. Y. 433, namely, 'Where, although the debt remains, the promise is founded on a new consideration which moves to the promisor. This consideration may come from the debtor, as where he puts a fund in the hands of the promisee, either by absolute transfer or upon a trust to pay the debt,' etc. *Lippincott v. Ashfield*, 4 Sand. (N. Y.) 611. From the facts proved in this case the law would imply a liability to apply the fund in the defendant's hands in the manner Stansbury directed him, and he undertook to do. *Barker v. Bucklin*, 2 Den. (N. Y.) 45; *Lawrence v. Fox*, 20 N. Y. 268; *Barlow v. Myers*, 64 id. 41. When the law will imply a debt or duty against any man, his express promise to pay the same debt or perform the same duty must in its nature be original." *Justin v. Tallman*, 86 Penn. St. 147; *Lee v. Newman*, 55 Miss. 365; *Williams v. Rogers*, 14 Bush. (Ky.) 776; *Beardslee v. Morgner*, 4 Mo. App. 139; *Estabrook v. Gebhart*, 32 Ohio St. 415; *Thacher v. Rockwell*, 4 Cal. 375. In *Price v. Trusdale*, 28 N. J. Eq. 200, a promise to a debtor to apply to the payment of a particular debt funds of the debtor received or to be received by the promisor amounts to a purchase of the debt, and is not within the statute. In *Calkins v. Chandler*, 36 Mich. 320, it was held that the promise of an employer to pay the wages of an employee, earned and to be earned, to a creditor of the employee is not within the statute. In that case the plaintiffs having a chattel mortgage upon a new mill owned by M, it was verbally agreed between them and M and the defendants, M being then engaged in sawing lumber for the

defendants, that if the plaintiffs would extend the time for the payment of the mortgage, M should allow the defendants to retain fifty cents per thousand feet of all lumber sawed by M for them, and that they would pay such sums to them. It was held that the promise was not within the statute, and that they were liable for such sum whether they did or did not retain it. Contractors to build a railroad agreed with merchants to pay orders and time-checks issued by a subcontractor to his employees. Upon the faith of this agreement, and giving credit exclusively to the contractors, the merchants accepted and received such orders and time-checks in exchange for goods. It was held that the promise of the contractors was not within the statute of frauds. *Doyle v. White*, 26 Me. 341; *Walker v. Penniman*, 8 Gray (Mass.) 233; *Billingsley v. Dempewolf*, 11 Ind. 414; *Hanford v. Higgins*, 1 Bosw. (N. Y.) 441; *Williams v. Corbett*, 28 Ill. 262; *Chase v. Day*, 17 Johns. (N. Y.) 114; *Brown v. George*, 17 N. H. 128; *Hall v. Wood*, 3 Pin. (Wis.) 308; *Birchard v. Booth*, 4 Wis. 419; *Thayer v. Gallup*, 13 id. 411; *Champion v. Doty*, 31 id. 190; *Vogel v. Melms*, id. 306; *West v. O'Hara*, Wis. S. C. In *Laidlow v. Hatch*, 75 Ill. 11, it was held that a promise by a person to pay to a subcontractor what might become due to the contractor for work to be done for him, is a promise to pay the debt of another and within the statute. Where A, who was indebted to B, gave him an order on C for certain goods, and C *having the goods in his possession*, and also a claim against A, agreed with B by parol that he would sell the goods and apply the proceeds to the payment of their respective claims, it was held that the promise was not within the statute. *Clark v. Hall*, 11 N. J. L. 78. In an action by E against F, the complaint recited substantially that E held a mortgage

continues to subsist or not. But in such cases the promisor must have authority to apply the proceeds of the property in payment of the debt, or his promise is within the statute. Thus, where the assignee of a note for collection promised, without authority from the assignor to apply it in payment of a debt due from such assignor to the plaintiff, it was held to be within the statute.¹ In an Illinois case² A bought lumber on the credit of B, and *paid B therefor*, and B promised the creditor that he would pay him for the lumber. It was held that this was an original undertaking on the part of B, and that he thereupon became the debtor. The same rule was adopted in Iowa,³ and it was held that neither an agreement by the vendee of real estate to pay a note of the grantor as a part of the consideration for the land, nor an agreement to pay a note

on R's leasehold of a coal-mine to secure payment of certain notes, not including one for \$327; that F, desiring security for R's indebtedness to himself, promised to pay E this note, and E consented to R's executing to F a mortgage on the same leasehold, to secure said indebtedness of R to F, and in such mortgage said note was included; that R became insolvent and F took possession; that by reason of such promises E was induced to, and did, release R. It was held that F's promise was on a sufficient consideration, not to be within the statute of frauds; and under the issue made by the general denial, evidence was admissible to determine whether F's mortgage became a prior lien over E's and also the extent of E's loss of security. *Fleming v. Easter*, 60 Ind. 399. See *Olmstead v. Greenly*, 18 John. (N. Y.) 12; *Wait v. Wait*, 28 Vt. 350; *Draughan v. Bunting*, 9 Ired. 10; *Hall v. Robinson*, 8 id. 56; *Hicks v. Critcher*, Phil. 353; *Threadgill v. McLendon*, 76 N. C. 24; *Stanly v. Hendricks*, 13 Ired. 86; *Mason v. Wilson*, 84 N. C. 51.

¹ *France v. August*, 88 Ill. 561; *Gower v. Stuart*, 40 Mich. 747; *Murphy v. Renkert*, 12 Heisk. (Tenn.) 397.

² *Watkins v. Sands*, 4 Ill. App. 207.

³ *Morrison v. Hogue*, 49 Iowa,

574. In *Barker v. Bucklin*, 2 Den. (N. Y.) 61, the defendant's brother owed the plaintiff, and delivered to the defendant a pair of horses, worth less than the debt, and the defendant agreed to pay the price to the plaintiff on account of his demand against his brother. The plaintiff declared upon the promise as made *to himself*, and upon that ground was non-suited, but the opinion of JEWETT, J., shows that, had the declaration been properly framed, a recovery could have been had. He said: "It was not a promise to answer for the debt of another, *but merely to pay the debt of the party making the promise*, to a particular person designated by him to whom the debt belonged, *and who had a right to make such payment a part of the contract of sale.*" See also *Meriden Britannia Co. v. Zingsen*, 48 N. Y. 247; *Barker v. Bradley*, 42 id. 316; *Ellwood v. Monk*, 5 Wend. (N. Y.) 235; *Farley v. Cleaveland*, 4 Cow. (N. Y.) 432. In *Skelton v. Brewster*, 8 John. (N. Y.) 376, a debtor who had been taken in execution delivered to the defendant all his household goods, upon the promise of the latter to pay the debt. The promise was held not to be within the statute. *Westfall v. Parsons*, 16 Barb. (N. Y.) 645; *Gold v. Phillips*, 10 John. (N. Y.) 414.

of the grantor in consideration of the release of an attachment by a surety on the note, is within the statute.¹

SEC. 141. **Promise made to the Debtor.** — *Where a promise predicated upon a good and sufficient consideration is made by a third person to a debtor to pay a debt owed by him to another, the promise is not within the statute, and in many of the States, under such circumstances, the creditor is treated as standing in such a relation to the contract, — being the person beneficially interested therein, — that he may maintain an action thereon against the promisor in his own name.*²

But this is not in accordance with the rule as adopted in Connecticut.³ In that case it appeared that William

¹ In *Green v. Randall*, 51 Vt. 67, it was held that a parol agreement by the *vendor* of real estate, to remove a mortgage thereon given to secure the debt of another, is not within the statute, it being an original undertaking and a promise to pay his own debt. In *Prince v. Kochler*, 77 N. Y. 91, it was held that a promise made by the vendee of land to a mortgagee who was about to foreclose for overdue interest, that if he would not foreclose, he would pay the arrears when the next instalment fell due, was an original undertaking. *Moore v. Stovall*, 2 Lea (Tenn.) 543, overruling *Campbell v. Findley*, 3 Humph. (Tenn.) 330. A mere promise, by a mortgagee of goods engaged in selling the mortgaged chattels for the purpose of obtaining payment of the mortgage debt, to a third person holding a note of the mortgagor, that, if he should realize enough, after paying his own demand, he would pay each note, cannot be enforced, for want of consideration, even if evidenced by his indorsing his name on the note. A mere naked promise to pay an existing debt of another, without a new consideration, is void. So held, where, in fact, the mortgagee did not realize more than enough to pay his own demand. *Starr v. Earle*, 43 Ind. 478; *Hayler v. Atwood*, 26 N. J. L. 504.

² *Vogel v. Melms*, 31 Wis. 306; *Harrison v. Sawtelle*, 10 John. (N. Y.) 242; *Dunn v. West*, 5 B. Mon. (Ky.) 376; *De Merrett v. Bickford*, 58 N. H.

523; *Beaman v. Russell*, 20 Vt. 205; *Pike v. Brown*, 7 Cush. (Mass.) 133; *Barry v. Ransom*, 12 N. Y. 462; *Smith v. Sayward*, 5 Me. 504; *Reed v. Holcomb*, 31 Conn. 360.

³ *Clapp v. Lawton*, 31 Conn. 95. In a recent case, *Meech v. Ensign*, 49 Conn. 191; 44 Am. Rep. 225, the question as to the right of a creditor to sue upon a promise made by a third person to his debtor to pay the debt, was before the court under the following state of facts: The plaintiffs had a mortgage on real estate, and the defendant purchased the mortgagee's equity of redemption, agreeing with him to pay the mortgage debt to the plaintiffs. This he did not do, and the court held that the plaintiffs could not maintain an action against him upon the promise, upon the ground that although the promise was incidentally made for their benefit, it was not made to them, nor were they privy thereto, thus ignoring the doctrine of a large class of cases in our courts, which hold that where a promise is made for the benefit of a third person, that person may maintain an action therefor. *Lawrence v. Fox*, 20 N. Y. 268; *Thorp v. Keokuk Coal Co.*, 48 id. 253; *Burr v. Beers*, 24 id. 178; *Davis v. Calloway*, 30 Ind. 112; *Croswell v. Currie*, 27 N. J. Eq. 152; *Blyer v. Mulholland*, 2 Sandf. Ch. (N. Y.) 478; *Urquhart v. Brayton*, 12 R. I. 169; *Vroman v. Turner*, 69 N. Y. 280; 25 Am. Rep. 195; *Hendrick v. Lindsey*, 93 U. S. 143; *Exchange Bank v. Rice*, 107 Mass. 39; 9 Am. Rep. 1; *Merritt*

Faulkner and Robert Wright were partners under the name of Faulkner & Wright, and as such partners were the owners of a newspaper called the New Haven Morning News, which they had been conducting for several months previously. They had contracted debts in the business to the amount of about \$1,300, among which were the notes of the plaintiffs described in the declaration, amounting to the sum of \$632.70. They had, besides their press, type, engine, and fixtures belonging to their establishment, debts due them amounting to about \$1,600. On the 3d of September, 1859, Faulkner sold to Thomas Lawton, the defendant, his interest in the establishment, and conveyed the same to him by a written instrument. At the time of this sale the parties had a schedule of the balances due the firm of Faulkner & Wright, and the gross amount of their indebtedness. The books of the firm were also present and contained an account of the debts due the plaintiffs, the notes of the plaintiffs being correctly described in their account of bills payable. Faulkner & Wright dissolved their co-partnership on the same day. Lawton & Wright entered into co-partnership for the purpose of conducting the same newspaper under the name of Lawton & Wright. The new firm of Lawton & Wright took possession of all the material, presses, types, cases, forms, engine and its fixtures, and all other property belonging to the firm of Faulkner & Wright, and Lawton on the same day paid the persons who had been the operatives in the establishment, and who had claims against Faulkner & Wright. He subsequently paid a debt contracted by Faulkner & Wright for paper, amounting to about \$100; and also \$83.37 for rent due for the quarter ending on the 1st day of October.

The accounts due Faulkner & Wright, estimated at about \$1,600, and the books on which they were entered, went into the hands of Lawton & Wright and were collected by them

v. Green, 55 N. Y. 270; *Gurnsey v. Rogers*, 47 id. 233; 7 Am. Rep. 440; *Simson v. Brown*, 68 id. 361; *Dean v. Walker* (Ill. S. C.); 44 Am. Rep. 232 n.; *Campbell v. Smith*, 71 N. Y. 26; 27 Am. Rep. 5. Without attempting to point out the reasons, we are inclined to believe that the doctrine of the

Connecticut court is most consistent with principle, and that the courts which have opened the door to this new flood of litigation will ultimately find it necessary to curtail and circumscribe the application of the doctrine if they do not recede from it altogether.

so far as they could be collected. Lawton & Wright opened new accounts with persons on their books in all new transactions, but they did not open any account with Faulkner, nor did they have any account in which they credited the firm of Faulkner & Wright with the money they collected on the accounts of Faulkner & Wright, but the money so collected was used by them as their own. The amount collected by them was about \$1,000.

The plaintiffs claimed that at the time of the sale of Faulkner's interest in the establishment to Lawton, and as a part of the same transaction, Faulkner & Wright assigned their accounts to Lawton & Wright, and that Lawton & Wright then promised to pay the debts due from Faulkner & Wright, among which debts were the notes due the plaintiffs; and thereupon the plaintiffs offered in evidence the deposition of Faulkner, and the testimony of Wright, to prove that at the time of the disposition of Faulkner's interest in the establishment to Lawton, Faulkner & Wright assigned to Lawton & Wright their interest in the debts due the firm of Faulkner & Wright, in consideration of the parol agreement of Lawton & Wright with him, Faulkner, that they would assume and pay all the liabilities outstanding against the co-partnership of Faulkner & Wright, and that Lawton & Wright received and accepted the claims so assigned upon such promise to pay the liabilities of Faulkner & Wright, and that Lawton had no interest in the claims so assigned except by his promise to pay such outstanding liabilities; and that there was exhibited to Lawton & Wright at the time a written schedule of the debts due to Faulkner & Wright on the 1st of August, 1859, amounting on their face to about \$1,600, and a statement in gross of the liabilities of the firm, amounting to about \$1,300. To the admission of this evidence the defendants objected, on the grounds that the promise claimed, being a promise to pay the debt of another, could not be proved by parol, and the court held that this objection was well taken. DUTTON, J., in delivering the opinion of the court, says: "Many of the numerous cases on this subject appear to treat this clause as if it read 'a special promise to pay,' instead of, 'to answer for the debt of another.'¹ The term 'answer for' clearly implies an

¹ In Florida the words are "answer or pay."

attempt to hold another as surety. The object of the statute is expressed to be, 'for the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subordination of perjury.' The danger is, that creditors will endeavor by false parol testimony to save debts which they will otherwise lose by the failure of the original debtor to pay. Why are the present plaintiffs suing Lawton & Wright instead of Faulkner & Wright? In a suit against the latter no objection could be raised to a recovery. We can conceive of no reason except that they are endeavoring to make Lawton & Wright answerable for a debt which cannot be recovered from Faulkner & Wright. It is therefore precisely the case which the legislature had in view. We are far from supposing that these creditors would resort to the fraudulent practices spoken of in the statute. But we could not in another case refuse to dishonest creditors a privilege which we have once granted to those who are honest.

It cannot be denied, however, that in many of the cases doctrines are sanctioned which would permit a recovery in this case. In some of them the court seem to have been influenced very much by the fear, that if the plaintiff was not allowed to recover, the defendant would use the statute as an instrument of fraud. They do not seem to have been conscious of their inconsistency, in drawing inferences in a case as proved, when the only question in the case is, whether the law will permit it to be proved in the way attempted. The statute is based upon the conviction of the legislature that it is not safe to allow a contract to be proved in this way. What propriety then can there be in drawing inferences of fraud from facts which are not proved? But the danger of fraud has been overrated. It does not follow at all that a defendant who denies the validity of an agreement on this ground can retain the consideration. Frauds are not in fact perpetrated by taking advantage of this statute, to near the same extent to which they are by objections to evidence of a parol contract made in connection with a written contract but not included in it. Yet this has never been considered a sufficient reason for not applying the rule strictly. Courts have also frequently been misled by not advert- ing

to the distinction between an attempt to hold a person as surety for another, and merely compelling him to pay a sum of money, which may happen to be the debt of another. If A sells a house to B for one hundred dollars, it is clearly immaterial to B whether he is to pay the money to A or to one of A's creditors. As a contract between A and B, there is no more danger that the fraud mentioned in the statute will be perpetrated than in any other contract. But the moment you allow the creditor of A to have an interest in this contract, and to have the right, either expressly or by implication, to sue upon it, as the plaintiffs claim to have in this case, the agreement is brought directly within both the letter and spirit of the statute.¹ Some of the cases seem to turn upon the question whether the defendant has actually received a full consideration or not. But it is obvious that the statute has no reference to the consideration. It implies that there is a sufficient consideration, otherwise the statute would be unnecessary, as the agreement would be void of itself. Some of the recoveries seem to have been allowed on the ground that it appeared that some new and distinct consideration passed from the plaintiff to the defendant. Here again it is plain that unless there was a new consideration, to which the defendant is in some way privy, the agreement would be void without the statute. These cases have grown out of, but in many instances are an extension of, the doctrine contained in an English case,² and which has been very properly applied in many subsequent cases, that where a creditor has in his hands or subject to his control, property of his debtor which he has a right to apply to the payment of his debt, he may transfer his right in that property to a stranger and take his parol promise to pay the debt. In such cases there is, in the language of JUDGE SWIFT,³ 'a purchase of the property at a price equivalent to the debt for which it was holden.' But the doctrine expressed in this case, as we have seen,⁴ is not generally adopted, and it may be said to be a general rule, that a promise made either to the debtor or the creditor, to pay the debt of another, because of

¹ See *Meech v. Ensign*, *ante*. See *Parker v. Benton*, 35 Conn. 343, where a different rule was adopted where the creditor accepted the substitution.

² *Williams v. Leper*, 3 Burr. 1886.

³ Swift's Dig. 255.

⁴ See *ante*, § 125.

property deposited with him by the debtor, or of assets in his hands, is founded upon a new and independent consideration, and is not within the statute, and that the creditor may maintain an action thereon in his own name. In a recent case in Pennsylvania,¹ involving a similar state of facts with those existing in *Clapp v. Lawton*, *ante*, it was held that the statute did not apply, because the promise was not to pay the debt of another, but rather to *pay the promisor's own debt*, and the soundness of this doctrine cannot be questioned.

SEC. 142. Promise of Grantee to pay Mortgage Debt.—In Minnesota² it is held that a verbal promise made by the grantee of lands, to pay the grantor's debts, is not within the statute; and a similar doctrine is held in Nebraska,³ Illinois,⁴ North Carolina,⁵ New Jersey,⁶ Kentucky,⁷ Nevada,⁸ California,⁹ Alabama,¹⁰ Maine,¹¹ Rhode Island,¹² Vermont,¹³ New York,¹⁴ South Carolina,¹⁵ and, indeed, in all the States except Connecticut, this rule prevails without question.¹⁶

SEC. 143. When Promisor Estopped from Denying that he has Funds.—If the promise is made directly to the creditor,

¹ *Wynn v. Wood*, 97 Penn. St. 216; *Standt v. Hine*, 45 id. 30.

² *Starha v. Greenwood*, 28 Minn. 521. But a verbal promise to pay a mortgage debt made by the purchaser of the equity of redemption in land *after the purchase and not connected with the consideration to be paid therefor* is within the statute. *Berkshire v. Young*, 45 Ind. 461.

³ *Clopper v. Poland*, 12 Neb. 63.

⁴ *Mathers v. Carter*, 7 Ill. App. 225. In this case the original debtor surrendered a bond for a deed which he held against A, in consideration that A would pay to C the amount of a note due from such debtor, and it was held that A's promise was an independent undertaking. *Prather v. Vineyard*, 9 Ill. 40.

⁵ *Mason v. Wilson*, 84 N. C. 51; 37 Am. Rep. 612; *Threadgill v. McLondon*, 76 N. C. 24.

⁶ *Berry v. Doremus*, 30 N. J. L.

399; *Clark v. Hall*, 11 id. 78; *Laing v. Lee*, 19 id. 337.

⁷ *Jennings v. Crider*, 2 Bush. (Ky.) 322.

⁸ *Rushling v. Hackett*, 1 Nev. 360.

⁹ *McLaren v. Hutchinson*, 22 Cal. 187; *Lucas v. Payne*, 7 id. 92.

¹⁰ *McKenzie v. Jackson*, 4 Ala. 230; *Cameron v. Clark*, 11 id. 209; *Lee v. Fontaine*, 10 id. 755.

¹¹ *Hilton v. Dinsmoor*, 21 Me. 410.

¹² *Thurston v. James*, 6 R. I. 103.

¹³ *Merrill v. Englesby*, 28 Vt. 150; *Wait v. Wait*, 28 id. 350.

¹⁴ *Seaman v. Whitney*, 24 Wend. (N. Y.) 360; *Wyman v. Smith*, 2 Sandf. (N. Y.) 33; *Budd v. Thurber*, 61 How. Pr. (N. Y.) 206; *Winfield v. Potter*, 10 Bos. (N. Y.) 226; *Farley v. Cleaveland*, 9 Cow. (N. Y.) 639.

¹⁵ *McCrary v. Madden*, 1 McCord (S. C.) 486; *Antonio v. Clissey*, 3 Rich. (S. C.) 201.

¹⁶ *Stanley v. Hendricks*, 13 Ired. (N. C.) 86.

the promisor representing to the creditor that he has property or assets of the debtor in his hands, and the creditor thereupon discharges the debtor, the promise is not within the statute, *even though the promisor has no such property in his possession belonging to the debtor, out of which to pay the debt.* By inducing the creditor to act upon such representations he is estopped from denying their truth,¹ and the same rule prevails, even though the original debtor is not discharged, where the representations and promise are made upon consideration that the creditor will refrain from enforcing the collection of the debt. Thus in the Pennsylvania case cited *supra*, the defendant represented to the plaintiff that he was owing a person who was indebted to the plaintiff, and promised to see him

¹ In *Dock v. Boyd*, 93 Penn. St. 92, the plaintiff having a claim against M, which they were pressing, and had threatened to institute legal proceedings upon, D, a third party, said to them that if they would give time, he would see the claim paid, as he had property of M in his hands, and that plaintiffs were secure. The plaintiffs then agreed not to push M without notifying D. M thereafter absconded, and plaintiff sued M and recovered judgment. In an action against D to enforce the promise, it was held that whether or not D had in his hands means belonging to M, he was estopped by his own declaration, upon the faith of which his verbal promise to pay the debt was accepted. Such being the case, it was clearly not within the statute of frauds. When the promise is to apply the funds or property of the debtor in the hands of the party, it is not necessary that the creditor should give up his recourse against the debtor upon the original claim. The promise is not a collateral, but an original one, founded on sufficient consideration. In *McKenzie v. Jackson*, 4 Ala. 230, A agreed with B to take his stock of goods and pay his debts, and afterwards A verbally promised one of B's creditors to pay him. It was held that the promise was not within the statute, and that the creditor could recover thereon.

In *Lucas v. Payne*, 7 Cal. 92, A conveyed to B to be disposed of for his benefit, and B accepted an order of A, and this was held to be an original undertaking. In *Hite v. Wells*, 17 Ill. 88, the declaration alleged that A was indebted to B in \$208.75; that C, in consideration that B would procure from A an order on C for the money so due, promised to pay to B the money due from A to B; that B procured the order and presented it to C who refused to pay it. To this the statute was pleaded, and held to be a good answer. See also, adopting the same rule, *Lippincott v. Aspfield*, 4 Sandf. (N. Y.) 611; *Edinfield v. Cunaday*, 60 Ga. 456. In a South Carolina case a doctrine inconsistent with this was held, where A received from B an assignment of his mills, to secure him against his liabilities for B. Two or three months after this assignment, A called upon C to obtain his indorsement to B's paper, to be discounted at a bank, saying that he had in his hands a quantity of lumber, and verbally promising to indemnify C, on account of such indorsement, as soon as he, A, got a return from his factor. C indorsed the note upon this representation, and having been compelled to pay it, sued A upon his guaranty. It was held that A's contract was within statute. *Simpson v. Nance*, 1 Spears, (S. C.) 4.

paid if he would give such debtor time. The plaintiff, relying upon this promise, refrained from enforcing the claim, but did not surrender it, and afterwards prosecuted it to judgment. It was held that the promise was an original undertaking not within the statute, and that the defendant was estopped from denying his obligation. In the New York case cited above, the facts were quite similar, and the same doctrine was held and its accuracy cannot be questioned. In a Wisconsin case the defendant purchased of C a wagon, etc., and as part of the contract of purchase, promised C to pay portions of the purchase-money to F and G, C being indebted to those parties respectively in the stipulated sums. Soon after the purchase, and before the service of garnishee process upon him, the defendant notified F and G of his promise to C to pay them such sums, and they each accepted such promise. He paid them according to promise, but not until after process of garnishment was served upon him. It was held that such promise was not within the statute. The ground upon which this doctrine is pleaded is, that although it was collateral to C's own liability or promise to pay, and may be said incidentally to have guaranteed his debts, *yet it was a guaranty in form only*, and not in substance or effect within the meaning of the statute of frauds. It was not a mere promise by the defendant to be responsible for the debts of C and to pay those debts, *but a promise by him to pay his own debt* in that particular way. It was a promise founded upon a new and sufficient consideration, moving to the promisor from the debtor, at the time the promise was made. After notice to them, and their assent, the liability of the defendant to F and G was absolutely fixed, and they each could have maintained an action against him to compel payment. After such notice and assent, it was no longer in the power of C to forbid such payment, or to withdraw his assent, or to require payment to be made to himself, without the consent of F and G. The defendant's liability being thus fixed, his voluntary payment after service of process upon him, was not unlawful or unauthorized. Indeed, it was immaterial whether he had paid at all or not. He was not liable as the garnishee of C. He was not C's debtor, but the debtor of F and G, at the time

the proceedings were commenced.¹ In a Michigan case,² the plaintiff having a mortgage against M on a mill owned by

¹ Putney v. Farnham, 27 Wis. 187. A doctrine inconsistent with this was held in Emerick v. Sanders, 1 Wis. 77.

² Calkins v. Chandler, 36 Mich. 320; 24 Am. Rep. 593. COOLER, J., in delivering the opinion of the court, said: "Three principal objections are taken to the recovery which has been had in this case: *First*, that the agreement proved was void for want of consideration; *second*, that it was void under the statute of frauds, because not reduced to writing; and *third*, that, conceding the agreement to be valid, defendants could only be responsible under it for such moneys due the Medlar Brothers as they should retain in their hands; and in this case they offered, but were not allowed, to show that they retained nothing. These objections will be considered in their order.

The defect in the consideration is supposed to be, that there was no agreement to extend payment for any definite time. In Rolle's Abridgment, 27, pl. 45, it is laid down that 'If A be indebted to B in one hundred pounds, and B is about to commence a suit for the recovery thereof, but C, a stranger, comes to him and says that if he will forbear him, he himself will pay it, this is a good consideration for the promise; B averring that he had abstained and forebore to sue A, *et ad hunc* did abstain and forbear; though no certain time be appointed for the forbearance; for it seems a perpetual forbearance shall be intended, the which he hath performed. So if he will forbear *paululum temporis*, this is good; plaintiff averring a certain time of forbearance.' In Payne v. Wilson, 7 B. & C. 426, the agreement counted upon was to suspend proceedings in consideration that defendant would pay a certain sum on account of the debt on April 1, following; and after verdict for the plaintiff, objection being taken that no consideration appeared, TENTERDEN, C. J., said:

'The promise made by the defendant was to pay £30 on the first of April, in consideration of the plaintiff's consenting to suspend proceedings. That imports that the proceedings were at all events to be suspended until that period; and I think that the averment that the plaintiff did suspend the proceedings is sufficient after verdict; because it must be taken that it was proved at the trial that the plaintiff had suspended the proceedings, either for a time required by law, or for a definite or reasonable time.' In Sidwell v. Evans, 1 P. & W. (Penn.) 383, the evidence showed an agreement in consideration of a promise of the creditor to 'wait a while and not push' the debtor. The plaintiff had counted on an agreement to forbear to sue for a reasonable time; and the jury having found for the plaintiff on this evidence, the verdict was upheld. In King v. Upton, 4 Mc. 387, the promise counted on was to pay the debt of another in consideration that the creditor would 'forbear and give further time for the payment of the debt,' naming no time. The plaintiff averred that he did thereupon forbear, and the consideration was held sufficient. Elting v. Vanderlyn, 4 Johns. (N. Y.) 237, is to the same effect. Reference is also made to Allen v. Prior, 3 A. K. Marsh (Ky.) 305; and Hakes v. Hotchkiss, 23 Vt. 231. The averments in the declaration in this case are similar to those in King v. Upton, and we think the court was correct in holding them sufficient.

The second objection seems to be more relied upon. Our statute of frauds declares that 'in the following cases, specified in this section, every agreement, contract, or promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized;' and

him, who was then engaged in sawing lumber at such mill under a contract with the defendants, the defendants, in con-

it enumerates among other cases, 'every special promise to answer for the debt, default, or misdoings of another person.' It is claimed that the promise counted upon in this suit is of this nature; it being a promise by the defendants to answer for the debt and default of Medlar Brothers to the extent promised. It is true that the promise of defendants was to make payments on the debt of Medlar Brothers, but it is also true that every payment they promised was to apply on an indebtedness that was to accrue against themselves for the sawing that should be done for them by the Medlar Brothers from time to time. Their promise was consequently a promise to answer for their own debt, and they took upon themselves no new obligation whatever. It has already been determined that the promise was made on a sufficient consideration, namely, the agreement to forbear foreclosure. But while in most cases of similar promises to be found in the books the benefit of the forbearance was expected to accrue to the debtor himself, in this case it is very evident the defendants entered into the arrangement for their own advantage, and that they promised to pay nothing for which they should not receive an equivalent in services performed for them. In other words, there was a consideration moving to them, which was the inducement to their making the promise. In many cases the test whether a promise is or is not within the statute of frauds is to be found in the fact that the original debtor does or does not remain liable on his undertaking; if he is discharged by a new arrangement made on sufficient consideration, with a third party, this third party may be held on his promise though not in writing; but if the original debtor remains liable and the promise of the third party is only collateral to his, it will in strictness be

nothing more than a promise to answer for the other's debt. But where the third party is himself to receive the benefit for which his promise is exchanged, it is not usually material whether the original debtor remains liable or not. This subject has been so fully considered in the New York courts that a reference to the leading cases of *Farley v. Cleveland*, 4 Cow. (N. Y.) 432; s. c. on appeal, 9 id. 639, and *Mallory v. Gillett*, 21 N. Y. 412, in which the other cases are collected, will be all we shall make here. In *Nelson v. Boynton*, 3 Met. (Mass.) 396, 402, *SHAW, C. J.*, on an examination of the authorities, says: 'The rule to be derived from the decisions seems to be this: that cases are not considered as coming within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself; but where the object of the promise is to obtain the release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute.' There are many cases in Maine to the same effect, which are collected in *Stewart v. Campbell*, 58 Me. 439. In *Putney v. Farnham*, 27 Wis. 187, 189, *DIXON, C. J.*, in considering a promise by the defendant to pay to the creditors of one Corbett, debts owing by himself, to Corbett, says: 'The question is whether such promise was within the statute of frauds, and we believe it to be well settled that it was not, although it was collateral to Corbett's own liability or promise to pay the same debts, and may be said incidentally to have guaranteed such payment. It was a guaranty in form, but not in substance or effect, within the meaning of the statute of frauds. It was not a mere promise by the defendant to be responsible for the debts of Corbett to those parties, and to pay those debts, but a promise by him to pay his own debt in that particular way.

sideration that the plaintiff would give further time for the payment of the mortgage, promised to retain out of the money to become due to M the sum of fifty cents for each thousand feet of lumber sawed by him for them, and to pay the same to the plaintiff. It was held that this promise was not within the statute. But a promise made by a person who is indebted to another, without any consideration therefor, or the assent of the debtor, that he will retain the money due to enable a creditor of such person to secure his debt, is within the statute and void;¹ but a promise made to a debtor to pay his debt to a third person, or based upon *any good* consideration, is not within the statute.²

SEC. 144. When Debt has become Debt of the Promisor.

—The statute does not apply to a promise to pay the debt of a third person, where by the receipt of an adequate consideration, such debt has become also the party's own debt,³

It was a promise founded upon a new and sufficient consideration moving to the promisor from the debtor at the time the promise was made. Such a promise or agreement is not within the statute of frauds." In further illustration of the same doctrine reference is made to *Brown v. Weber*, 38 N. Y. 187; *Clymer v. De Young*, 54 Penn. St. 118; *Eddy v. Roberts*, 17 Ill. 505; *Wilson v. Bevans*, 58 id. 232; *Runde v. Runde*, 59 id. 98; *Ford v. Finney*, 35 Ga. 258; *Davis v. Banks*, 45 id. 138; *Fullam v. Adams*, 37 Vt. 391, 396; *Andre v. Bodman*, 13 Md. 241, 255; *Britton v. Angier*, 48 N. H. 420; *Johnson v. Knapp*, 36 Iowa, 616; *Besshears v. Rowe*, 46 Mo. 501.

The exact point has not hitherto been presented for adjudication in this State. In *Brown v. Hazen*, 11 Mich. 219, a verbal promise by the defendant to pay to the plaintiff a debt owing to him from a third person was held to be within the statute, there being no consideration moving from the plaintiff to the defendant. There is some discussion of the general subject in *Gibbs v. Blanchard*, 15 Mich. 292, but it has no very direct bearing. We think the authorities support the judgment.

The question which remains is, whether if the defendants, before suit was brought, had paid over to Medlar Brothers all that was due for the sawing, this would discharge them from their promise to the plaintiffs. If it would, it must be on the ground that they were liable only while they were the debtors of Medlar Brothers, and because of their indebtedness, which in connection with their promise would in effect make them the custodians of a fund set apart for application to the plaintiff's demand. But we think it became their duty under their promise to observe it by withholding from Medlar Brothers the proportion of their bill which they had agreed to pay to the plaintiffs; and that they could not discharge themselves by a disregard of their promise. It is a paradox to say that a promise is valid, but that the promisor may relieve himself from its obligations by violating it."

¹ *Milcote v. Kile*, 47 Ill. 88.

² *Goetz v. Foss*, 14 Minn. 265; *Brown v. Brown*, 47 Mo. 130.

³ *Robinson v. Gilman*, 43 N. H. 485.

nor where the promisor derives a direct benefit therefrom. Thus, the plaintiff subscribed for \$2,000 worth of stock in a railroad corporation payable in ten years, secured by bond and mortgage. The company subsequently offered to allow all such subscriptions to be reduced one-half, provided that when so reduced, they should be payable in cash on call, as other cash subscriptions. The defendant being largely indebted to the company, and interested in raising funds for its immediate use, to relieve himself as far as possible from responsibility, agreed and promised that if the plaintiff would accept this proposition, he would hold him harmless, and be answerable to the corporation for all liability on his subscription, and plaintiff accepted it in consequence of this promise, it was held that the promise was founded on a sufficient consideration, and was not within the statute of frauds.¹

Where the promisor has funds in his hands belonging to the debtor, from which he has authority to pay a certain debt, the promise is not within the statute, because it is a promise merely to pay to the creditor what he would otherwise be bound to pay to the debtor in satisfaction of his own debt; and the same is true where the promise is conditional, as, to pay, if he receives funds of the debtor to the amount of the debt. In such case, while there is no obligation to pay unless the condition is fulfilled, yet if the condition is fulfilled the promise is operative and not within the statute, because the debtor's own funds are relied upon for payment.²

¹ North v. Robinson 1 Duv. (Ky.) 71.

² Clymer v. De Young, 54 Penn. St. 118; May v. Nat. Bk. of Malone, 9 Hun (N. Y.) 108; Wyman v. Smith, 2 Sandf. (N. Y.) 331; Calkins v. Chandler, 35 Mich. 320; McKeenan v. Thissel, 33 Me. 368; McLaren v. Hutchinson, 22 Cal. 187; Nelson v. Hardy, 7 Ind. 364; Corbin v. McChesney, 26 Ill. 231. In the Consociated &c. Society v. Staples, 23 Conn. 543, a contractor for the erection of a meeting-house for an ecclesiastical society applied to C, D, and E for materials and labor, each of whom had previously subscribed certain sums towards the cost of said house, and agreed that the society might pay them therefor

by applying the amount of their subscriptions thereto; and in case the amount so furnished should exceed their subscriptions, such excess should be paid in cash by the society, which cash and subscriptions cancelled were to be charged by the society to such contractor as payment upon such contract. The agreement was made known to the society, and assented to by the building committee; and relying upon their promise, the parties aforesaid furnished the material and labor. The court held that the promise was not within the statute nor void for want of a consideration. HINMAN, J., said: "This was not a promise to pay the debt of another; it was a promise by the society to pay their own

But a promise to pay out of funds of the debtor without his assent is within the statute. Thus, A being indebted to B, C verbally promised to B to pay him the sum, and charged

debt to Hawley and Wheeler, or a portion of it to the several claimants, and it was made in consideration of the extinguishment of the claimants' demands against Hawley and Wheeler. The agreement between Hawley and Wheeler and the claimants, assented to by the society, operated to extinguish the claimants' demands against Hawley and Wheeler, and as an assignment of them to the society." *Standt v. Hine*, 45 Penn. St. 187; *Ladd v. Tobey*, 29 Me. 219; *Lucas v. Payne*, 7 Cal. 92; *Hitchcock v. Lukens*, 8 Port. (Ala.) 333; *Loomis v. Newhall*, 15 Pick. (Mass.) 159; *Andrews v. Smith, Tr. & G.* 173. A promise by the purchaser of real estate or personal property to pay a part or the whole of the price to certain creditors of the vendor, is a promise to pay his own debt, and not within the statute. *Blair & Co. Land Co. v. Walker*, 39 Iowa, 406; *Lester v. Bowman*, 39 id. 611; *Chamberlain v. Ingalls*, 38 id. 300. In *Davis v. Banks*, 45 Ga. 138, A, a merchant indebted to B and C, sold his goods to B for more than his indebtedness to him. While B was removing them from the county, C threatened to attach them, and, thereupon, B orally promised C that if he would not attach the goods, he would pay to him the surplus arising from the sale of the goods over and above his debt. It was held that this was an original undertaking, and not within the statute. Where one assignee for the benefit of creditors, having collected money for the estate, in compliance with a previous agreement with his co-assignee, conveys property to a third person, upon the condition that the latter shall pay the co-assignee the sum collected, and such person afterwards promises the co-assignee to pay it to him, such promise is founded upon a sufficient consideration, and is not within the statute of frauds. *Perkins v. Hitch-*

cock, 40 Me. 468. In *McCartney v. Hubbell*, 54 Wis. 360, by the terms of the contract, C was to sell chattels to B, and B was to pay him therefor by an order for goods on A, and a note to be executed by A to C. It was held that as the contract on its face appeared to have been made for A's benefit, his mere approval of it created no liability on his part; but the question still was whether, before such contract was made between B and C, he promised to pay C, and whether the contract was made and the property delivered to B in reliance upon such promise. But if A sells goods to C in part payment of such claim, this circumstance is evidence for the jury upon the question whether he did not originally promise to pay the debt. An entire stranger to a contract cannot make himself liable thereon by a subsequent "ratification and adoption," but only by some new contract upon a new consideration, such as a guaranty of performance upon consideration or an assignment, and that new contract is within the statute of frauds. *Ellison v. Jackson & Co.*, 12 Cal. 542. Where the owner of negotiable paper sells it, and accompanies the sale by a guaranty of collection thereon, it is not necessary to the validity of such guaranty that the name of the guarantee should appear in it. A guaranty so given is not within the statute of frauds. *Thomas v. Dodge*, 8 Mich. 51. A assigned a bond against B to C, to enable him to obtain goods on the credit of the assignment, and guaranteed the payment of the bond by an indorsement on the back thereof signed by his name, and goods were obtained on the credit of the indorsement and guaranty. It was held that this was not an undertaking for the debt of another within the statute of frauds. *Hopkins v. Richardson*, 9 Gratt. (Va.) 485.

it to A without his consent. It was held that the promise was within the statute, and must be in writing, to be binding.¹

SEC. 145. When Promise Cannot be Revoked.—Where a valid promise is made by one having property in his hands left with him by the debtor for that purpose to pay his debt to another, the promisor is not relieved therefrom by instructions subsequently given to him by the person promised for, not to pay the debt. Thus in *May v. the National Bank of Malone*² it appeared that the firm of Townsend & Hyde were indebted to the firm of May & Co. in the sum of \$2,738.78, for which the latter firm held the note of Townsend & Hyde, payable at the defendant bank. This note became due Feb. 23, 1876, and on that day was presented there by the National Hide and Leather Bank of Boston for payment, which was refused; whereupon the note was protested and returned to the Boston bank by George Hawkins, the cashier of the defendant, by mail, with notice of protest attached thereto. On the 6th of March, 1876, Townsend & Hyde wrote to said George Hawkins as follows:

“DEAR SIR,— We send by this mail our note to Mr. A. White, for him to indorse and hand to you, for \$2,879.

“We want you to discount it for us to pay the May & Co. note, due February twenty-third, which amounts to \$2,777.40, and interest from the twenty-third day of February, and hand Mr. White the notes we sent you, \$3,000, for him to hold as collateral . . . It will be a very great accommodation to us if you will discount this note, and send draft to May & Co. for the note due them February 23, 1876.

“Very truly yours,

“TOWNSEND & HYDE.”

On the 8th of March, 1876, said White presented the note at said National Bank of Malone, and after he had indorsed it delivered it to Hawkins to be discounted by said bank to pay May & Co.'s note. Thereafter, on the 10th of March, 1876, a communication was forwarded by Hawkins to said May & Co., at Boston, as follows:

¹ *Richardson v. Williams*, 49 Me. 558.

² 9 Hun (N. Y.) 108.

“ *Messrs. May & Co. :*

“ *Forward to me the past due note of Townsend & Hyde, and I will pay it.*

“GEORGE HAWKINS,

“ *Cashier.*”

On the same day a communication was forwarded by Hawkins to Townsend & Hyde as follows :

“ *Messrs. Townsend & Hyde :*

“DEAR SIRs, — Your favor of the — is received. I have written to May & Co. to return your note to me for payment, we having done as requested in yours of the sixth.

“Yours, etc.,

“GEORGE HAWKINS,

“ *Cashier.*”

In obedience to the directions contained in the communications of Hawkins, on the 13th day of March, 1876, at 1 o'clock in the afternoon, that being the same day upon which the communication from Hawkins was received by May & Co., they returned the protested note of \$2,743.78 of Townsend & Hyde to the National Bank of Malone, by depositing the same in the post-office at Boston, addressed to George Hawkins, cashier of said National Bank of Malone, postage paid, with the following letter of instructions :

“BOSTON, *March 13, 1876.*

“ *George Hawkins, Esq., Cashier National Bank of Malone :*

“DEAR SIR, — In obedience to your pc. of tenth March, we inclose note Townsend & Hyde, \$2,743.78, and interest from 20th October, 1875. Protest fees \$1.14, for which please send us check on New York or Boston, and oblige,

“Yours truly,

“MAY & Co.”

On the 13th day of March, 1876, at seven and a-half o'clock in the evening, and after the closing of said National Bank of Malone for that day, but before the protested note sent by May & Co. had reached the bank in return, a telegram sent by said Townsend & Hyde from Cortland, N. Y., at 5.16 o'clock of the afternoon of that day, was delivered to Hawkins, addressed to him, which read as follows :

"CORTLAND, N. Y., *March* 13, 1876.

"*To George Hawkins, Cashier, Malone:*

"Do not pay the May note. I will be at home to-morrow.

(Signed.)

"W. H. HYDE."

On the 15th day of March, 1876, Townsend & Hyde *personally* instructed Hawkins not to pay the May & Co.'s note, and on the 16th day of March, 1876, payment of the note was again refused at the defendant bank, and the same was returned to May & Co. unpaid. The note of \$2,789, made by Townsend & Hyde, and indorsed by Abram S. White, and by him delivered to the defendant to pay the May & Co.'s note of \$2,743.78, remained in the possession of the bank up to the time this action was brought, and no entries in relation thereto were ever made in the books thereof. BOARDMAN, J., in delivering the opinion of the court, said: "If the contract of defendant could be considered as governed by the statute of frauds, it would still be good and binding. It is in writing, and signed by the party to be charged. The signature by the cashier of the defendant is sufficient under this statute.¹ But the contract was not within the statute of frauds. It was an original undertaking by the defendant, founded upon an adequate consideration moving from Townsend and Hyde to it, to pay the debt of Townsend & Hyde to the plaintiffs. The proceeds of the note discounted by defendant for Townsend & Hyde were held for plaintiff—were put in defendant's hand to pay plaintiff with, and defendant had assumed and promised to pay such debt therewith. The discounting of the note is admitted by defendant. This takes the case out of the statute of frauds. The distinction between original and collateral promises is fully considered and explained in the following leading cases in this State: *Leonard v. Vredenburg*² and *Mallory v. Gillett*.³ From the distinctions therein pointed out, it is apparent that this is an original undertaking, and can be enforced by the plaintiffs. Many of the cases cited and commented upon by the learned judges in those cases are applicable here. I shall cite but one or two. In *Barker v. Bucklin*⁴ it is held that an action may be maintained on promise

¹ *Dykers v. Townsend*, 24 N. Y. 57.

² 21 N. Y. 412.

³ 8 Johns. 39.

⁴ 2 Den. (N. Y.) 45.

made by the defendant to a third person for the benefit of the plaintiff, upon a consideration moving from such third person to the defendant, and without any consideration moving from the plaintiff. So in *Lawrence v. Fox*¹ it is held that an action lies on a promise made by the defendant upon valid consideration, to a third person for the benefit of the plaintiff, although the plaintiff was not privy to the consideration. Such promise is to be deemed made to the plaintiff if adopted by him, though he was not a party nor cognizant of it when made.² In the present case Townsend & Hyde had put the defendant in funds to pay plaintiff's debt, requesting it to pay the same. The defendant acknowledges to Townsend & Hyde that it had done as requested, and had sent for the note to be returned for payment. It had also, in consideration of such provisions made, promised the plaintiffs to pay their debt upon the note being returned to defendant; but upon its return refused to do so at the instance of Townsend & Hyde. I think the means, derived by the bank from Townsend & Hyde's note discounted by it, were put there for the payment of plaintiffs' debt, and upon a mutual understanding between the bank and Townsend & Hyde, to which each agreed, that plaintiffs' debt should be paid therefrom. By such act the liability of the defendant was fixed. The bank, however, is still in possession of the note discounted, and of the funds derived therefrom. It will not be the loser if compelled to pay. The assets of Townsend & Hyde will pay the debt."

SEC. 146. When Payable if no Time is Agreed Upon.—The ground upon which this doctrine rests is that the promise in such a case is based upon a new and independent consideration, distinct and apart from the original debt. The rule, however, is modified by the promise. If the promise is made in consequence of a debt due from the promisor to the debtor, or of money placed in his hands by the debtor, and nothing is said as to the time of payment, the promise is enforceable *instantly*; but if the promise is to pay the debt out of the proceeds of property placed in the promisor's hands for that purpose, and is to pay out of *the avails* of the property, liability does not attach until the property has been sold,

¹ 20 N. Y. 268.

² See also *Barker v. Bradley*, 42 N. Y. 316.

or the promisor by his conduct has made himself the purchaser.¹ But if he promises to pay out of the property, and *guarantees that it will be sufficient to pay the debt*, the promise is not within the statute, even though the avails thereof prove insufficient.² The mere fact that the promisor has funds or property in his hands belonging to the debtor is not sufficient to take the case out of the statute, but *it must also appear that they were deposited with him for that purpose, or that he had authority to so apply them*,³ and *it must be an absolute promise to pay the debt*, and not merely to see it paid if the debtor does not pay it, or to stand as security for its payment.⁴

¹ Draughan v. Bunting, 9 Ired. (N. C.) 10. Threadgill v. McLendon, 76 N. C. 24; Stanley v. Hendricks, 13 Ired. (N. C.) 86; Hall v. Robinson, 8 Ired. (N. C.) 56; Hicks v. Critcher, Phillips (N. C.) Eq. 353.

² Lippincott v. Ashfield, 4 Sandf. (N. Y.) 611.

³ Dilts v. Parke, 4 N. J. L. 219; State Bank v. Mattler, 2 Bos. (N. Y.) 392.

⁴ In Weyer v. Beach, 14 Hun (N. Y.) 235, BARKES, J., states the facts of the case and the law applicable thereto as follows: "It appears that Beach, the owner, entered into a written agreement with the contractors, Stone & Bassett, by which the latter agreed to erect a building for the former on his premises, the contractor to furnish the material therefor. There was a clause in the agreement which permitted Beach to retain moneys due thereon to Stone and Bassett for the purpose of paying for material used by them, and he was authorized to make such payments and have them applied as payments on the contract. Stone & Bassett then contracted with the plaintiffs for the brick necessary to erect the building at a stipulated price per thousand. After the plaintiffs had made delivery to Stone & Bassett of a small portion of the brick they became distrustful of the latter's responsibility and thereupon, on meeting Beach, they enquired if he would retain moneys on his contract with Stone & Bassett for

the building of the house, sufficient to pay for such brick as they should deliver to S. & B. and pay them therefor, in case they would keep him informed from time to time of the amount remaining unpaid. According to the testimony of one of the plaintiffs, Beach replied that he would do so; this, however, Beach flatly denied. Now, in the first place, it becomes important to see precisely what the arrangement was between the parties, if any was in fact made; and in determining this fact we are not concluded by the decision of the referee, though there was a conflict of evidence, but it becomes our duty on the appeal to examine the case *de novo* on the proof submitted. Such seems now to be the rule laid down by the Court of Appeals. Godfrey v. Moser, 66 N. Y. 250. We must therefore examine the evidence and determine the nature and extent of the alleged contract between the parties for ourselves.

The plaintiff Weyer alone testified to the arrangement on the part of the plaintiffs. He gave the conversation between himself and the defendant, Beach, as follows: 'I asked him if I should keep him posted as to what they (S. & B.) owed me, whether he would keep money enough back out of his contract to pay me. Mr. Beach said he would. I said I would commence drawing, and he said all right.' This occurred after some of the brick had been delivered. On his cross-

But in this class of cases it is immaterial whether the original debtor is discharged or not, because the promise is based upon

examination, the witness gave the conversation as follows: 'I asked him if he would retain money if I would keep him posted, and he said he would *see me through*. I think that was it; and I replied, then I can commence delivering brick, and he said all right; this was all there was said. . . . I am sure that the remark of Beach was, "I will see you through." The witness also testified to various facts, showing that the plaintiffs made the delivery to Stone & Bassett on their contract. He (Weyer) called on them for payment, and obtained payment of part from or through them; and on one occasion he told Beach that he 'would not have drawn the brick if he (Beach) had not *agreed to be security*.' Besides in the notice which stands as a pleading, the plaintiffs state that the brick were furnished to Stone & Bassett. Thus it is made entirely certain that there was no surrender or abandonment of the first contract for the brick, made between the plaintiffs and Stone & Bassett. This contract was not terminated or superseded by the alleged agreement between the plaintiffs and Beach. It continued in force, and the brick was delivered under that contract. It must follow then that the alleged arrangement between the plaintiffs and Beach was collateral to it, and was in the nature of a guaranty of its performance by Stone & Bassett as to payment. And so the plaintiff, Weyer, who made the arrangement understood it. He testified that he told Beach that he would not have drawn the brick if he (Beach) had not agreed to be '*security*.' Such is the plain import of his evidence. He says, 'I asked him if I should keep him posted as to what they *owed me*'—(that is, as to the amount Stone & Bassett should become indebted on the brick contract from time to time) 'whether he would keep money enough back out of his contract to pay me;' and when

afterwards he called the defendant's attention to the conversation, he said he should not have drawn the brick had he (Beach) not agreed to be '*security*.' It is very manifest that the plaintiff, Weyer, understood the arrangement as one of security on the part of Beach; that is, that he (Beach) would be responsible for whatever amount Stone & Bassett should fail or omit to pay. Therefore, accepting the arrangement or promise to be as proved by the plaintiffs, it was a promise to answer for the debt or default of Stone & Bassett; hence, having been oral merely, it was void by the statute of frauds. The statute declares that every special promise to answer for the debt, default, or miscarriage of another person shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith. It is said in *Brown v. Weber*, 38 N. Y. 187, that the language employed in the statute shows that the test to be applied to every case is, whether the party sought to be charged is the principal debtor, primarily liable; or whether he is only liable in case of the default of a third person. In *Cowdin v. Gottgetreu*, 55 N. Y. 650, it is laid down, that while a person may become liable upon a parol promise for goods purchased which are delivered to and are intended for the use of another, in order to make him so, the debt must be his only; he must be exclusively liable therefor. In *Duffy v. Wunsch*, 42 N. Y. 243, A promised to pay the debt of B, if C would discontinue a suit for its recovery, then pending against B. The promise was held to be within the statute of frauds and void. Lorr, J., in this case, remarked, that the promise was not made or accepted in the place or as a substitute of the original debt, or in its extinguishment; on the contrary, B continued liable for the amount or

a consideration entirely independent of it.¹ The distinction between promises of this character and those having no independent consideration is illustrated by PEARSON, C. J.,² as follows: "The principle," says he, "is this, when in consideration of the promise to pay the debt of another the promisor receives property and realizes the proceeds, the promise is not within the mischief provided against, *and the promisee may recover on the promise or in an action for money had and received*. For although the promise is in words, to pay the debt of another and the performance of it discharges the debt, still *the consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an original and distinct cause of action*." In *Threadgill v. McLendon*, ante, the question as to whether liability upon a promise to pay the debt of another attaches where property is placed in the hands of the promisor for the purpose of paying a debt, until the property is converted into money, was considered, and a distinction was made in this respect between what is denominated "a cash article" and one which is not. In that case the plaintiff furnished supplies to a cropper of the defendant upon a promise of the defendant to pay for the

balance thereof which the defendant agreed to pay. So here the promise by Beach, as testified to by the witness, was not made or accepted in place of, or as a substitute for, the original contract between the plaintiffs and Stone & Bassett, or in extinguishment thereof; on the contrary, Stone & Bassett continued liable for the amount or balance which Beach agreed to pay. See also *Mallory v. Gillett*, 21 N. Y. 412; *Loonie v. Hogan*, 9 N. Y. 435; *Larson v. Wyman*, 14 Wend. (N. Y.) 246; *Payne v. Baldwin*, 14 Barb. (N. Y.) 570. No new terms of payment or conditions of delivery were agreed upon, or even considered, between the plaintiffs and defendant. The contract with Stone & Bassett determined all that, and it was to continue in force. Delivery of the brick and payment therefor was to be made according to its terms, and the promise of the defendant, according to the proof, was this, in legal effect: *That he would answer to the plaintiffs*

for the default of Stone & Bassett in making payment as they had agreed. Not having been made in writing, it was void by the statute of frauds. Nor does the clause in the agreement between Stone & Bassett and Beach, by which the latter was at liberty to retain money which should become due the former thereon, and apply it in payment for materials used by them in erecting the building, aid the plaintiffs' case. This was merely permissive as to Beach, not obligatory on him; and this clause in no way validated his otherwise invalid promise."

¹ *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374; *Wait v. Wait*, 28 Vt. 350; *Olmstead v. Greenly*, 18 John. (N. Y.) 12; *Mitchell v. Griffin*, 58 Ind. 559; *Burr v. Wilcox*, 13 Allen (Mass.) 269; *Young v. French*, 35 Wis. 111; *Fish v. Thomas*, 5 Gray (Mass.) 45; *Wells v. Brown*, 118 Mass. 137.

² *Stanley v. Hendricks*, ante.

same. Afterwards the promisor took into his possession cotton belonging to the cropper, and sufficient to pay the plaintiff's account, and thereafter promised to pay the same. In an action to recover the debt of the promisor it was held that the promise was not within the statute, and that the defendant was liable for the reason that *the promise was not made as surety for the cropper, but for himself*, because the fund out of which the debt was to be paid was in his hands. It was insisted by the defendant's counsel that the case did not come within the principle involved in the rule stated *supra*, *because the cotton had not been sold*, but the court held that a distinction existed in this case *because cotton was a cash article*, and could readily be converted into money, and had a fixed and standard money value. But we cannot believe that the rule adopted in this case can be sustained, except the jury find, as a fact, that the promisor was a purchaser of the cotton, or agreed to pay absolutely without reference to its sale, or that he unreasonably delayed making the sale. The court must enforce the contract *made by the parties*, and has no power to make one for them.

SEC. 147. Parting with Security or Giving up a Lien.— In an English case¹ it was held that where a person parts with securities or gives up a lien which he has for a debt, upon the strength of a verbal promise by a third person, the promise is not within the statute whether such promise inures to the benefit of the promisor or not. In that case certain carriages belonging to one Copey were sent to the plaintiffs by the defendant to be repaired, and the defendant gave the orders respecting them. The bill for the repairs was made out in the name of Copey. When the carriages were repaired the defendant sent an order to pack them and send them on board ship. The plaintiffs thereupon sent to him to know who was to pay for them. The defendant said he had sent them and would pay for them. In reliance upon this promise the carriages were packed and sent on board ship, and a bill made out and delivered to the defendant. After having called for the pay several times without avail, this action was brought, and LORD ELDON held that the defend-

¹ Houlditch v. Milne, 3 Esp. 86.

ant was liable irrespective of the question whether credit was given solely to the defendant or not. He said: "In general cases, to make a person liable for goods delivered to another, there must be either an original undertaking by him, so that the credit was given solely to him, or there must be a note in writing. There might, however, be cases where the rule does not apply. If a person gets goods into his possession on which the landlord had a right to distrain for rent, and he promised to pay the rent though it was clearly the debt of another, yet a note in writing was not necessary; it appeared to apply precisely to the present case. The plaintiffs had, to a certain extent, a lien upon the carriages which they parted with on the defendant's promise to pay. That, he thought, took the case out of the statute, and made the defendant liable for the bill." In this case it will be observed that the defendant derived no advantage from the discharge of the lien, and that Copey was not discharged from his liability for the debt, and we believe that the case does not express a correct rule of law, and it never has been adopted in England, and in but few of the courts of this country. The promise of the defendant could not in any sense be said to be predicated upon a new and independent consideration, unless, indeed, as was intimated in the case, but not shown, Copey had placed money in the hands of the defendant to pay the bill. It is intimated in a note to *Forth v. Stanton*¹ that the doctrine of this case may be reconciled with the other English cases,

¹ *Forth v. Stanton*, 1 Wm. Saund. 211 b. In *Gull v. Lindsay*, 4 Exchq. 45, the plaintiff was a ship broker, and was employed by the owners of the "Mathesis" to procure for them a charter of the ship, upon the times that he should be entitled to receive the freight, and satisfy himself out of it for his commission. He procured a charter party, and the ship sailed on her voyage, and returned to England. Before her return, a change in the ownership of some of the shares of the ship had transpired, and the defendants, who were the brokers of the new owners, — the plaintiffs being about to collect the freight, being anxious to gain possession of the ship, — promised the plaintiff that if

he would relinquish his right to collect the freight, they would pay him his commission. Relying upon this promise, the plaintiff relinquished such right. The plaintiff had a verdict, but was set aside, *POLLOCK, C. B.*, saying: "We think the defendants' counsels were right in saying that this contract was a contract made to pay the debt of another within the statute of frauds. It was not a case of transfer of liability as if A had agreed to accept C, a debtor of B, as his debtor in lieu of him. It is plain that, although the defendants agreed to pay the plaintiff, yet the debt to him still remained due from the owners by whom he was retained."

because it appears from all the circumstances that the sole credit was given to the defendant, and that the real owner of the carriages was not at all liable. But this statement is forced and without support, as it appears that credit was given to the owner of the carriages because the bill was made out in his name, and the plaintiffs seem to have regarded him as their debtor, and not until the order for the shipment was given, and the defendant made the promise relied upon, did they ever regard or treat him as their debtor; and the fact that the bill was made out in the name of Copey shows that they clearly understood that the work was being done for him, although performed upon the order of the defendant, and the court makes no mention of any such grounds for its decision, showing that it had no influence thereon, and while the result reached may have been correct upon the ground that the defendant, from what he said to the plaintiffs when asked who was to pay the bill, may have made himself chargeable as original debtor. Yet this has no tendency to reconcile the doctrine of the case with that of other English cases, because it is not the ground upon which the court proceeded, and there can be no question but that the real doctrine of the case is that where a person discharges a lien upon property which he holds as security for a debt, upon the promise of a third person to pay the debt if he will do so, the promise is not within the statute.¹

Upon what LORD ELDON says in reference to the liability of a person who gets goods into his possession on which the landlord had a right to distrain for rent, who to prevent a distress promises to pay the rent, it is evident that he intended to follow the doctrine laid down in *Williams v. Leper*,² and

¹ In *Briggs v. Evans*, 1 E. D. S. (N. Y. C. P.) 192, the doctrine of *Houlditch v. Milne* was followed. In that case the plaintiff manufactured some furniture for A; but before delivery, presented the bill to A; and he being unable to pay it, the plaintiff refused to deliver the furniture. But at A's request, he went with him to see the defendant, who took the bill and promised to pay it, thereupon the plaintiff delivered the furniture, and charged it to the defendant. It was

held that the defendant's promise was an original undertaking.

² *Williams v. Leper*, 3 Burr. 1886. In *Blackford v. Plainfield Gas Co.*, 43 N. J. L. 438, the holder of an execution levied on personal property on which, by statute, the landlord had a lien for rent, promised the landlord that if he would waive his rights under the statute, and allow the property to be sold, he would pay the rent, and it was held that the promise was not within the statute. In *Coquard*

that his ruling resulted from a misapprehension of the doctrine of that case. But the points of distinction between the two cases are marked. It will not be advisable to give that case in full here, as the gist of it is given in another section; and from the facts as there stated, it will be seen that the defendant Leper held the goods of the original debtor in his possession under a bill of sale from the debtor, who was a tenant to the plaintiff, and largely in arrears for rent, to be sold for the benefit of his creditors. While Leper so held the goods the plaintiff was about to distrain them for the rent, whereupon the defendant promised him that if he would not distrain he would pay him the £45 due for rent, and upon the faith of that promise the plaintiff did not make the distress. LORD MANSFIELD, C. J., said: "The *res gestae* would entitle the plaintiff to his action against the defendant. *The landlord had a legal pledge.* He enters to distrain; he has the pledge in his custody. The defendant agrees that the goods shall be sold and the plaintiff paid in the first place. *The goods were the funds.* The question was not between Taylor, the tenant, and the plaintiff, the landlord. *The plaintiff had a lien on the goods, Leper was a trustee for all the creditors, and was obliged to pay the landlord who had a prior lien.* This has nothing to do with the statute of frauds." WILMOT, J., said: "Leper became the bailiff of the landlord, and when he had sold the goods, *the money was the landlord's* (as far as £45) *in his own bailiff's hands.* Therefore an action would have lain against Leper for money had and received to the plaintiff's use." It was not even intimated in this case that the surrender of the lien by the plaintiff gave validity to the defendant's promise, or that a recovery could be had upon that ground, but the defendant's liability was placed upon the ground that the defendant, being a trustee for all the creditors, was obliged to pay the plaintiff who had the prior lien, and ASTON, J., regarded the goods as the debtor, *as a fund between both*, and thought that the defendant was not bound

v. Union Depot Co., 10 Mo. App. 261, the plaintiff's wife, while travelling, pledged her trunk to the conductor for the fare of a child travelling with her; and the plaintiff — her husband — afterwards agreed with the baggage-master to settle the claim for the trunk

if it was sent to him C. O. D. The trunk was so sent, when, instead of settling the claim, the plaintiff replevied it. The court held that the promise to pay the claim was not within the statute, and that he could not recover in the action.

to pay the landlord more than the goods sold for. In this case the defendant had the custody of the goods, coupled with an interest and a right to sell them, while in the case of *Houlditch v. Milne* the defendant neither had an interest in, or the possession of the goods, or the right to sell them.

SEC. 148. Rule in Maine. *Stewart v. Campbell.*—There are several early American cases in which the doctrine of *Houlditch v. Milne* was adopted,¹ but that doctrine is not generally held by our courts, and the relinquishment of a lien upon the verbal promise of a third person to pay the debt, is held not to be operative unless the person making the promise has an interest therein, and derives some benefit and advantage therefrom, and in some of the cases it is held that the promise is collateral, notwithstanding the promisor derives an advantage therefrom, *unless the lien is extinguished, and the original debtor is discharged from the debt.* Thus in a Maine case,² in which the plaintiff had a debt against D, and a lien therefor upon the defendant's vessel, S, being pressed for money by the plaintiff, told him that he should have his lien-claim on the vessel, to be enforced if D did not pay it. The defendant hearing of this, and not desiring that his vessel should be stopped, verbally promised the plaintiff that he would pay S's claim *if D did not.* The plaintiff did not discharge S, nor did S release D or his lien on the vessel, although he did not enforce it as he would have done but for the expectation raised by the defendant's promise that the claim would be paid to the plaintiff. D afterward collected of the defendant, but did not pay the plaintiff. It was held that the promise was within the statute, and the ground upon which the court based the doctrine was *that the plaintiff did*

¹ *Tindal v. Touchberry*, 3 Strobb. (S. C.) L. 177; *Dunlap v. Thorne*, 1 Rich. (S. C.) L. 213; *Adkinson v. Barfield*, 1 McCord (S. C.) L. 575; *Sian v. Pigott*, 1 N. & McCord (S. C.) 124; *Slingerland v. Morse*, 7 John. (N. Y.) 463; *Mercein v. Andrus*, 10 Wend. (N. Y.) 461; *Stewart v. Hinkle*, 1 Bond (U. S. C. C.) 506. But in New York this doctrine is now repudiated; and where the plaintiff had in his possession a canal-boat belonging to A, upon which

he had a lien for repairs, and upon B's oral promise to pay for the repairs, delivered it to A, it was held that the promise was within the statute. *Mal-lory v. Gillett*, 21 N. Y. 412; overruling *Watson v. Parker*, 1 Hun (N. Y.) 618; and *Fay v. Bell*, Lalor's Sup. (N. Y.) 251.

² *Stewart v. Campbell*, 58 Me. 439; 4 Am. Rep. 296. See also *Brightman v. Hicks*, 108 Mass. 246.

*not release the lien or his claim against the principal debtor, so that the promise of the defendant was merely collateral, and not binding unless in writing.*¹

SEC. 149. **General Rule.**—In Massachusetts a different rule is adopted, and when the owner of a vessel, subject to a lien for a debt incurred, agreed verbally with the holder of the lien that if he would forbear enforcing it, he would pay the debt, the court held that the promise was an original undertaking, and that whether the lien was absolutely abandoned or not. "By permitting the vessel to go to sea," said SOULE, J., "and forbearing to enforce their lien, the plaintiffs abandoned *for the time being, at least,* the advantage which their lien gave them for securing their debts, *for the benefit of the defendant,* who thereby gained the opportunity to send his vessel to sea, and put her beyond the jurisdiction of the courts of this Commonwealth, so that they could not enforce their lien."² In this case, while the defendant had a direct interest in having the lien discharged, yet it does not appear that the lien was absolutely discharged, or that the original debtor was released from the debt. Therefore the doctrine announced in it is directly opposed to that adopted in the Maine case, *ante*, but comes clearly within the rule stated in the text as well as in accord with the doctrine generally held in the several States of this country,³ and as announced by SHAW,

¹ In *Spooner v. Dunn*, 7 Ind. 81, it was held that where a creditor releases a specific lien which he has upon property upon the faith of a third person to pay the debt, the promise is not within the statute. See also, to same effect, *Dunlap v. Thorne*, 1 Rich. (S. C.) L. 213; *Plummer v. Lyman*, 49 Me. 229; *Arnold v. Stedman*, 45 Penn. St. 186; *Fay v. Bell, H. & D. Suppt.* (N. Y.) 251.

² *Fears v. Story*, 131 Mass. 47. But see *Brightman v. Hicks*, 108 id. 246, where it was held that an oral promise made to a creditor by whom property subject to a lien for the debt is transferred by the debtor *without any release of the creditor's claim, either on the debtor or the property*, is within the statute.

³ *Hodgkins v. Henney*, 15 Minn. 185; *Arnold v. Stedman*, 45 Penn. St. 186; *Corkins v. Collins*, 16 Mich. 478; *Smith v. Sayward*, 5 Me. 504; *King v. Despard*, 5 Wend. (N. Y.) 277; *Whitfield v. Potter*, 10 Bos. (N. Y.) 226; *Young v. French*, 35 Wis. 111; *Cross v. Richardson*, 30 Vt. 641; *Lampson v. Heartt*, 28 id. 697; *Boyce v. Owens*, 2 McCord (S. C.) L. 208; *Krutz v. Stewart*, 54 Ind. 178; *Scott v. Thomas*, 2 Ill. 58; *Crawford v. King*, 54 Ind. 6; *Spooner v. Drum*, 7 Ind. 81; *Luark v. Malone*, 34 id. 444; *Scott v. White*, 71 Ill. 287; *Mallory v. Gillett*, 23 Barb. (N. Y.) 610; *Stern v. Drinker*, 2 E. D. S. (N. Y. C. P.) 401; *Fay v. Bell, H. & D. Suppt.* (N. Y.) 251; *Van Slyck v. Pulver*, id. 47; *Alger v. Scoville*, 1 Gray (Mass.) 391; *Burr v.*

C. J.,¹ that where the plaintiff, in consideration of the defendant's promise, has relinquished some lien, benefit, or advantage for securing or recovering his debt, *and where by means of such relinquishment the same interest or advantage has inured to the benefit of the defendant*, the defendant's promise to pay the debt is an original undertaking and not within the statute; and in that case this rule was applied to uphold an action against the owner of a building who, in consideration that the builder would release him from the further performance of a building contract, and assign to him the materials procured for the completion of the contract, verbally promised to pay the outstanding bills due from the builder for labor and material. In another case² one of the owners of a ship orally promised to pay a claim for labor and materials furnished for her construction, and charged to the builder in case a libel to enforce a lien upon a similar claim should be enforced in admiralty, if the plaintiff would forbear to enforce his claim, and it was held that the promise was not within the statute whether the plaintiff actually had a lien or not.³ It is not enough that a benefit or advantage *may incidentally* inure to the promisor from the release of a lien, but it must appear that such advantage was the object or consideration of the promise.⁴

SEC. 150. Promisor must Derive Benefit Therefrom.—In cases of this character, in order to take a verbal promise out of the statute, *the person making the promise must not only*

Wilcox, 13 Allen (Mass.) 269; Fish v. Thomas, 5 Gray (Mass.) 45; Dexter v. Blanchard, 11 Allen (Mass.) 400; Fullam v. Adams, 37 Vt. 391; Kelsey v. Hibbs, 13 Ohio St. 340; Maule v. Bucknell, 50 Penn. St. 340; Small v. Schaefer, 24 Md. 143.

¹ In *Curtis v. Brown*, 5 Cush. (Mass.) 491.

² *Fish v. Thomas*, 5 Gray (Mass.) 45.

³ But see *Ames v. Foster*, 106 Mass. 400, where it was held that an oral promise made by the mortgagee of a vessel to persons who had furnished her with supplies, for which they had no lien, if they would not attach the

interest of the other part owners, was within the statute.

⁴ *Clapp v. Webb*, 52 Wis. 638. In *Mallory v. Gillett*, 21 N. Y. 412, the plaintiff had a lien for repairs upon a boat belonging to one A, which he would not release without payment of the debt. The defendant verbally promised, in consideration that the lien should be released, to pay the plaintiff the amount of the debt, part in hand, and the remainder in two equal instalments. The lien was released, and the part stipulated for paid. But in an action to recover the instalments, the court held that no recovery could be had, as the contract was clearly within the statute.

*have an interest in having the lien discharged, but the promisee must release the lien, and accept the promisor as debtor in the place of the original debtor.*¹ In an Indiana case this rule was applied where the plaintiffs had a statutory lien upon a house for an amount due them by the defendant, who also had a lien on the house for work done on it. The owner of the house, to prevent a mechanic's lien being filed against it, agreed to pay

¹ In *Conrad v. Sullivan*, 45 Ind. 461, the mortgagee of a chattel verbally promised the plaintiff—a mechanic—to pay him for repairs which he had made upon the chattel after the mortgage was executed, in consequence of which the plaintiff gave up his lien upon the chattel, and it was held that the statute did not apply. If there is *any* liability on the part of the original debtor, it is conclusive that the promise is collateral. *Ware v. Stephenson*, 10 Leigh. (Va.) 155; *Read v. Ladd*, 1 Edm. (N. Y.) Sel. Cas. 100; *Cutter v. Hinton*, 6 Rand. (Va.) 509; *Kurtz v. Adams*, 12 Ark. 174; *Kinloch v. Brown*, 1 Rich. (S. C.) 223; *Taylor v. Drake*, 4 Strobb. (S. C.) 431; *Cropper v. Pitman*, 13 Md. 190; *Knox v. Nutt*, 1 Daly (N. Y. C. P.) 213; *Walker v. Richardson*, 39 N. H. 259; *Dixon v. Frazer*, 1 E. D. S. (N. Y. C. P.) 32; *Cahill v. Bigelow*, 18 Pick. (Mass.) 369; *Hill v. Raymond*, 3 Allen (Mass.) 540; *Allen v. Scarff*, 1 Hilt. (N. Y. C. P.) 209; *Hetfield v. Dow*, 29 N. J. L. 440; *Swift v. Pierce*, 13 Allen (Mass.) 136; *Brown v. Bradshaw*, 1 Duer (N. Y.) 199; *Carville v. Crane*, 5 Hill (N. Y.) 483; *Brady v. Stackrider*, 1 Sandf. (N. Y.) 514. In *Richardson v. Robbins*, 124 Mass. 105, the defendant, to whom E was indebted, requested a chattel mortgagee of E to consent to a sale of the chattels to S, subject to the mortgage, S agreeing to pay the mortgage debt; and the defendant promised the plaintiff that if he would consent to such sale, *he* would pay such part of the debt as S did not; and it was held that the promise was within the statute. In *Goelet v. Farley*, 57 How. Pr. (N. Y.) 174, a verbal agreement by the assignee of

a lease to pay a mortgage on the premises, was held to be void. But in *Prime v. Koehler*, 7 Daly (N. Y. C. P.), where the defendant purchased premises subject to a mortgage, without assuming its payment, promised the plaintiffs, who were about to foreclose the mortgage, that if they would extend the time of payment, he would pay the interest then due, and thereafter to become due under the mortgage, it was held that the promise was not within the statute. The distinction between this case and the two former is that in this case the defendant had a direct interest in the subject-matter of the promise, and derived an immediate benefit therefrom; while in those cases the promisors had no direct interest, and derived no benefit from the promise. In *Waether v. Merrell*, 6 Mo. App. 370, the defendant, who was president of a bank, promised the plaintiff, who had money deposited there, that if he would not draw it out, but allow it to remain there, he would pay him the total deposit if the bank should fail. The plaintiff did not draw out his money, and the bank did fail; but the court held that the defendant's promise was within the statute. The officers of a bank agreed with the payee of a check, on its presentment,—the bank then having no funds on deposit to pay the check,—that if he would deposit it in another bank, so that it should be presented for payment through the clearing house, the bank would pay it; and it was held to be a promise to pay the debt of another, and within the statute. *Morse v. Mass. Nat. Bank*, 1 Holmes (U. S. C. C.) 209.

the plaintiffs; and they, *in reliance upon his promise, abandoned their lien*, and the court held that the owner of the house could not avoid his promise on the ground that it was not in writing because he derived a benefit and advantage from the discharge of the lien.¹ In a New Jersey case² a United States commissioner, who had taken certain depositions for the son of the promisor, sent them off upon the promise of the defendant to pay his fees, and thus lost his lien thereon; but the court held that the detriment from thus losing his security did not take the case out of the statute, because the promisor derived no benefit or advantage from the discharge of the lien, and could not in any sense be said to be a purchaser of the debt. The fact that there is a good consideration at common law for the *verbal* promise, so that it could be enforced if in writing, does not take the case out of the statute *unless the creditor accepts the promisor as debtor in place of the person on whose behalf the promise is made*,³ or the promise is predicated upon

¹ Luark v. Malone, 34 Ind. 444.

² Cowenhaven v. Howell, 36 N. J. L. 323. In Hall v. Woodin, 35 Mich. 67, the defendant promised the plaintiff, in behalf of several lumbermen whose logs required the aid of more water, that if he would raise and let go the floods, the lumbermen would pay him, and that he would see him paid; and it was held to be a collateral promise, and within the statute. In Searight v. Payne, 2 Tenn. Ch. 175, it was held that the promise of an officer of a corporation who promised to see that a bill for goods sold to the corporation is paid, is within the statute. See also Whitman v. Bryant, 49 Vt. 512; Gridley v. Capen, 72 Ill. 11. In Durant v. Allen, 48 Vt. 58, the defendant verbally promised the plaintiff that if he would not present his bill for doctoring her deceased husband in his last sickness for allowance by the commissioners, she would pay it, to which he agreed, and did not present the bill. The deceased had no minor children, and his real estate was worth less than \$500, and his personal estate less than \$100, and the Probate Court assigned the whole of the estate to her, she being entitled thereto as widow under

the statute. It was held that the promise was within the statute, and not binding upon her. But such a promise made by a widow to a creditor of her husband's estate, where there are assets with which to pay his debts, is held to be valid, and not within the statute. Crawford v. King, 54 Ind. 6. A promise by the payee of a note to the maker that if he will delay issuing an execution he has obtained against a third person, he will pay the judgment by allowing him credit for the amount on the note, is within the statute unless in writing. Krutz v. Stewart, 54 Ind. 178. But in Tennessee it has been held that a written promise to pay the debt of another, if the creditor will for a time delay the issue of an execution, is valid. Abel v. Wilder, 9 Lea (Tenn.) 453. In Haynes v. Burkam, 51 Ind. 130, it was held that a promise by A to C to sign a bond as surety for B for the return of certain United States bonds if C would loan them to B, which C did, relying upon such promise, is within the statute unless in writing.

³ Gill v. Herrick, 111 Mass. 501; Furbush v. Goodnow, 98 id. 296.

a new and independent consideration moving between the original contracting parties, so that the promisor can be said to be a purchaser of the debt, because otherwise the promise is merely collateral. Thus it has been held that a promise to pay the debt of a third person against whom an action is pending, and whose property had been attached therein, in consideration that the promisee will discontinue the suit, the promisor not being shown to have derived any immediate benefit therefrom, is within the statute, although the suit is discontinued, and the creditor thereby loses the benefit of the attachment.¹ The rule in such cases is that *when the party promising has for his object a benefit or advantage which he did not before enjoy, accruing immediately to himself, and assumes the debtor's place as to the payment of the debt*, the promise is not within the statute; *but where the object of the promise is solely for the benefit or advantage of the person in whose behalf it was made*, as to secure the release of his person or property, or other forbearance to him, the debtor still remaining liable, it is within the statute, and void unless in writing.² In a Ken-

¹ *Nelson v. Boynton*, 3 Met. (Mass.) 396.

² *Curtis v. Brown*, 5 Cush. (Mass.) 488; *Alger v. Scoville*, 1 Gray (Mass.) 391; *Nelson v. Boynton*, *ante*; *Stone v. Symmes*, 18 Pick. (Mass.) 467; *Harrington v. Rich*, 6 Vt. 666; *Clopper v. Poland*, 12 Neb. 69. In such case the promisor assumes the debt and makes it his own. The promise is a direct undertaking on the part of the person promising to pay, not upon the failure of the debtor to pay, but to pay the debt. Such a contract rests upon the same grounds as a contract for property sold and delivered, and is not collateral. *Fitzgerald v. Morrissey*, Neb. S. C. 1883. In *Reed v. Holcomb*, 31 Conn. 360, the defendant, in taking a note from a firm that was indebted to him, had it made payable to the order of the plaintiff. This was done for the purpose of getting the plaintiff's indorsement, and that he might get the paper discounted at a bank, but was done without consulting the plaintiff. He then carried it to the plaintiff, and requested him to indorse

it, which the plaintiff declined to do, but did so eventually upon the verbal promise of the defendant to see the note paid, and save him harmless. In making the indorsement the plaintiff relied solely upon the defendant's promise and responsibility, and for his accommodation. The defendant indorsed the note and took it to the bank, and procured it to be discounted. Before it became due, the makers failed, and the plaintiff had to take it up. In an action brought by him to recover the amount of the defendant upon his promise, the court held that the defendant's promise was not within the statute. *HINMAN, J.*, in delivering the opinion of the court, said: "It appears to us that the statute of frauds does not apply to this case. We think the defendant never intended to become the surety of Frazier, Mills, & Co. in making the promise that he did make, and that the plaintiff never intended to accept of his undertaking as that of a surety, or as at all collateral to their liability. It is often difficult from the mere words

tucky case¹ it was held that if the debtor is discharged from the debt in consequence of the promise of a third person to

¹ *Jones v. Walker*, 13 B. Mon. (Ky.) 357.

in which a promise is made to determine whether any credit was given to a third person, and the undertaking therefore collateral to the engagement or liability of such person, or whether it was a wholly independent and originally undertaking. In such cases courts must rely upon the circumstances of each particular case, and its general features, in order to ascertain the intention of the parties, and how they viewed it, where it is doubtful whether it was a contract of suretyship or guaranty, or an original undertaking. Now in this case the defendant wished to borrow money which he could obtain upon the plaintiff's indorsement, but could not upon the note of Frazier, Mills, & Co. without such indorsement, and as he had their note he preferred that the plaintiff should indorse it rather than to make a new note of his own to be indorsed. But on requesting the plaintiff to indorse their note he declined to do it, on the ground of their want of responsibility, until the defendant promised that if he would do it, he, the defendant, would pay it when due, and, in case the plaintiff had anything to pay by reason of his indorsement, he would repay the same, and fully indemnify and save the plaintiff harmless. This in substance, we think, was the same as if the plaintiff had indorsed the defendant's own note to enable him to raise money upon it. Of course no one would doubt his liability on such a transaction. The plaintiff gave no credit whatever to the name of Frazier, Mills, & Co., but relied entirely upon the undertaking of the defendant. In principle it is very similar to the case of *Brown v. Curtiss*, 2 N. Y. 226, which, though in form a promise to answer for the debt or default of another, was yet held to be in substance an engagement to pay the guarantor's own debt in a particular way, and therefore not

within the statute. The section of the statute, which is supposed to be applicable to the case, was not intended to protect parties from any other contracts than those of suretyship, or guarantee for the payment of some debt, or the performance of some duty by a third person. But if no credit is given to such third person, and the consideration of the promise does not move from him, and he is not to be benefited by it, the statute did not intend to make void the promise, because such third person might also be primarily liable for the same debt or duty. 'If,' says JUDGE BRONSON, in *Johnson v. Gilbert*, 4 Hill. (N. Y.) 178, 'A promise B, upon a sufficient consideration moving wholly between them, that a stranger will pay a sum of money, or do any other act, this is an original undertaking, and not within the statute; and it makes no difference whether the stranger is under an obligation to do the act or not.' The same principle was stated in *Alger v. Scoville*, 1 Gray (Mass.) 391, where it is laid down that 'a promise, the leading object of which is a benefit to the promisor, which he did not before enjoy, is not within the statute of frauds, although its effect be to discharge another from an obligation.' If the promise is on a sufficient consideration, moving between the immediate parties to it, and from which the promisor is to derive a benefit, in view of which the promise is made, it then becomes a new and independent contract existing entirely between the immediate parties to it. The benefit which the original debtor may derive from it is incidental, and in no respect the object of the parties, and ought not therefore to affect the validity of their contract. *Cross v. Richardson*, 30 Vt. 641; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 23. But in this case there was no benefit whatever to the original debtors arising

pay it, the promise is not within the statute, but when the person in whose behalf it is made is *not* discharged, but the liability assumed is contingent upon the failure of the original debtor to pay, the promise is collateral, and within the statute.¹

SEC. 151. Discharge of Attachment or Forbearance to Sue, etc., not Enough, Unless. — A verbal promise to pay the debt of another, if the creditor will forbear to sue,² or discontinue a suit already brought,³ or release an attachment,⁴ or if he will

¹ *Waggoner v. Gray*, 2 H. & M. (Va.) 603; *Noyes v. Humphries*, 11 Gratt. (Va.) 643; *Ware v. Stephenson*, 19 Leigh (Va.) 155.

² *Forth v. Stanton*, 20 Wend. (N. Y.) 201; *Thomas v. Delphy*, 33 Md. 373; *Hilton v. Dinsmoor*, 21 Me. 410. In *Peabody v. Harvey*, 4 Conn. 119, a promise made by the indorser of a note that if the payee would forbear suing the maker he would pay the debt, was held to be within the statute. "A promise on a *new* consideration," said *Hosmer, J.*, "rests on different principles, and has never been sustained on the forbearance of a debtor." *Huntington v. Harvey*, 4 id. 124; *Turner v. Hubbell*, 2 Day (Conn.) 457; *Jones v. Walker*, 13 B. Mon. (Ky.) 356; *Ellison v. Wisheart*, 29 Ind. 32.

³ *Nelson v. Boynton, ante*; *Duffy v. Wunsch*, 42 N. Y. 243; *Thomas v. Delphy*, 33 Md. 373. A mere oral promise by a stranger to an action that he will pay the debt and costs if the plaintiff will cease to prosecute the action, is not an original undertaking, and is within the statute. *Hearing v. Dettinan*, 8 Phila. (Penn.) 307; *Allwin v. Garbenick*, 8 id. 637.

from the plaintiff's indorsement of their note. Their liability to pay it was not altered except in respect to the party to whom it was payable. It was not discounted by the bank for their benefit, but for the defendant, and they obtained nothing in consequence of it. In this respect it is very distinguishable from the case of *Green v. Cresswell*, 10 Ad. & El. 453, which was principally relied upon by

⁴ *Nelson v. Boynton, ante*; *Licher v. Levy*, 3 Met. (Ky.) 292. In *Russell v. Babcock*, 14 Me. 139, it was held that a promise to pay the debt of an execution debtor if the creditor would delay the collection of the execution, was not within the statute. But this doctrine was overruled in *Hilton v. Dinsmoor*, 21 id. 410. *SHEPLEY, J.*, saying in reference to that rule: "If this was in reality the ground of decision in that case, and the abstract of the reporter is to that effect, we are constrained to say it is unsupported by the authorities. And in a later case, in the same State, *Stewart v. Campbell*, 58 Me. 439, *APPLETON, J.*, in referring to the doctrine adopted in *Russell v. Babcock, ante*, said: "This decision would repeal the statute, and it has been overruled." In *Ames v. Foster*, 106 Mass. 400, it was held that an oral promise made by a mortgagee of a part of a vessel to persons who had furnished her with supplies, that he would pay the debt if they would not attach the interest of the other owners, was collateral, and within the statute. A promise to pay a tax, if the collector will not levy, is not within the statute. *ALLEN, J.*, in *Goodwin v. Bond*, 59 N. H.

the defendant. In that case the bailbond, though given at the defendant's request, was still given for the sole benefit of the arrested debtor, and the only object of it was to procure his liberation from imprisonment. But in this case the indorsement was for the entire benefit of the defendant, to enable him to obtain money upon the note. The plaintiff had no dealings with the makers of the note, and re-

forbear making an attachment,¹ unless the promisor derives a benefit or advantage therefrom peculiar to himself, are clearly collateral undertakings, and within the statute unless in writing. A promise in writing to guarantee the debt of another, in consideration that the creditor will forbear attaching the debtor's property, will not support an action *if, at the time when it was made, the creditor had in fact no right to make such attachment*,² and the same is true as to a guaranty given to induce a creditor to forbear proceedings against the debtor in bankruptcy, because in such cases the consideration fails.³ Where the plaintiff, a broker, had a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, and the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies, in order that he might collect the money due on them for the principal; it was held that this promise was not within the statute.⁴

fused to rely on their responsibility at all; and the sole consideration for the indorsement being the defendant's promise to pay, or see that the note was paid at maturity, it seems very ungracious now, after he has obtained the money upon the indorsement, which the plaintiff was under no obligation to make, to attempt to protect himself, because the promise was not in writing." See also *Dyer v. Gibson*, 16 Wis. 557; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Danver v. Blackney*, 38 Barb. (N. Y.) 432; *Mason v. Hall*, 30 Ala. 599; *Cross v. Richardson*, 30 Vt. 641; *Spann v. Baltzell*, 1 Fla. 301; *Allen v. Thompson*, 10 N. H. 32; *Scott v. Thomas*, 2 Ill. 59; *Lemmon v. Box*, 20 Tex. 329; *Huber v. Ely*, 45 Barb. (N. Y.) 169; *Todd v. Tobey*, 29 Me. 219; *Small v. Shaeffer*, 24 Md. 143; *Hindman v. Langford*, 3 Strobb. (S. C.) 207. In *Talman v. Rochester City Bank*, 18 Barb. (N. Y.) 123, where a bank guaranteed to a trust company the final collection of certain instalments, to become due upon a bond and mortgage assigned by a debtor of the bank to the trust company, and

upon which the trust company advanced money to be applied by the debtor to the payment of his debt to the defendant bank, and which was so applied, it was held that the defendant was liable upon its guaranty.

¹ *Waldo v. Simonson*, 18 Mich. 345.

² *Smith v. Easton*, 54 Md. 138; 39 Am. Rep. 355. In *Ecker v. Bohn*, 45 Md. 278, it was held that while forbearance to proceed against a person in bankruptcy is a good consideration for the promise of a third person to pay the debt, yet, *if the creditor had in fact no right to take such proceedings*, the consideration failed, and no action could be maintained upon the promise.

³ *Ecker v. Bohn*, 45 Md. 278. A parol promise by the payee of a note to the payor that if the latter will forbear to attach property in the hands of the former, and in which he is interested, belonging to an absconding debtor, he will credit the indebtedness of such debtor to the maker of the note upon the note, is not within the statute. *Mitchell v. Griffin*, 58 Ind. 559.

⁴ *Castling v. Aubert*, 2 East, 325.

SEC. 152. Purchase of Debt.—Where a person promises to pay the debt of another in consideration of its assignment to him, the promise is not within the statute, because he purchases the debt. Thus, where A being insolvent, a verbal agreement was entered into between several of his creditors, whereby B agreed to pay the creditors 10s. in the pound, in satisfaction of their debts, which they agreed to accept and to assign their debt to B; it was held that this agreement was not within the statute, as it was not a collateral promise to pay the debt of another, but an original contract to purchase the debts.¹ But where W D by indenture agreed to grant a certain composition deed to all the creditors of J D who should before a fixed day execute a release of their debts, and each creditor on executing the release received the joint note of J D and W D; it was held the agreement was one which must be in writing, and that any variation in its terms must have been evidenced in writing.²

So where a written agreement, signed by the defendants, the plaintiffs, and the charterers, after reciting that the ship had arrived in port, and a stop had been put on the freight by the owners, and that a difficulty had arisen as to the settlement of the charterers' accounts, stated that the stop was to be immediately taken off, and that the commission on the charter-party, payable to the plaintiff, was to be paid by the defendants, and that no person signing that agreement was to put any stop on the freight; it was held that this was an agreement to be answerable for the debt of another.³

SEC. 153. Refraining from Distress.—A parol promise made by a third person to a landlord to pay rent in arrear, in consideration of the landlord's refraining from making a distress of goods in the promisor's possession, is held to be an original and not a collateral promise, and valid whether the goods have been actually distrained upon or not, because in such a case the promisor derives an immediate advantage from

¹ *Anstey v. Marden*, 1 Bos. & P. (N. R.) 124; *Barrett v. Hyndman*, 3 Ir. L. R. 109; *Macrory v. Scott*, 5 Ex. 907; *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 395; 29 L. J. (C. P.) 119.

² *Emmet v. Dewhurst*, 3 Mac. & G. 587.

³ *Gull v. Lindsay*, 4 Ex. 45; 18 L. J. Ex. 354; and see *Clancy v. Piggott*, 2 Ad. & El. 473.

the retention of the property. The leading case upon this point is *Williams v. Leper*.¹ There one Taylor was indebted to the plaintiff Williams in £45 for three-quarters of a year's rent, and Taylor becoming insolvent, made a bill of sale to the defendant Leper of all his goods in the house, to be sold for the use of his creditors. *While the defendant was in possession of the goods upon the premises* the plaintiff came there to distrain for his rent, whereupon the defendant, in consideration that he would not distrain, promised to pay the £45. It was held that this was not a promise to pay the debt of another, *that the goods were debtor*,² and *the defendant was in the nature of a bailiff for the landlord*, and that if the defendant had sold the goods and received money for them, an action for money had and received for the plaintiff's use would have been laid. And ASTON, J., said that the defendant was not bound to pay the landlord more than the goods sold for, in case they had not sold for £45.

So where the plaintiff, having distrained for rent upon the tenant's goods, agreed with the defendants to deliver up the goods, *and to permit them to be sold by one of the defendants for the tenant*, upon the defendants first undertaking to pay to the plaintiff all such rent as should appear to be due to him from the tenant, it was held that the undertaking was not within the statute.³ Again, where an auctioneer employed to sell goods on certain premises for which rent was in arrears, was applied to by the landlord for the rent, the landlord saying it was better to apply so than to distrain, and the auctioneer answered, "you shall be paid; my clerk shall bring you the money;" it was held that an action lay on this promise without a note in writing.⁴

Where J A made a bill of sale of goods to the plaintiff in consideration of a debt of £129 19s. due from him to the plaintiff, and the plaintiff being about to sell the goods in satisfaction of his debt, the defendant undertook to pay him £129 19s. if he would forbear to sell, it was held that this

¹ 3 Burr. 1887; 2 Wils. 308.

² It is submitted that this is the true ground of the decision, and that if the defendant had not been the owner of the goods, the promise must

have been in writing. *Forth v. Stanton*, 1 Wms. Saund. 211 d.

³ *Edwards v. Kelly*, 6 M. & Sel. 204; *Love's Case*, Salk. 28; *Slingerland v. Morse*, 7 John. (N. Y.) 463.

⁴ *Bampton v. Paulin*, 4 Bing. 264.

promise was not within the statute, and MANSFIELD, C. J., said: "What is this but the case of a man who, having the absolute, uncontrolled power of selling goods, refrains from the request of another?"¹

In *Thomas v. Williams*,² LORD TENTERDEN, C. J., said: "In *Williams v. Leper* there was no actual distress, but there was a power of immediate distress, and an intention to enforce it; and I think the judges must be understood to have considered that power as equivalent to an actual distress." A promise to pay the sum due for rent out of the proceeds of a sale of the tenant's effects is a positive engagement to pay, if the goods are sufficient, and is not within the statute.³

SEC. 154. Promise in Some Cases Original. Instances.—In certain cases the promise may, in fact, be original, although made respecting the debt or default of another. Thus, where H, who was the agent for the plaintiff, being desirous of retiring, the defendant applied for the agency. H was indebted to the plaintiff, and also claimed a commission for introducing customers. It was agreed that the plaintiff should allow H £52 on that account, and that the defendant, on taking the agency, should allow the plaintiff to retain six months' salary, which amounted to £52. In an action by the plaintiff for money had and received by the defendant as such agent, the defendant pleaded a set-off for six months' salary; it was held that this was not an undertaking to answer for the debt of another within the statute.⁴ In the case last cited, POLLOCK, C. B., said: "The question is, whether an agreement of this kind is required by the statute of frauds to be in writing, and I am of opinion that it is not. If a person agrees that whatever shall hereafter become due to him shall be disposed of in a particular way, such an agreement need not be in writing. It is true that, if a person agrees to serve another for nothing, the latter cannot compel the former to serve, because the agreement is without consideration; but if he does serve, he cannot claim any compensation in respect of the service which he agreed to do for nothing. He could not say at

¹ *Barrell v. Trussell*, 4 Taunt. 117; and see *Meredith v. Short*, Salk. 25; *Walker v. Taylor*, 6 C. & P. 752; *Barker v. Birt*, 10 M. & W. 61.

² 10 B. & C. 664.

³ *Stephens v. Pell*, 2 Cr. & M. 710.

⁴ *Walker v. Hill*, 5 H. & N. 419.

first, 'I will serve for nothing,' and afterwards, 'I will have a salary.' If a person has done work without a consideration, it is a good answer to any claim in respect of it that he agreed to do so; but if he merely agrees to do something without consideration, that agreement is void. So, if a person says to another, 'I will give you £20,' the latter could not compel payment of it because there is no consideration for the promise; but if the money were actually given, it could not be recovered back. Such being the true principle, it follows that if a person may, without writing, agree to serve for nothing, so that when the work is done he cannot enforce payment, it cannot be that an agreement in writing is required that the money shall be applied in a particular way, as, for instance, giving it to an hospital or the poor of a parish. I therefore think that no writing was requisite in this case."

CHANNEL, B., said: "I am also of opinion that the rule ought to be discharged. The case is the same as if the defendant was suing the plaintiff for services rendered. If a person enters into the service of another, and there is nothing to explain the terms of the employment, the former is entitled to be paid the worth of his service. This fact should be borne in mind, that there was but one agreement between the parties. At the time the plaintiffs agreed to receive the defendant into their service the defendant agreed that his salary for twenty-six weeks should not be paid to him, but be applied by the plaintiffs in a certain way. If, indeed, after the service had been performed and the money earned, the defendant had agreed that twenty-six weeks' salary should be applied by the plaintiffs in satisfaction of the debt due from Hulls to them, there might be some color for contending that the statute of frauds applied; but whatever doubt might have existed in that case, this must be regarded as one entire contract. Upon these grounds I think the verdict was right."

SEC. 155. Statute Applies to Promises to Answer for Tortious Acts.—The statute, it is now clearly settled, applies to guaranties against the tortious default or miscarriage of another person, as well as to guaranties against breaches of contract.¹ It appears that at one time a distinction was

¹ 1 Wms. Saund. 231; Add. 151.

made between cases where the debtor was chargeable in contract, and where he was answerable to an action of tort, where the guarantor would not have been liable. Thus, where the declaration stated that in consideration that the plaintiff would deliver his gelding to A, the defendant promised that A should redeliver him safe, it was held that this was a collateral undertaking, and POWELL, J., said: "The objection that was made was, that if English did not redeliver the horse, he was not chargeable in an action upon the promise, but in trover or detinue, which are founded upon the tort, and are for a matter subsequent to the agreement. But I answered that English may be charged on the bailment in detinue on the original bailment, and a detinue is the adequate remedy, and upon the delivery English is liable in detinue, and, consequently, this promise by the defendant is collateral, and is within the reason and the very words of the statute."¹ In *Read v. Nash*,² it was held that a promise to pay damages by a third person in case the plaintiff would withdraw his record, in an action of assault and battery, was not within the statute.³

In *Fish v. Hutchinson*,⁴ it was held that a promise to pay the debt of a third party, in consideration that the plaintiff would stay an action commenced, was within the statute. The court said: "Here is the debt of another party still subsisting, and a promise to pay it. It is not like the case

¹ *Birkmyr v. Darnell*, Ld. Raym. 1085.

² 1 Wils. 305.

³ And see *Stephens v. Squire*, 5 Mod. 205.

⁴ 2 Wils. 94. A parol promise to an execution creditor to pay the debt if he will stay proceedings on the execution is within the statute, although the creditor was about to pay the same, and desisted in reliance upon the promise. *Van Slyck v. Pulver*, H. & D. Supp. (N. Y.) 47; *Durham v. Arledge*, 1 Strobh. (S. C.) 5; *Stern v. Drinker*, 2 E. D. S. (N. Y. C. P.) 401. Unless the promisor derives an immediate benefit from the stay of the execution or the enforcement of the right. *Barker v. Guillard*, 5 Iowa, 510. Thus, in the case last

cited, where a judgment *in rem* was obtained by F against a steamboat, and while the action was pending, and before judgment, the defendants bought the boat; and where, after the judgment was recovered, the defendants, in consideration that F would forbear to sell said boat on said judgment, promised to pay said judgment, when requested, within a reasonable time; and where F assigned the judgment and the claim on which it was founded, in writing; and where the assignee brought an action in his own name, on the promise of defendants,—it was held, that the promise was not one to answer for the debt of another, and was not within the statute of frauds.

of *Read v. Nash*. In that case there was no debt in another, it being an action of battery, and it could not be known before trial whether the plaintiff would recover any damages or not. But in the present case there is the debt of another still subsisting, and a promise to pay it.”¹ In *Kirkham v. Marter*,² A had wrongfully, and without license of the owner, ridden his horse, and thereby caused its death; and it was held that a promise by a third person to pay the damage thereby sustained, in consideration that the owner would not bring any action against A, was a collateral promise, and must be in writing. “This case,” said HOLROYD, J., “is certainly within the mischief contemplated by the legislature, and it appears to me to be within the plain intelligible meaning of the words of the Act of Parliament.” And ABBOTT, C. J., said: “The wrongful riding the horse of another without his leave and license, and thereby causing its death, is clearly an act for which the party is responsible in damages, and therefore, in my judgment, falls within the meaning of the word ‘miscarriage.’” His lordship distinguished the case from *Read v. Nash*,³ saying: “The promise there was to pay a sum of money as an inducement to withdraw a record in an action of assault brought against a third person. It did not appear that the defendant in that action had even committed the assault, or that he had ever been liable in damages; and the case was expressly decided on the ground that it was an original and not a collateral promise. Here the son had rendered himself liable by his wrongful act, and the promise was expressly made in consideration of the plaintiff’s forbearing to sue the son.” It is submitted that the effect of this decision is to overrule *Read v. Nash*. In that case the ground on which the judgment was based was that as the original action had not been tried, it was not proved that the defendant in it had ever committed the assault — that is to say, that he might have had a defence. The same argument, however, would apply to the defendant in the original action for causing the death of the horse: he, also, might have had a defence. In both cases the original defendants practically admitted their

¹ And see *King v. Wilson*, 2 Str. 873; *Elkins v. Heart*, Fitz. 202; *Rothery v. Curry*, B. N. P. 281; *Thompson v. Bond*, 1 Camp. 4; *ex parte Adney*, Cowp. 460; *French v. French*, 2 Man. & Gr. 644.

² 2 B. & Ald. 613.

³ 1 Wils. 305.

liability.¹ But the case has never been expressly overruled, and the principle laid down in it was followed in *Bird v. Gammon*.² There, the plaintiff, having issued execution against one Lloyd for debt, Lloyd, with the assent of the plaintiff, conveyed all his property to the defendant, who thereupon undertook to pay the plaintiff the debt due from Lloyd, the plaintiff withdrawing the execution. It was held that the defendant's undertaking was not an undertaking to pay the debt of a third person, within the meaning of the statute, TINDAL, C. J., saying: "This is not an agreement to pay the debt of a third person, but an agreement that if the plaintiff would forego his claim on Lloyd, the defendant would pay the amount of the debt due on his own account. The case, therefore, falls within the principle of *Read v. Nash*."³ In *Jarmain v. Algar*,⁴ it was held that a promise by the defendant to execute a bail bond in a suit to be commenced against A B, in consideration of the plaintiff forbearing to arrest A B on a writ already issued, was not within the statute.

SEC. 156. Bail in Criminal Proceedings.—Where a person, at the request of another, enters into a recognizance of bail for the appearance of a third person to answer a criminal charge, this is not within the statute, for there is no contract on the part of the person bailed to indemnify the person who becomes bail for him.⁵ It has been held in England, however, that where the plaintiff becomes bail for a *stranger* in civil proceedings, in consideration of the defendant's request and of the defendant promising to indemnify him against the consequences, no action lies upon such promise unless it be in writing.⁶

SEC. 157. When Liability Guaranteed is Extinguished.—*Where the debt or liability guaranteed against is extinguished by the promise, the undertaking is original, and not within the statute.* Thus,

¹ See 1 Wms. Saund. 231.

² 3 Bing. (N. C.) 883; 5 Scott, 213.

³ 1 Wils. 305. And see also the judgment of LORD KENYON in *Chater v. Beckett*, 7 T. R. 201.

⁴ 2 C. & P. 249; Ry. & M. 348.

⁵ *Cripps v. Hartnoll*, 4 B. & S. 414; 32 L. J. Q. B. 381.

⁶ *Green v. Cresswell*, 10 Ad. & El. 453; 2 P. & D. 430. See the distinction between these cases pointed out by WILLIAMS, J., in *Cripps v. Hartnoll*, *ubi supra*; and see also *Batson v. King*, 4 H. & N. 739.

where the plaintiff had taken A into custody on a *ca sa*, and released him in consideration of the defendant promising to pay the debt, it was held that the discharge of A out of custody by the consent of the plaintiff extinguished the debt, and that therefore the promise to pay the debt was an original promise.¹ And in *Butcher v. Steuart*,² the facts of which were similar, PARKE, B., said: "It appears to me that this is an absolute promise, in consideration of the agreement of the plaintiff to discharge the defendant from execution. It is not a promise to answer for the debt, default, or miscarriage of another, but is a promise to pay a debt in the event of the other contracting party doing a certain act. It is, therefore, within the decision of *Goodman v. Chase*, and does not require a memorandum in writing to satisfy the statute." But where a suit in Chancery was pending between A and B, which C conducted for A as his attorney, and an agreement was made between B and C, with the consent of A, purporting that in consideration of the suit being put an end to, B promised to pay C the costs due to him from A, it was held that this was an agreement by B to pay the debt of another, and, therefore, ought to be in writing.³

SEC. 158. **Novation, Effect of.** — There is a species of novation, called *delegation* in the civil law, which is effected by the intervention of another person, whom the debtor, in order to be liberated from his creditor, gives to such creditor, or to him whom the creditor appoints, and such person so given becomes obliged to the creditor in place of the original debtor. But it is necessary that there should be the concurrence of the person delegating, that is, of the original debtor, and of the person delegated, or the person whom he appoints. The intention of the creditor to discharge the first debtor and accept the second in his place must, in order to give effect to the delegation, be perfectly evident. There are authorities which show that the circumstances consti-

¹ *Goodman v. Chase*, 1 B. & Ald. 297; and see *Browning v. Stallard*, 5 Taunt. 450; *Bird v. Gammon*, 3 Bing. (N. C.) 883; 5 Scott, 213; *Lane v. Burghart*, 1 Q. B. 937; *Maggs v. Ames*, 4 Bing. 470; 1 M. & P. 294; *Anderson v. Spence*, 72 Ind. 315; *Aldrich v. Ames*, 9 Gray (Mass.) 76; *Holmes v. Knights*, 10 N. H. 175. See note 1, *ante*, p. 262.

² 11 M. & W. 873.

³ *Tomlinson v. Gell*, 1 N. & P. 588; 6 Ad. & El. 564.

tuting, under the Roman law, a delegation, sustain the promise of a third person to pay a debt of another to his creditor, when that debt has been extinguished, and the debt of the person promising has been substituted upon sufficient consideration therefor. But there must be the mutual assent of all the parties to make the substitution effectual at common law.¹ Therefore, when the transaction amounts to a novation,

¹ *Butterfield v. Hartshorn*, 8 N. H. 348. In *Tatlock v. Harris*, 3 T. R. 180, *BULLER, J.*, says: "Suppose A owes B £100, and B owes C £100, and they meet, and it is agreed between them that A shall pay C £100, B's debt is extinguished, and C may recover the same against A." "If," says *CLOUDMAN, J.*, in *Bird v. Gammon*, 3 Bing. (N. C.) 883, "a debtor, creditor, and a third party agree that the third party shall be substituted for the debtor, the debtor is exonerated. *Fairlee v. Denton*, 8 B. & C. 395, has decided that, establishing to that extent an exception to the rule that debts cannot be assigned." Such promises are not within the statute. It was held in *Plumer v. Lyman*, 49 Me. 229, that a parol promise to accept an order from a debtor in favor of his creditor, between whom and the maker of the promise there had been no privity, was within the statute of frauds as a promise to pay the debt of another. Thus, where A had a claim on a vessel for materials used in building it, and B held the vessel to secure him for advances made to the builder, a promise by B to accept the order of the builder in favor of A, for the amount of his claim, cannot be enforced unless it appears to have been for some consideration, such as a discharge of A's lien on the vessel, or his promise to discharge it, or release his claim upon the builder. In the case at bar there was no discharge of lien or promise to discharge or release of the defendant of the amount in controversy. In *Richardson v. Williams*, 49 Me. 558, A being indebted to B, C verbally promised B to pay him the amount, and charged it to A without the consent of the

latter. It was held that B, not having released or assigned his debt, the promise was without consideration, and that such promise was within the statute of frauds, and not binding. In *Furbish v. Goodenow*, 98 Mass. 297, it was decided that an oral promise to pay the debt of another is within the statute of frauds, if the original promisor remains liable, and no consideration moves from the creditor to the new promisor, although there is a valuable consideration moving from the original debtor to the new promisor. But here there is no consideration moving from anybody to the defendant. In *Russell v. Babcock*, 14 Me. 139, it was held, that an agreement to delay the collection of an execution was a sufficient promise by a third person to pay the same, and that such promise need not be in writing. But this decision would repeal the statute, and it has since been overruled. Referring to this decision in *Hilton v. Dinsmoor*, 21 Me. 410, *SHEPLEY, J.*, uses the following language: "If this was in reality the ground of the decision in that case, and the abstract of the reporter is to that effect, we are constrained to say it is unsupported by the authorities." To the same effect was the case of *Doyle v. White*, 26 Me. 341. In *Dearborn v. Parks*, 5 Me. 81, the debtor of the plaintiff left funds in the hands of the defendant, with which he was to pay his (the debtor's) debt to the plaintiff. The defendant receiving these funds, or being allowed for them in settlement, as if paid to the plaintiff, promised to pay them to the plaintiff. The plaintiff, therefore, had funds in the defendant's hands, placed there for his benefit, for which he

the obligation becomes primary, and the statute does not apply.¹ Thus, where the defendant had bought the interest of a person in a contract for the purchase of certain lumber, a part of which had been delivered to such person, in con-

might well maintain a suit. In *Hilton v. Dinsmoor*, 21 Me. 210, the consideration of the defendant's promise was forbearance to sue, and funds placed by the debtor in the defendant's hands with which he was to pay the debt. The court held the promise in consideration of forbearance was within the statute, but the funds having been placed in the defendant's hands by the plaintiff's debtor, the promise of the defendant in consideration thereof was not within the statute. In *Rowe v. Whittier*, 21 Me. 545, notice was taken of the fact that the plaintiff had not discharged his debt against his debtor, which he sought to enforce against the defendant. "If," says WHITMAN, C. J., "the claim was a legal one against Patten & Co. (the debtors of the plaintiff), it does not appear that they were discharged from it in consideration of the promise made by the defendant, and if it had so appeared, the defendant not being otherwise liable, his promise would not have been obligatory under the statute of frauds without a memorandum in writing." In *Brown v. Atwood*, 7 Me. 356, where S sold a vessel to A, who promised in consideration thereof to pay B a debt due from S, upon which promise B brought his action against A, it was held that such promise was good, though not in writing, *for it was a promise to pay his own debt*, though inuring to the benefit of B. The plaintiff had funds in the defendant's hands, left by his debtor, and might well call them out. In *Maxwell v. Haynes*, 41 Me. 559, the plaintiff's debtor sold out to defendant, leaving funds in his hands to pay his debt to the plaintiff. In all these the defendant held funds of the debtor in his hands designated and set apart for the payment of his debt, and held by the defendant for that purpose. In

Fullam v. Adams, 37 Vt. 391, POLAND, C. J., referring to this class of cases, says: "And we believe it will be found that in all the cases now regarded as sound, where it has been held that a parol promise to pay the debt of another is binding, the promisor held in his hands funds, securities, and property of the debtor devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty, growing out of the receipt of the fund." There is a class of cases, as in *Alger v. Scoville*, 1 Gray (Mass.) 391, in which it was held, that the promise to a debtor to pay his debt to a third person is not a promise to answer for the debt of another within the statute. So in *Pike v. Brown*, 7 Cush. (Mass.) 136. In *Eastwood v. Kenyon*, 11 Ad. & El. 446, it was held, that a promise by the defendant to the plaintiff to pay A B was not within the statute. "The facts were," says Lord DENMAN, "that the plaintiff was liable to a Mr. Blackburn on a promissory note; the defendant, for a consideration which may, for the purpose of the argument, be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Mr. Blackburn. If the promise had been made to Mr. Blackburn, doubtless the statute would have been applied, and it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other, viz., the debtor and not the creditor, the statute not having in terms stated to whom the promise contemplated by it is to be made. But upon consideration we are of opinion that *the statute only applies to promises made to the person to whom another is answerable.*"

¹ *Bowen v. Kurtz*, 37 Iowa, 239.

sideration thereof, verbally agreed to pay for that which *had been* as well as that *to be delivered*, his undertaking was held to be original and not within the statute.¹ But, where A, being indebted to B for sawing lumber at A's mill, conveyed his property to C who hired B to continue the running of the mill, telling him that he would pay him the same that A had, and also that he had made arrangements with A to pay him what A owed him, and that he would pay him the back pay that was coming to him, it was held that C's promise was collateral and within the statute.² The distinction between the two cases, and the reason for the difference in the rules applicable thereto, is apparent, and arises from the circumstance that in the first case, the defendant assumed the debt and was substituted as debtor in the place of the original debtor, while in the latter case, the original debtor still remained liable for the debt, notwithstanding the defendant's promise, so that no novation took place. This distinction is illustrated by some more recent cases. Thus in a Michigan case,³ certain manufacturers contracted with lumber dealers to convert certain standing timber into shingles and siding. A logger contracted with the dealers to cut and haul the timber. Subsequently, the logger refused to go on with the contract unless he received some of the money due him, and the manufacturers then orally promised the logger to pay him on orders from the dealers, and several payments were so made, and then payment being refused on such orders, an action was brought to enforce it. The court held that the agreement was collateral and within the statute, *because the original debtors still remained liable to the plaintiff for the debt.*

To constitute a promise to answer for the debt, default, or miscarriage of another person, within the meaning of the

¹ Cox v. Weller, 6 T. & C. (N. Y.) 309; Lawrence v. Fox, 20 N. Y. 268.

² Belknap v. Bender, 4 Hun (N. Y.) 414; 75 N. Y. 446; Pfeiffer v. Adler, 37 N. Y. 164; Mallory v. Griffiths, 21 id. 412. But see Bagley v. Moulton, 42 Vt. 184, where it was held that a continuance of professional services as a physician might form a good consideration for a promise to pay not only for those *afterwards*, but also for

those *previously* rendered. In Eddy v. Davenport, 42 Vt. 56, it was held that a promise to pay a physician for professional services *to be rendered* in treating a third person, is an original undertaking, and not a promise to answer for the debt of another, which must be in writing.

³ Preston v. Young, 46 Mich. 146; 41 Am. Rep. 148.

statute of frauds, the promise must be a collateral one; there must be in existence an original liability upon which the collateral promise is founded, and *where the debt which constitutes the consideration of the agreement is entirely discharged*, the promise is a new and original one and not collateral.¹

¹ In *Belknap v. Bender*, 75 N. Y. 446, cited *ante*, it appeared that, in 1872, the plaintiff was engaged with his men and teams in managing a saw-mill for the firm of Ward & McVicker, and they were indebted to him, for labor performed, in the sum of \$1,500, and were also largely indebted to the defendant and other parties. The defendant then for the purpose of securing his debt entered into the following agreement with the firm:

"Agreement made 20th August, 1872.

"W. M. Bender hereby agrees with Ward & McVicker to take their mill, called Shed's mill, to run the said mill, and to saw up their logs now lying in their log yard, to ship the lumber and to sell the same, and to apply the proceeds thereof to the payment of the current expenses of sawing and shipping said lumber, and also to the payment of the judgment claims, amounting to \$4,872.29, and the claim of said Bender, say \$7,000, and the rent of mill, \$1,000, now due, and the back wages of their hands, say \$1,500, as stated in schedule annexed, and the balance, if any, to pay over to said Ward & McVicker, for the consideration of ten per cent on the amount of said sales; and the said Bender agrees, in case of any sale of said logs or lease of said mill, under any judgment, to buy the same and to hold them in order to carry out the true intent of this agreement, it being understood that said Bender is only to pay said several claims as mentioned above from the proceeds of said lumber as aforesaid.

"BENDER, SON & Co.

"WARD & McVICKER."

To this agreement was annexed a schedule of the debts to be paid under the agreement among which was the debt due the plaintiff.

In pursuance of this agreement the defendant took possession of the mill, and the stock of logs and lumber on hand, and at the time of the commencement of this action had disposed of about half of the lumber. This action was brought by the plaintiff, not for an accounting under the agreement and to recover his share of the proceeds of the lumber, but to recover the whole sum due him from Ward & McVicker, upon the theory that the defendant had absolutely promised to pay it to him.

Upon the trial the plaintiff testified that the defendant came to him and told him to keep on working at the mill, and he would pay him for his work at the same rate which Ward & McVicker had been paying him, and that he had bought the stock of Ward & McVicker, and had made an arrangement with them to pay him what was due him from them, and if he would keep on working for him, he would pay him for his work, and in a day or two would pay him \$1,000 upon the amount due him from Ward & McVicker; and he testified that he went on and worked for the defendant, but that the defendant had failed to pay him the amount due him from Ward & McVicker. The plaintiff recovered \$1,000 and interest.

EARL, J., said: "The promise of the plaintiff to work for the defendant at what appeared to be a full compensation did not furnish a consideration for the defendant's promise to pay Ward & McVicker's debt. *Pfeiffer v. Adler*, 37 N. Y. 164. And the trial judge so held. But from the plaintiff's evidence standing alone, it might have been inferred that the defendant had purchased the saw-mill stock of Ward & McVicker, and had agreed with them to pay a portion of the purchase-price to him in satisfac-

The rule is that, *where a party who was not before liable undertakes to pay the debt of a third person, and as a part of the*

tion of the debt due him from them, and in that case, under the rule laid down in *Lawrence v. Fox*, 20 N. Y. 268, and other similar cases, the plaintiff could have recovered. But at a later stage of the case, the written agreement between the defendant and Ward & McVicker was proved, and that shows precisely what the defendant agreed with them to do. Under that agreement, he did not become personally liable to pay the plaintiff; he did not agree to pay the plaintiff absolutely, or with his own funds. He did not purchase the stock. He simply agreed to saw the logs, and market the lumber, and apply the net proceeds in payment of the debts specified. He incurred no personal liability for the debts, and was required only to be faithful in the discharge of the trust assumed.

The defendant could not become bound to pay to the plaintiff the debt due him from Ward & McVicker by any verbal promise made to him. Such a promise to be binding within the statute of frauds must be in writing, and founded upon a sufficient consideration passing between the parties. *But if Bender had purchased lumber of Ward & McVicker, and thus become indebted to them, and in consideration thereof had agreed to pay a portion of his debt to the plaintiff in satisfaction of the amount due him from Ward & McVicker*, such a promise, as stated above, would not have been within the statute of frauds. But the difficulty here is that there was no such debt to Ward & McVicker, and no such promise by the defendant. But the trial judge held that if the jury were satisfied that the defendant agreed to pay the \$1,000, as testified to by the plaintiff, the plaintiff could recover upon the theory that the property had been placed in the hands of the defendant for sale, and that he would be liable to pay the plaintiff

after he had disposed of it, and hence, that he could waive the delay and be bound by his promise to pay before he had realized the proceeds. And it is upon this theory in part that the plaintiff now seeks to uphold the recovery at the circuit.

The case then stands thus: The defendant by his agreement with Ward & McVicker was not personally bound to pay this debt. He was bound only to pay it out of the proceeds of the property when realized. The property was placed in his hands upon the consideration expressed in the paper, and he had it at the time of the alleged promise to the plaintiff. What consideration is there to uphold the promise? Clearly none. That promise, if valid, imposed upon him an entirely new obligation; it bound him to pay the \$1,000 personally, whether he realized sufficient to pay it from the sale of the lumber or not. It created a personal liability when none existed before. Such a promise to be valid, aside from the statute of frauds, must be based upon a consideration. The plaintiff furnished none, and the lumber which had been before placed in defendant's hands upon a different consideration furnished none. After this promise the defendant's interest in the lumber, and control thereof, were no greater than before.

But the counsel for the plaintiff strenuously contends that the promise of the defendant is without the statute of frauds, and founded upon a sufficient consideration, simply because Ward & McVicker placed in defendant's hands property upon trust to pay this debt; and there are some general expressions in reported cases which, literally taken, support this construction. In *Malory v. Gillett*, 21 N. Y. 412, JUDGE COMSTOCK says that *when the debtor puts a fund into the hands of the promisor, either by absolute transfer or upon a trust to pay the debt, the promise to*

agreement, the original debtor is discharged from his indebtedness, the agreement is not within the statute; but if the origi-

pay it is not within the statute of frauds.

This general language needs some limitation or explanation. If the promise in such case be made to the debtor in consideration of the transfer, it is no doubt valid. If it be made to the creditor after it has become the duty of the promisor under his arrangement with the debtor to pay, then it is valid; as if in this case, Bender had converted the property into money, and then promised the plaintiff to pay the debt, he could have been sued directly on such promise. That would have been an original promise to discharge his own obligation to the plaintiff. As said by JUDGE COMSTOCK in that case: 'The law would imply an obligation on the defendant's part to pay over the money to the plaintiff after selling the goods; and when the law will imply a debt or duty against any man, his express promise to pay the same debt, or perform the same duty, must in its nature be original.' POLAND, C. J., in *Fullam v. Adams*, 37 Vt. 391, after laying down the rule in substantially the same language as that used by JUDGE COMSTOCK, says the true principle why the promise to the creditor in such a case is valid is, that 'the party making the promise holds the funds of the debtor for the purpose of paying his debt, and, as between him and the debtor, it is his duty to pay the debt, so that when he promises the creditor to pay it, *in substance he promises to pay his own debt, and not that of another.*' Throop, in his work on Verbal Agreements, vol. 1, p. 535, lays down the rule as follows: 'When the promisor absolutely controls the fund, but his application thereof to the payment of the debt due to the promisee will acquit him of a duty which he owed to the person who furnished it, the promise is not within the statute.' Here the defendant owed Ward & McVicker no duty to pay the debt. The only duty he owed

them was to convert the property and apply the proceeds upon the debts specified. When this action was commenced he was not in any default in the discharge of that duty, and the action was not brought upon such a theory.

To test this case further. Suppose a voluntary assignee of an insolvent debtor after he had taken possession of the property assigned, but before he has converted it into money, and before the duty to pay has arisen, promises without any further or new consideration to pay the debt of one of the preferred creditors, could such a promise be enforced? Suppose one takes a conveyance of real estate from debtor upon the agreement with him that he will rent it, and accumulate the rent for ten years, and then pay the net amount to his creditors, and the next day without any new consideration he promises at once to pay the creditors, could such a promise be enforced? These cases are analogous to the one in hand, and no authority, certainly no case that would be regarded as authority in this State, can be found which would authorize the enforcement of such promises. They would be void at common law as without any consideration, and void also under the statute of frauds as not in writing.

But we can go one step farther in this case. Even if the promise had been made after the defendant had converted the proceeds, it could have been enforced against him only to the extent of the proceeds applicable to this debt. *Arden v. Rowney*, 5 Esp. 254. If the amount applicable to this debt had been less than the \$1,000, then for the excess of the debt the promise would have been without consideration. Defendant in such a case would have owed the duty to pay the plaintiff his share of the proceeds, and his promise to that extent would have been valid as one to discharge

*nal debtor continues liable, then the agreement is within the statute.*¹ Therefore, when one, thus undertaking, agreed "to pay and guarantee" the debt, it was held that the word "guarantee" was not to be understood in a technical sense, but that the agreement was an absolute agreement to pay, and that *indebitatus assumpsit* would lie.² In an Alabama

his own obligation. But his promise for more would, as to the excess, not have been to pay anything for which he was liable in any way, but to pay the debt of Ward & McVicker, and hence within the statute of frauds. Here the complaint was not framed, and the trial was not conducted, for a recovery upon such a theory. There was no proof that the property was sufficient to pay the \$1,000, but on the contrary, the proof showed that it was not sufficient. The plaintiff's counsel upon the argument claimed that the case of *Young v. French*, 35 Wis. 111, was very much in point in his favor. But in that case there was a new consideration for the promise sued on, moving from the plaintiff to the defendant, and hence that case is unlike this. It is difficult to perceive how the doctrine of waiver can apply in a case like this. A person may waive some act or condition which another is to perform to or for him. He may choose to pay a debt before due; but in a legal sense he waives nothing by so doing. Here, however, there was no debt of the defendant, and he could not by such a waiver, if we call it such, based upon no consideration, impose upon himself an entirely new obligation."

¹ In *Yale v. Edgerton*, 14 Minn. 194, the defendant loaned plaintiff \$300, which the latter promised to repay with interest, and at the same time assigned and delivered to the defendant a chattel mortgage made by another party before that time, and also the debt which the chattel mortgage was given to secure, amounting to \$1,600. At the time agreed upon for the payment, \$50 was paid and the time for the payment of the

\$250 balance was extended, interest to be paid thereon at the rate of one per cent per month. Afterwards, the defendant still holding the chattel mortgage and debt as collateral security, for the balance due him, it was agreed between plaintiff, defendant, and mortgagor, that the defendant, for a good and valid consideration, should discharge and satisfy the chattel mortgage and the original debt secured by it then due with interest, amounting to \$1,700, and that he should pay to the plaintiff out of the first issue of a bank specified, the balance of said \$1,700 remaining after deducting therefrom the unpaid balance of the loan to plaintiff and interest. In pursuance of this agreement the defendant did satisfy and discharge the chattel mortgage and the debt secured by it. The promise of the defendant to pay the plaintiff the balance of the debt due him was the only consideration for the latter's consent to the discharge and satisfaction of the mortgage and the debt secured by it. It was held that an action would lie upon the promise of the defendant to pay the plaintiff the balance of the debt secured by the mortgage after deducting the amount loaned by the former to the latter. The consideration of the defendant's promise, being the consent of the plaintiff to the release and discharge absolutely of the mortgage and the mortgage debt by the defendant, was a sufficient consideration; and the promise was an original one and not within the statute of frauds.

² *Parker v. Benton*, 35 Conn. 343. In this case BUTLER, J., said: "We think that by the contract as claimed by the plaintiffs, and which we must presume to have been found by the

case,¹ it was held that where, by an arrangement between a creditor and the promisor, the original debtor is discharged,

jury, the defendant became indebted to the plaintiffs by an assumption of the debt of Tilley & Co. to the extent of seventy-five cents on the dollar of that debt, and it is elementary law that, *where a sum certain is due on a simple contract, indebitatus assumpsit will be to recover it*. It is true that the language of the motion in respect to the assumption claimed is that 'the defendant then and there agreed to pay and guarantee the debt of the plaintiffs,' but it is clear from the whole statement of the contract that it was intended to be an absolute contract to pay the debt, and that the word 'guarantee' as used in that construction, is not to be understood in its technical sense. We have no disposition to relax the rules of construction applicable to the statute of frauds, or in any manner to weaken that statute. Our views on that subject are fully expressed by JUDGE DUTTON, in *Clapp v. Lawton*, 31 Conn. 95; and if this case was as claimed, analogous to that, we should come to the same conclusion in respect to it. But this case differs essentially from that. There a third party received the property of the debtor and promised him generally to pay his debts. None of the creditors were parties to the arrangement, and the original indebtedness continued as before. Here the contract was tripartite, between the debtor, a creditor, and a third person; and it contemplated the discharge of the original debtor, and a new obligation, by the third party, to the particular creditor. Such new obligation and indebtedness is not within the statute of frauds. In *Turner v. Hubbell*, 2 Day (Conn.) 457, the distinguished counsel for the defendant in error deduced from the cases which had then occurred under this branch of the statute, the following definition of the promise intended by it, to wit: 'An undertaking by a person, not before lia-

ble, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made, is, at the same time, liable,' and it was adopted by the court. With a single modification that definition furnishes as perfect a test as has ever been, or, we think, can be devised. The modification required is this: In the case of *Williams v. Leper*, 3 Burr. 1886, the promise to pay the debt was made after the original debtor had been discharged by reason of a distress, and the counsel in *Turner v. Hubbell* seem to have assumed that a contract to pay the debt of another would be within the statute of frauds if the original debtor was liable at the time the promise was made. But it is now well settled that if the original debtor is discharged by the new contract, it is not within the statute. See the cases cited by JUDGE DUTTON in his revision of *Swift's Digest*, p. 248. The foregoing definition may be modified therefore, so as to read: 'An undertaking by a person not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made continues liable.' Applying this test to the case in hand, it is obvious that the objection of the defendant ought not to prevail. It was the purpose and effect of the tripartite contract in question to discharge the original debtors in consideration of their giving up their property to the defendant, as well as to operate the defendant, in consideration of that discharge, the assent of the plaintiff to the delivery of the property to the defendant, and of his agreement to loan the funds necessary to enable the defendant to purchase the debts and carry out his speculation. *As the original debtors did not continue liable, an essential element of the test was wanting, and the contract was not within the statute.*"

¹ *Underwood v. Lovelace*, 61 Ala.

and a new debt is created binding on the promisor alone, the promise, whether verbal or written, is supported by a valuable consideration, the detriment to the promisee in the extinguishment of the original debt, and will support an action, although no consideration moved from the original debtor to the promisor, and even though there was no request from the original debtor, or subsequent assent on his part. A promise to pay a certain sum which is due from A to B to B's creditors is only binding as to the amount named, and even though the creditors are specifically named, a creditor

155. Where contractors to furnish materials and build a house for another to furnish a certain part of the materials, and the latter after furnishing a small part of the materials abandons the contract because of the insolvency of the principal contractors, and the owner of the premises verbally promises to pay for the balance, and other materials are furnished on the faith of such promise, it is not within the statute. *Schoenfield v. Brown*, 78 Ill. 487. But where A contracted to do certain work on B's premises, having partially completed it, he refused to go on, alleging that B was insolvent, C, a mortgagee, told him to go on and he would see him paid. It was held that there was no consideration for this promise, as A was bound to go on under the original contract, and that it was a mere promise to answer for the default of B, and being verbal and without consideration, could not be enforced. *Ellison v. Jackson & Co.*, 12 Cal. 542. A promise by a landlord to a person from whose service he has enticed away the tenant, and to whom the tenant was indebted, to subordinate his lien on the tenant's crops as landlord to the other's statutory lien for advances, in consideration that the latter would forbear to sue him for damages, is not within the statute, unless the landlord also agreed to answer for any default of the tenant to the other. *Wells v. Thompson*, 50 Ala. 84. And *quere*? whether the undertaking in the latter event would not, in view of the consideration, be

original? The plaintiff furnished lumber to erect certain houses; the defendant advanced the money to M to erect them. The lumber was delivered to M, but charged to the defendant. The plaintiff said to the defendant, "I am furnishing this lumber and charging it to you, and if it is not all right, I want you to say so." The defendant said it was all right if he got a certain deed of one of the houses that had been built. The defendant informed M of this conversation, and continued to furnish the lumber. M testified that the deed was delivered to the defendant, and that he left money in his hands to pay for the lumber, and it was held that the defendant's undertaking was original. *Booth v. Heist*, 94 Penn. St. 177. In *Bailey v. Rutjes*, 86 N. C. 517, the plaintiff delivered lumber on the order of A, the lessee, which was used on the premises of B and C, the lessors, and then sued them for the price. It was held that although it was not error to charge that if the plaintiff believed he was furnishing the lumber on their credit, they were liable; yet if the lessors, knowing that he expected them to pay for the lumber, acted in such a manner as to create a belief on his part that they would do so, and thereby induced him to deliver it, a promise on their part to pay for it might be inferred. But that, if the defendants were not *originally* liable by reason of some contract, an oral promise to pay for the lumber *after it was furnished and used* would not bind them.

so named has no remedy against the promisor for his debt, if A has previously paid the sum named to other creditors designated by B.¹ *Where the defendant, in order to get rid of an incumbrance on his own property, or to obtain some direct personal advantage to himself, or because of his indebtedness to such person to an amount equal thereto, promises to pay the debt of another, the promise is not within the statute. And if the original debt is discharged and extinguished by the substitution in lieu thereof of a new contract by a third person, to pay the amount of that debt, such new contract is not a collateral promise to answer for the debt or default of another.*²

Thus, where A was indebted to B & Co. for goods sold, and, upon being released from his liability, assigned to the latter a debt, which was due to him from C & Co., and notice of the assignment was given to a partner in the house of C & Co., who, by parol, promised in the name of the firm to pay the debt of B & Co. out of the partnership funds; it was held, in an action by B & Co. against C & Co. for money had and received, that the promise was not within the statute.³ So where A sold goods to B, who, being unable to pay, transferred them to C, who promised to pay for them, it was held that this was a new sale to C, and not a mere promise by C to pay the debt of B.⁴ If A be a creditor of B, and B and C propose to enter into, or have entered into partnership, and say to A, "We wish this debt to be a debt from us both, and we will pay it," and A accedes to that, although there is no writing, the agreement is valid and effectual, and is not impeached or affected by the statute. The effect of such an agreement is to extinguish the first debt, and for a valuable consideration to substitute the second debt.⁵ So where there is a defined and ascertained debt due from A to B, and a debt to the same or a larger amount due from C to A, and the three agree that C shall be B's debtor instead of A, and C promises to pay B, the latter may maintain an action against C.⁶ *But it is incumbent on the plaintiff to show*

¹ Odell v. Mulry, 9 Daly (N. Y. C. P.) 381.

² Add. on Contrs. 153.

³ Lacy v. McNeile, 4 D. & R. 7; and see Hodgson v. Anderson, 3 B. & C. 842; 5 D. & R. 735; Taylor v. Hilary, 1 C. M. & R. 741.

⁴ Browning v. Stallard, 5 Taunt. 450; see also De Colyar on Guaranties, 83-87; 1 Wms. Saund. 224.

⁵ Ex parte Lane, De G. 300.

⁶ Fairlie v. Denton, 8 B. & C. 395; 2 M. & R. 353; Wilson v. Coupland, 5 B. & Ald. 228; Crowfoot v. Guer-

that at the time when C promised to pay B, there was an ascertained debt due from A to B.¹ It is also necessary that the original debt from A to B should be extinguished; for B cannot sue C if he retains the right to sue A.² So that if the creditor "were to sue or issue execution against the original debtor, the latter might show that the plaintiff, on good consideration, gave up his remedy against him, and took the liability of the other instead, which though not properly accord and satisfaction, would be a complete defence."³

Where the plaintiffs were creditors, and the defendants debtors, to T & Co., and by consent of all parties an arrangement was made that the defendants should pay to the plaintiffs the debt due from them to T & Co., it was held that as the demand of T & Co. on the defendants was for money had and received, the plaintiffs were entitled to recover on a count for money had and received against the defendants.⁴ In *Parkins v. Moravia*,⁵ the defendant undertook to pay the plaintiff the amount due from him to B for work to be done by B, in consideration that the plaintiff would advance money to B, *Wilson v. Coupland*⁶ was cited, and it was argued that this was an assignment of a chose in action. ABBOTT, C. J., said: "It is an assignment of a thing not *in esse*; *Wilson v. Coupland* is not like this case." A verdict was taken for the plaintiff subject to this and another point of law for the consideration of the court above, but it does not appear that any motion was made. Much importance cannot, therefore, be attached to the case.⁷

SEC. 159. **Indemnities, Whether within the Statute.** — There appears to be some doubt in the English courts as to whether or not promises to indemnify are within the statute. In

ney, 2 M. & Sc. 482; *Hodgson v. Anderson*, 3 B. & C. 855; 5 D. & R. 735.

¹ *Fairlie v. Denton*, 8 B. & C. 395; 2 M. & R. 353.

² *Wms. Saund*, 224, citing *Cuxon v. Chadley*, 3 B. & C. 591; 5 D. & R. 417; *Wharton v. Walker*, 4 B. & C. 163; 6 D. & R. 288; *Parker v. Wise*, 6 M. & Sel. 239; *Liversidge v. Broadbent*, 4 H. & N. 603.

³ *Bird v. Gammon*, 5 Sc. 220; 3 Bing. (N. C.) 883, *per TINDAL*, C. J.

⁴ *Wilson v. Coupland*, 5 B. & Ald. 228; *Thompson v. Percival*, 5 B. & Ald. 925; see also *Roe v. Haugh*, 3 Salk. 14; *Israel v. Douglas*, 1 H. Bl. 239; *Tatlock v. Harris*, 3 T. R. 174.

⁵ 1 C. & P. 376.

⁶ 5 B. & Ald. 228.

⁷ See *De Colyar on Guaranties*, 86. *Smith's Merch. Law*, 8th ed. 457. And see as to assignments of debts and choses in action 36 & 37 Vict. c. 66, § 25, subs. 6.

Thomas v. Cook,¹ it was laid down that a promise to indemnify does not fall within the words or policy of the act. On the other hand, in Green v. Cresswell,² DENMAN, C. J., referring to Thomas v. Cook, said: "The reasoning in that case does not appear to us satisfactory in support of the doctrine there laid down: which, taken in its full extent, would repeal the statute. For every promise to become answerable for the debt or default of another may be shaped as an indemnity, but even in that shape we cannot see why it may not be within the words of the statute. Within the mischief of the statute it most certainly falls." Green v. Cresswell, however, was dissented from in Cripps v. Hartnoll,³ and Batson v. King.⁴ In the former of these cases POLLOCK, C. B., said: "Now it has been laid down that a mere promise of indemnity is not within the statute of frauds, and there are many cases which would exemplify the correctness of that decision. On the other hand, an undertaking to answer for the debt or default of another is within the statute, and no doubt some cases might be put where it is both the one and the other, that is to say, where the promise to answer for the debt or default of another would involve what might very properly and legally be called an indemnity." In the latter case the same learned judge said: "If a man says to another, 'If you will at my request put your name to a bill of exchange, I will save you harmless,' that is not within the statute. *It is not a responsibility for the debt of another.* It amounts to a contract by one, that, if the other will put himself in a certain situation, the first will indemnify him against the consequences. In Green v. Cresswell, LORD DENMAN pointed out a distinction between that case and one where the defendant is a co-surety. *I don't think that the case itself was rightly decided.*" In a later English case⁵ the doctrine of Green v. Cresswell, ante, was directly overruled, and the doctrine of Reader v.

¹ 8 B. & C. 728; 3 Man. & R. 444. 374; 29 L. J. C. P. 119; Reader v.

² 10 Ad. & El. 453; 2 P. & D. 430. Kingham, 13 C. B. (N. S.) 344; Wildes

³ 4 B. & S. 414; 32 L. J. Q. B. 381. v. Dudlow, L. R. 19 Eq 198.

⁴ 4 H. & N. 739.

⁵ Reader v. Kingham, 13 C. B. (N. S.) 344. See also Mallett v. Bateman, 16 C. B. (N. S.) 537, per BYLES, J.; and Fitzgerald v. Dressler, 7 C. B. (N. S.) 462, n. (k), 7th ed.

Kingham has quite recently been confirmed.¹ In this case the VICE CHANCELLOR said: "I am surprised to find that there has been so much conflict;" and added: "I am happy to find that, the matter having been most carefully and elaborately considered in the case of *Reader v. Kingham*, when the full number of judges was present, the case of *Green v. Cresswell* was overruled, and the doctrine of *Thomas v. Cook* restored." Thus practically, although perhaps not decisively, the doctrine of *Green v. Cresswell* has no authoritative force in England, and has but little force in our courts. In a recent case in Indiana,² after a careful review of the cases, the doctrine of this case was directly repudiated, and the distinction between a contract of guaranty and one of indemnity was well illustrated by ELLIOTT, J. He said: "There is, in principle, an obvious and important difference between a contract of guaranty and one of indemnity. The former is a collateral undertaking, and presupposes some contract or transaction to which it is collateral.³ The contract, though in form a guaranty, may be so framed as to constitute an absolute and original undertaking, as was the case in *Frash v. Polk*,⁴ but even in that class of cases there is an obligation from the party whose act or contract is guaranteed, and there is also a debt, and may be default, toward the promisee. It is impossible to conceive a guaranty as existing without some act or contract guaranteed. *A contract of indemnity is essentially an original one. Between the promisor and promisee there is a direct privity.* Between the person to whom the promise of indemnity is given, and the person for whom the latter undertakes as surety or bail, there is no privity at all. No matter what may be done by the person for whom bail is entered, at the request of a third, he who becomes bail cannot have any action, because as to the person bailed the undertaking was purely voluntary.⁵ The

¹ *Wildes v. Dudlow*, L. R. 19 Eq. 138.

² *Anderson v. Spence*, 72 Ind. 315; 37 Am. Rep. 162.

³ *Dole v. Young*, 24 Pick. (Mass.) 250; *Story on Prom. Notes*, § 457; *McMillan v. Bull's Head Bank*, 32

Ind. 11; 2 Am. Rep. 323; *Goff v. Sims*, 45 Ind. 262; *Dickinson v. Colter*, id. 445; *Taylor v. Taylor*, 64 id. 356, 359.

⁴ 67 Ind. 55.

⁵ *White's Ex'rs v. White*, 30 Vt. 338; *McPherson v. Meek*, 30 Mo. 345.

contract is an original and independent one, in which there is no debt or default toward the promisee, to which there are no collateral contracts, and in which there is no remedy against the third party. A contract of this character has long been held not to be within the statute.¹ The general rule running through almost all the cases is, that if the third person is not liable, *then the undertaking is not within the statute*. This doctrine is exemplified in the great number of cases which hold that a promise to answer for the debt or default of an infant or *femme covert* is not within the statute, because there is no third person bound.² It must be held, both upon principle and authority, that the cases which confuse the contracts of guaranty and indemnity, and place both upon the same footing, were erroneously decided, and that they are not to be accepted as true interpreters of the law."³

The plaintiff having promised to indemnify G against the consequences of a bail bond into which E had entered at plaintiff's request, and E being forced to make a payment in consequence, it was agreed between the plaintiff and defendant that the plaintiff should obtain the money by discounting a bill drawn by the plaintiff and accepted by the defendant; it was held that the plaintiff was not liable on his promise to indemnify, it not being in writing.⁴

In this country it is generally held that a verbal contract of indemnity made upon a good consideration is not within the statute. Thus, where A, in consideration of twenty-five dollars, verbally agreed to indemnify B against any claim made upon him for a certain subscription he had made, and a judgment for the amount thereof was afterwards obtained by him, it was held that A was liable upon his promise for the amount of the judgment;⁵ and it has been held that a verbal promise to indemnify a person against loss from becoming

¹ Read v. Nash, 1 Wils. 305; Tomlinson v. Gill, Amb. 330; Loomis v. Newhall, 15 Pick. 159; Harrison v. Sawtel, 10 Johns. (N. Y.) 242; Toplis v. Grane, 5 Bing. (N. C.) 636; Marcy v. Crawford, 16 Conn. 549. (S. C.) 395; Drake v. Fleurellen, 33 Ala. 106; Roche v. Chaplin, 1 Bail. (S. C.) 419.

² Harris v. Huntback, 1 Burr. 373; Chapin v. Lapham, 20 Pick. (Mass.) 467; Mease v. Wagner, 1 McCord (N. Y.) 113. ³ Overruling Brush v. Carpenter, 6 Ind. 78. ⁴ Cresswell v. Wood, 10 Ad. & El. 460. ⁵ Conkey v. Hopkins, 17 John.

surety for another, upon the faith of which the promisee assumes the responsibility, is an original undertaking and supported by a sufficient consideration.¹ In a recent case in Indiana² this doctrine was carefully and ably considered,

¹ Chapin v. Merrill, 4 Wend. (N. Y.) 657; Lucas v. Chamberlain, 8 B. Mon. (Ky.) 276; Harris v. Sawtelle, 10 John. (N. Y.) 242; Dunn v. West, 5 B. Mon. (Ky.) 376; Holmes v. Knights, 10 N. H. 175; Mills v. Brown, 11 Iowa, 315; Chapin v. Lapham, 20 Pick. (Mass.) 467; Jones v. Shorter, 1 Ga. 294; Perley v. Spring, 12 Mass. 297; Lucas v. Chamberlain, 8 B. Mon. (Ky.) 276. In Bohannon v. Jones, 30 Ga. 488, the defendant verbally promised the plaintiff, who was a sheriff and about to sell the horse of another upon an execution that he held against such person, that if he would not sell the horse he would pay the amount of the execution, and the defendant did not sell the horse, and was subsequently obliged to pay the debt, and it was held that the promise was not within the statute, and a similar doctrine was held in Tindall v. Touchberry, 3 Strobb. (S. C.) 177, and these cases seem sustainable upon the ground that as the promise is made to a public officer for doing or not doing an act, from which a direct liability is incurred by him, and has no immediate relation to the debt, it is an original promise of indemnity which is not within either the letter or spirit of the statute.

² Anderson v. Spence, 72 Ind. 315; 37 Am. Rep. 162. In this case the opinion of ELLIOTT, J., is such a careful and masterly review of the cases that I give the main portion of it. He said: "The appellant contends that the contract upon which the action is founded creates no liability, and in support of his contention states and argues these two general propositions: 1st. There was no consideration to support the promise made to appellee; 2d. That as the agreement was not in writing, it is void, because it is a contract to answer for the default of an-

other, and therefore within the statute of frauds.

There is nothing in the first proposition deserving discussion, and we put it aside with the remark that appellant got all the consideration he stipulated for; and he is not now in a position to make a complaint (as least with much prospect of having it heeded) of lack of consideration.

The second proposition involves an inquiry into the nature of the oral agreement upon which appellee relies. If it is an original agreement, it is not within the statute; if a collateral one, it is: the great weight of authority is, that an original agreement is not within the statute, although it may directly concern a third person, or relate to the performance of some act by one not a party to the contract. Thacher v. Rockwell, 4 Col. 375; Edenfield v. Canady, 60 Ga. 456; Hartley v. Varner, 88 Ill. 561; Johnson v. Knapp, 36 Iowa, 616; Smith v. Cramer, 39 id. 413; Lester v. Bowman, id. 611; Emerson v. Slater, 22 How. (U. S.) 28; DeWolf v. Rabaud, 1 Pet. (U. S.) 476; Morrison v. Baker, 81 N. C. 76; Spooner v. Dunn, 7 Ind. 81; Crawford v. King, 54 id. 6; Billingsley v. Dempe-wolf, 11 id. 414; Nelson v. Hardy, 7 Ind. 367; Beaty v. Grim, 18 id. 131. The general rule, as we have stated it, is in its terms clear, and is well supported by the authorities, but there is much difficulty in determining what are original or what collateral agreements. The cases upon this point are much in conflict, and it is by no means an easy task to determine from them what are to be deemed original contracts. The first case in our own reports, which directly bears upon the question under discussion is that of Brush v. Carpenter, 6 Ind. 78, where it was held, 'An oral promise by A to B to indemnify B against loss, if he

and the doctrine stated in the text announced. In that case it appeared that one Mary Sullenger had been indicted for

will become replevin bail for C, is void under the statute of frauds.' The case was not very carefully considered, and very few of the adjudged cases seem to have been brought to the attention of the court. The case of *Brush v. Carpenter*, 6 Ind. 78, did not receive any direct notice from the time it was decided except a bare reference in two cases, until the decision in *Horn v. Bray*, 51 Ind. 555, where it was cited and commented upon at much length, and declared to lay down an erroneous rule, the court saying: 'The ruling in *Brush v. Carpenter* is against the current of American adjudications, and has been, in effect, though not expressly, overruled by the subsequent decisions of this State.' The question in *Horn v. Bray*, 51 Ind. 555, was whether a verbal contract of indemnity as between sureties was valid, and it was not there necessary to expressly approve or directly overrule *Brush v. Carpenter*. Here we must approve or condemn. There is not a little confusion in our own cases upon the subject of what is an original and what a collateral contract, but the weight is decidedly against the doctrine of *Brush v. Carpenter*.

The English cases have not been at all harmonious. The old case of *Winckworth v. Mills*, 2 Esp. 484, held that a promise of indemnity was within the statute, but in *Thomas v. Cook*, 8 B. & C. 728, the contrary doctrine was declared. *Thomas v. Cook* was, in turn, overruled in *Green v. Cresswell*, 10 Ad. & El. 453. For a long time the doctrine of *Green v. Cresswell* has been viewed with disfavor, and it was, long before its overthrow, often severely censured, notably so in the cases of *Batson v. King*, 4 H. & N. 739, and *Cripps v. Hartnoll*, 4 B. & S. 414. After a long struggle the doctrine of *Green v. Cresswell* was directly overthrown in *Reader v. Kingham*, 13 C. B. (N. S.) 344. In

the later case of *Wildes v. Dudlow*, L. R. 19 Eq. Cas. 198, *Reader v. Kingham* is expressly approved, the court saying that the case of *Thomas v. Cook*, 8 B. & C. 728, was decided 'upon the plainest principles of common sense and justice.' While the doctrine of *Green v. Cresswell*, *supra*, was still recognized as the law of England, the courts declared that there was an important and broad distinction between the undertaking as surety in civil cases and that as bail in criminal proceedings. This doctrine is stated with clearness and force by *POLLOCK, C. B.*, in *Cripps v. Hartnoll*, 4 B. & S. 414. This learned judge, after speaking of *Green v. Cresswell*, *supra*, said: 'But there is a great distinction between that case and the present. Here the bail was given in a criminal proceeding; and where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails, there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be. Now it has been laid down that a mere promise of indemnity is not within the statute of frauds, and there are many cases which would exemplify the correctness of that decision.' The English cases therefore establish a rule which would take the present case out of the statute, even though it be conceded that the doctrine of *Green v. Cresswell* should be deemed the correct one. *We confess, however, that it seems to us that there was a real conflict between the doctrine of Green v. Cresswell and that of Cripps v. Hartnoll, and that the distinction attempted to be made by the later case was simply an effort to get rid of an unsound doctrine without expressly overruling it.*

assault and battery with intent to kill, and was in custody upon that charge. The defendant, being desirous to secure

Green v. Cresswell was always in conflict with the English cases, and there are many of them holding, to borrow the language of the cases, 'that the debt or default must be toward the promisee.' *Eastwood v. Kenyon*, 11 Ad. & El. 438; *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374. There is no 'debt or default toward the promisee' in cases where one person becomes bail for another at the request of a third. In such a case, it is impossible to conceive a debt or default as existing toward the promisee.

Long before the final overthrow of *Green v. Cresswell*, many, indeed most, of the American courts had accepted the doctrine, which indeed had never been directly challenged, either in England or America, that the debt or default must be toward the promisee, and had carried it to its logical conclusion. There are however many American cases holding to the doctrine of *Green v. Cresswell*, some of them somewhat extending it. With the downfall of the original case, the doctrine which it declared, always plainly erroneous upon principle, must, in time, be repudiated by all the courts of the land. The doctrine of *Green v. Cresswell* has been repudiated and that of *Thomas v. Cooke* adopted in Michigan. *Potter v. Brown*, 35 Mich. 274; *Comstock v. Morton*, 36 id. 277. Massachusetts: *Blake v. Cole*, 22 Pick. (Mass.) 97; *Chapin v. Lapham*, 20 id. 467. Maine: *Smith v. Sayward*, 5 Me. 504. Minnesota: *Gaetz v. Foos*, 14 Minn. 265. New York: *Sanders v. Gillespie*, 59 N. Y. 250. New Jersey: *Apgar v. Hilers*, 24 N. J. H. 812. New Hampshire: *Cutter v. Emery*, 37 N. H. 567; *Holmes v. Knights*, 10 id. 175. Kentucky: *Jones v. Letcher*, 13 B. Mon. (Ky.) 363; *Dunn v. West*, 5 id. 376; *Lucas v. Chamberlain*, 8 id. 276. Connecticut: *Reed v. Holcombe*, 31 Conn. 360; *Iowa Mills v. Brown*, 11 Iowa, 314. Vermont: *Beaman v. Russell*,

20 Vt. 205. Indiana: *Anderson v. Spence*, *ante*. Georgia: *Jones v. Shorter*, 1 Kelly (Ga.) 294, and Wisconsin: *Vogel v. Melms*, 31 Wis. 306. In North Carolina, *Draughan v. Bunting*, 9 Ired. (N. C.) 10, the doctrine of *Green v. Cresswell* is adopted, while in the other States the question is an open one. *Ferrett v. Maxwell*, 28 Ohio St. 383; *Simpson v. Nance*, 1 Speers (S. C.) 4; *Bissig v. Britton*, 59 Mo. 204; *Garner v. Hodgkins*, 46 id. 399; *Macy v. Childress*, 2 Tenn. Ch. 438; *Gadden v. Pierson*, 42 Ala. 370.

In *Aldrich v. Ames*, 9 Gray (Mass.) 76, *SHAW, C. J.*, speaking for the court, held an oral promise of indemnity made to one to induce him to become bail for another to be good. In *Holmes v. Knights*, 10 N. H. 175, an oral promise to indemnify a plaintiff, if he would become bail for a third person, was held not to be within the statute. Cases are cited in *Horn v. Bray*, from the reports of Massachusetts, Pennsylvania, Iowa, Maine, New Hampshire, Vermont, Maryland, Georgia, and Kentucky, showing that a contract to indemnify is not within the statute; and to these may be added *Vogel v. Melms*, 31 Wis. 306; s. c. 11 Am. Rep. 608; *Shook v. Vanmater*, 22 Wis. 532; *Reed v. Holcomb*, 31 Conn. 360; *Sanders v. Gillespie*, 59 N. Y. 250; *Green v. Brookins*, 23 Mich. 48; 9 Am. Rep. 74; *Stocking v. Sage*, 1 Conn. 519. The general doctrine, that a promise to indemnify the promisee for becoming surety for a person other than the promisor is not within the statute, is approved by many of the text-writers. 3 Pars. Cont. (6th ed.) 21, n.; *Roberts on Frauds*, 223; 1 *Hilliard Cont.* 384, § 11, 385, § 12; *Throop, Verbal Agreements*, § 361. Our own cases have declared the same general doctrine. In *Downey v. Hinchman*, 25 Ind. 453, it was said that, 'to make the promise collateral the party for whom the promise is made must be liable to

her release, procured the plaintiff to enter into a recognizance for her appearance to answer to the charge, promising him orally that he would indemnify him against all loss, and save him harmless from all liabilities, costs, charges, and expenses by reason of so becoming bail for her. The plaintiff, having been damnified by reason of his having entered into such recognizance, in an action to recover the same from the defendant, he set up the statute of frauds in bar of the claim. The court held that the statute had no application to contracts for indemnity.¹ So it is held that an agreement to indemnify a person against the consequences of an act which may amount to a trespass, are valid, unless a wilful trespass is contemplated.² Thus, an agreement to indemnify an

the party to whom it is made.' In *Palmer v. Blain*, 55 Ind. 11, it was held that a verbal promise by one person to the creditor of an execution issued on a judgment against a third, that if he will satisfy such execution, the promisor will make payment of the judgment in property and money, was not within the statute. *Green v. Cresswell* is cited with approval in *Crosby v. Jeroloman*, 37 Ind. 264; but the point involved in that case was very different from that here under discussion. The question in *Crosby v. Jeroloman* was whether there had been a novation, not whether the contract was an original or collateral one; and it was rightly held, that unless the original debt was extinguished by the new promise, the case was not taken out of the statute. In *Ellison v. Wishart*, 29 Ind. 32, the question and the holding were the same as in *Crosby v. Jeroloman*. The question in *Druly v. Hunt*, 35 Ind. 507, was presented by the refusal to give the jury the following instruction: 'If Druly promised to guarantee or warrant the pay to plaintiff which had been promised to be paid by a public meeting, his promise was only collateral, and not binding on Druly unless in writing.' It is very plain that no such question as the one involved in the present could have arisen in that case. It may be safely affirmed, without

further citation, that there is no case in our own reports directly supporting the doctrine of *Brush v. Carpenter*, and that there are several indirectly condemning, and one, at least, censuring it in express words, and in effect overthrowing it." *Horn v. Bray*, *ante*. In *Easter v. White*, 12 Ohio St. 219, the same doctrine was held as in *Brush v. Carpenter*, *ante*.

¹ *Conkey v. Hopkins*, 17 John. (N. Y.) 113; *Staats v. Howlett*, 2 Den. (N. Y.) 559. In *Barry v. Ransom*, 12 N. Y. 462, it was held that a parol agreement between two sureties that one of them would indemnify the other from loss, was held not to be within the statute. But in Michigan it is held that an engagement to indemnify sureties against loss is within the statute, and when made in writing in the name of one party and purporting upon its face to bind no other, it can no more be shown by parol to be in fact the undertaking of a different party than could such a liability be originally created by parol. *First Nat. Bank v. Bennett*, 33 Mich. 520. In *Bissig v. Britton*, 59 Mo. 204, a verbal promise to hold a surety upon a replevin bond harmless was held to come within the statute as being a promise to answer for the default of another.

² *Stone v. Hooker*, 9 Cow. 154; *Avery v. Halsey*, 14 Pick. (Mass.) 174,

officer to induce him to execute process by attaching property where the title is in dispute, is valid, although by parol.¹ In Connecticut² it was held that a parol promise to indemnify a person against a trespass, where the act to be done was under a claim of right, is valid, and not within the statute. In that case the facts were, that it was agreed between A and B that if C would enter upon the land of D and fish in D's mill-pond, that, if C should be prosecuted therefor by D, B would pay A one-half of the amount recovered and the expenses of defending the suit. C did the acts specified, and D sued him in trespass therefor and recovered judgment, the amount of which was paid by A, together with the expenses of defending the suit. In an action to recover of B one-half of such disbursements it was held that the contract was an original undertaking, and not within the statute. "The promise of the defendant," said HINMAN, J., "to pay one-half of the damages which might be recovered against Samuel P. Crawford for fishing in the mill-pond, and one-half of the expenses of defending against such a suit as might be brought against him for such fishing, was in no sense a promise to answer for the debt or default of Samuel P. Crawford, but was an original undertaking, and, of course, not within the statute of frauds. It could not be for the debt of Crawford, for he owed none. It was not for his default; but was, rather, a promise of indemnity, to a certain extent, for doing a particular act, like the promise of indemnity to an officer for taking property, which it may be doubted whether the creditor can hold."

If a *surety* upon an obligation promises a third person that if he will become a surety with him, he will indemnify him against loss thereby, his promise is an original one because it is a promise to answer, not for another's default, but his own;³ and it is held that a promise to indemnify another,

¹ Stark v. Raney, 18 Cal. 622; Marsh v. Gould, 2 Pick. (Mass.) 284; Train v. Gold, 5 id. 380; Wright v. Verney, 3 Doug. 240. It has been held that an agreement to indemnify the captain of a vessel against all legal expenses which may arise from his chastisement of the crew, is valid and binding as to expenses incurred in

groundless suits brought against him by the crew for chastisements inflicted within reasonable limits for the maintenance of the discipline of the ship, but not for expenses incurred in a prosecution where he was convicted. Babcock v. Terry, 97 Mass. 482.

² Marcy v. Crawford, 16 Conn. 548.

³ Farrell v. Maxwell, 28 Ohio St. 383.

if he will become surety for a third person, is not within the statute,¹ nor to indemnify a person if he will become a guarantor for another.² And, generally, a mere promise of indemnity is not within the statute. Thus, where a person promises to repay to another a share of the expenses of a suit brought at the instance of the promisor, and in reliance upon his promise, and for the mutual interest of the parties, the promise is not within the statute, being a contract for indemnity rather than guaranty.³ So where A agreed with B to assist in getting up an exhibition of the school of which B was the master, upon the understanding that he should lose nothing, but should be indemnified for his expenses and services, it was held that the promise of indemnity was an original one, and not within the statute.⁴ In a Massachusetts case, the plaintiff transferred his stock in a corporation, and a note he held against the corporation, to the defendant in exchange for a farm, the defendant agreeing to indemnify the plaintiff against his indorsements on certain notes of the corporation. It was held that the defendant's promise of indemnity was founded on a good consideration, and was not within the statute.⁵ In Maine,⁶ a parol promise by a *pro chien ami* to pay counsel for services afterwards to be rendered in a suit, for an infant, and to indemnify him for indorsing the writ, was held not to be within the statute. So, where the plaintiff at the request of the defendant, who verbally agreed with the plaintiff, who had been trusted in a suit against A, that if he would pay A the amount he owed him, he would pay any judgment which should be recovered against him. In reliance upon this promise, and upon no other consideration, the plaintiff paid to A the amount of his indebtedness, and it was held that the promise was an original undertaking, and not within the statute.⁷

¹ *Dunn v. West*, 5 B. Mon. (Ky.) 376; *Lucas v. Chamberlin*, 8 id. 276; *Mills v. Brown*, 11 Iowa, 315; *Harrison v. Sawtel*, 10 John. (N. Y.) 242; *Jones v. Shorter*, 1 Ga. 294; *Holmes v. Knights*, 10 N. H. 175; *Perley v. Spring*, 12 Mass. 297; *Chapin v. Lap-ham*, 20 Pick. (Mass.) 467.

² *Chapin v. Merrill*, 4 Wend. (N. Y.) 657.

³ *Dorwin v. Smith*, 35 Vt. 69; *Goodspeed v. Fuller*, 46 Me. 141.

⁴ *Walker v. Norton*, 29 Vt. 226.

⁵ *Alger v. Scoville*, 1 Gray (Mass.) 391. See also *Aldrich v. Ames*, 9 id. 76, where it was held that a promise to indemnify a person for becoming bail for another is not within the statute.

⁶ *Sanborn v. Merrill*, 41 Me. 467.

⁷ *Soule v. Albee*, 31 Vt. 142.

SEC. 160. Promise to Indemnify Against Costs of Suits.—

A promise to indemnify a third person against the costs of a suit commenced or defended by him at the request of the promisor, is not within the statute. Thus, in *Howes v. Martin*,¹ the plaintiff had accepted several bills of exchange from the defendant. These bills had all been regularly taken up, except the last, which was for £20. This bill had come into the hands of one Greensill, and the defendant, being unable to take it up when due, had prevailed upon Greensill to accept £16 in part, and the plaintiff's acceptance for six guineas, being the balance of the bill, with the interest then due for the remainder. This bill for six guineas not being paid when due, Greensill brought his action on it against Howes as the acceptor. On the action being brought, the plaintiff acquainted Martin with the circumstance, and he desired the present plaintiff to defend the action. In consequence of this advice the plaintiff defended the action, and Greensill obtained a verdict for the amount of the bill, which, with costs, amounted to £32. The present action was brought to recover this sum. LORD KENYON held that the case was not within the statute, saying that it appeared that the plaintiff never had any consideration whatever for the acceptances, which were given merely on the defendant's account and for his use; that the defence to the action on the note was on his account, and from whence he could have derived a benefit; that as he therefore was personally interested and directed the defence to be made, by which he might have been benefitted, the money must be considered to have been laid out by the plaintiff on his account and to his use, and that he, therefore, was entitled to recover it. So, in *Bullock v. Lloyd*,² it was held that the promise of the indorser of a dishonored bill to pay the indorsee the costs of an action against the acceptor, need not be in writing.³

¹ 1 Esp. 162; *Dorwin v. Smith*, 35 Vt. 69; *Goodspeed v. Fuller*, 46 Me. 141.

² 2 C. & P. 119.

³ But see *Winckworth v. Mills*, 2 Esp. 484. The indorser of a promissory note, who was discharged by the laches of the holder, promised him to pay the note in consideration of his

forbearance to sue the maker. It was held that such promise was within the statute, there being no new consideration therefor. *Peabody v. Harvey*, 4 Conn. 119; *Huntington v. Harvey*, 4 Conn. 124. See also *Jones v. Walker*, 13 B. Mon. (Ky.) 356; *Turner v. Hubbel*, 2 Day (Conn.) 457; *Ellison v. Wischart*, 29 Ind. 32. So a promise

In *Adams v. Dansey*,¹ the plaintiff, an occupier of land, at the request of the defendant, and upon a promise of indemnity, resisted a suit of the Vicar for tithes; it was held that this was not a promise required by the statute to be in writing. "Here," said TINDAL, C. J., "as between Adams and Dansey, what promise is there as to the debt, default, or miscarriage of another? It is a direct promise to repay Adams any money which might be paid by him for costs in the suit between the Vicar and Adams. It has been urged that at all events the promise would not be available for costs antecedently incurred. But it was competent to the plaintiff to make any bargain he pleased as the price of his resisting the tithe suit for the benefit of the defendant."²

by the holder to extend the time of payment of a note, made in consideration of a promise by a third person to pay additional interest, and a verbal release of the maker in consideration of a promise by a third person to pay the amount, is not binding, nor a bar to an action on the note, the promises which were the consideration being void. *Evans v. Lohr*, 3 Ill. 511. But the promise of one creditor to pay the claim of another against their mutual debtor, in consideration of the forbearance of the latter to contest the validity of a judgment obtained by the former against the debtor, is an original undertaking, and not within the statute of frauds. *Smith v. Rogers*, 35 Vt. 140. See also *Templeton v. Bascom*, 33 Vt. 132; *Pratt v. Humphrey*, 22 Conn. 317; *Fish v. Thomas*, 5 Gray (Mass.) 45; *Ferris v. Barlow*, 2 Aik. (Vt.) 103.

¹ 6 Bing. 506; 4 Moo. & P. 245.

² And see *Spark v. Heslop*, 1 E & E. 563; 28 L. J. Q. B. 197. In *Peck v. Thompson*, 15 Vt. 637, A owed B, and sent him with a verbal order, to procure the money from C on A's account. C refused to pay on a verbal order, and required B to bring a written order from A, or else to give his own accountable receipt for the money. B received the money, and gave his receipt to account to C for it, on demand. Afterwards C called on B, and threatened to commence a

suit upon his receipt. Of this B notified A, relying upon him to settle the demand of C. In order to induce B to submit to a suit in favor of C, and thereby afford A an opportunity to prove such payment, A and D promised B to indemnify him against any judgment which C might recover, and also against the expense of defending C's suit. It was held, that the promise of A and D was not affected by the statute of frauds. In *Rowe v. Whittier*, 21 Me. 545, it was agreed between the plaintiff and defendant in an action to settle the same in a certain manner, if the defendant would "pay the expenses," and he verbally promised the plaintiff's attorney to pay the same to him. It was held that the promise was not within the statute of frauds, as to the taxable costs, he being liable to pay the same to the plaintiff, but that it was within the statute as to the charge for commissions, he not being liable to the plaintiff for them. In *Ragland v. Wynn*, 37 Ala. 32, it was held that a verbal promise by the sureties on the official bond of a sheriff, after a decree against them all has been rendered, to pay an item of costs which had been omitted in the taxation of costs, on condition that the plaintiff would allow a credit on the decree for a sum which it was alleged had been paid, is not within the statute.

Generally it may be said that, if a promise of indemnity is not collateral to the liability of some other person to the same party to whom the promise is made, it is not within the statute, and, in the absence of all evidence that there was a liability of any other person to the plaintiff to which the promise of indemnity could be collateral, it will be treated as an original promise.¹

SEC. 161. Parol Guaranty of Note Turned Out to Pay Debt. — Under the rule as previously stated, that *a promise which is in effect to pay the debt of the promisor*, although in form to pay the debt of another, is not within the statute, it is held that a parol guaranty of a note of a third person, which a debtor transfers to a creditor in payment of his debt, either in whole or in part, is not within the statute,² and the creditor may

¹ Beaman v. Russell, 20 Vt. 205.

² Hassinger v. Newman, 83 Ind. 124; 43 Am. Rep. 64. But it was held in this case that an oral promise to pay what the maker did not, is within the statute. In *Milks v. Rich*, 80 N. Y. 269, the defendant recovered money from plaintiff for his own benefit, and delivered at the time to the plaintiff a note of one Marsh, for the amount, verbally promising that the note was good and that it would be paid at maturity. It was held that the defendant was liable for the amount on the note, and the promise to pay was not within the statute of frauds. The defendant delivered the note, and the plaintiff received it as a mode of paying for the money, and the defendant's promise was regarded in effect, not as a collateral promise to answer for the default of Marsh, but as a promise to pay the plaintiff for the money the defendant had, in case Marsh did not pay him. It was the promise of one to pay his own debt in case a third person does not pay it. Within the principles laid down in the authorities, such a promise is not within the statute. *Fowler v. Clearwater*, 35 Barb. (N. Y.) 143; *Dauber v. Blackney*, 38 id. 432; *Losee v. Williams*, 6 Lans. (N. Y.) 228; *Johnson v. Gilbert*, 4 Hill (N. Y.) 178; *Brown v. Curtis*, 2

N. Y. 225; *Cardell v. McNiel*, 21 id. 336; *Bruce v. Burr*, 67 id. 237; *Dunham v. Morrow*, 2 N. Y. 533; *Mobile & C. R. R. Co. v. Jones*, 57 Ga. 198. In the case of *Milks v. Rich*, *ante*, *EARL*, J., while doubting the soundness of the doctrine that such a parol contract is not within the statute, yet said that the court yielded its assent to it because he thought the authorities last cited should control. In *Rowland v. Rourke*, 4 Jones (N. C.) L. 387, it was held that a contract to make good certain notes which a debtor gave to his creditor in payment of a debt, in case the maker was not good for the amount on a certain day, was not within the statute. See also *Jones v. Palmer*, 1 Doug. (Mich.) 379. In *Eagle Mowing and Reaping Machine Co. v. Shattuck*, 53 Wis. 455; 40 Am. Rep. 78, it was held that where a debtor induces his creditor to take in settlement of the indebtedness the note of a third person, with such debtor's guaranty of its payment, not stating the consideration, this is, in effect, a promise by such debtor to pay his own debt in a particular manner, and is not within the statute of frauds. *CASSODAY, J.*, said: "At the time of the accounting and settlement of the defendants with the agent, the maker of the note in ques-

maintain an action against the promisor upon such guaranty to recover the amount of the note, or such part thereof as he

tion was not indebted to the plaintiff, but to the defendants. The note was not given for property belonging to, or furnished by, the plaintiff, but for property belonging to and furnished by the defendants. The note at the time was the property of the defendants. The defendants being indebted to the plaintiff for money or notes taken for the plaintiff's machines, and by them converted to their own use, turned out the note in question, with the guaranty upon it, as their own property, in payment of their own debt. Are they to be discharged of their debt without being held liable on their guaranty? Does the case come within the language or meaning of the statute? Was the promise of the defendants anything more than a promise to pay their own debt in the manner stated? We think it was not, and the case therefore comes clearly within the rule of *Wyman v. Goodrich*, 26 Wis. 21, where it was held that 'where the owner of a note, as part of the terms of sale thereof, guarantees its payment, his contract is not within the statute of frauds.' It was not the consideration of the note which was the basis of the promise of the defendants to the plaintiff, but the money or property of the plaintiff, which the defendants had converted to their own use, and which they undertook to pay by the transfer of the note with their guaranty upon it. It was in form a guaranty of the payment of the note, but the guaranty was in fact made in payment of their own debt. Such a case is neither within the letter nor spirit of the statute, as abundantly appears from the decisions of this court, and cases therein cited." In *Putnam v. Farnham*, 27 Wis. 187; 9 Am. Rep. 459, a debtor orally promised to pay part of his debt by paying the debt of the creditor to a third person, to which arrangement the latter assented. Held, a valid promise. The principal case is

sustained by *Barker v. Scudder*, 56 Mo. 272; *Allen v. Eighmie*, 9 Ilun (N. Y.) 201; *Mobile and Girard R. Co. v. Jones*, 57 Ga. 198; *Malone v. Keever*, 44 Penn. St. 107; *Milks v. Rich*, 80 N. Y. 269; 36 Am. Rep. 615. A recent Massachusetts case, *Dows v. Swett*, 120 Mass. 322, however, advances a doctrine which is apparently opposed to this, and holds that a parol guaranty of a note of a third person given in payment of the debts of the promisor is within the statute; and in *New York, Draper v. Snow*, 20 N. Y. 331; *Brewster v. Silence*, 8 id. 207; *Wood v. Wheelock*, 25 Barb. (N. Y.) 625, such a guaranty was held to be within the statute, upon the ground that the consideration was not sufficiently connected with the consideration in the principal contract. In *Bruce v. Burr*, 67 N. Y. 237, the defendant contracted to sell and deliver to the plaintiff a quantity of books, and to accept in payment therefor the note of one Lund, the plaintiff at the same time orally guaranteeing its payment at maturity. The court held that the guaranty was not within the statute. In *Johnson v. Gilbert*, 4 Hilt. (N. Y. C. P.) 178, the plaintiff paid a debt which the defendant owed, and in consideration of such payment, the defendant transferred to him a note against one Eastman, and guaranteed its payment, and the guaranty was held to be valid. In *Cardell v. McNiel*, 21 N. Y. 336, in which the defendant delivered the plaintiff a chattel note in part payment for a horse, verbally guaranteeing its payment, a similar doctrine was held, *Comstock, J.*, saying: "In mere form it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation. But looking at the substance of the transaction, we see that the defendant paid in this manner a part of the price of a horse sold to himself. In a sense merely formal he agreed to answer for the debt of

has failed to obtain from the maker. Whatever may be said as to the soundness of this rule, its justice cannot be doubted; and there can be no doubt that it comes fairly within the rule that, where the promise is in effect a promise to pay the debt of the promisor it is not within the statute, because, unless the note *was accepted in payment* of the promisor's debt, he would still remain liable upon the original debt for any deficiency which might arise from the creditor being unable to collect the full amount thereof, and his guaranty, therefore, creates no new obligation, but is in reality merely a promise to pay a debt from which he was never released; A different doctrine might be held where the legal effect of the transaction is to release the debtor from the debt, there being nothing in the transaction which shows that the *original* claim is to be kept on foot, because, while in the former case there is a mere change in the *form* of liability, in the latter there is a creation of a *new liability, in place of one which is extinguished*. It is upon this ground that the doctrine of a recent Massachusetts case¹ previously referred to, which is ap-

Cornell. *In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him, and thereby discharge him.*" In *Dauber v. Blackney*, 38 Barb. (N. Y.) 432, under a similar state of facts, Horr, J., said: "Wherever the holder of a note against a third person turns it out in payment of his own debt, or in payment of property purchased, or for money received by him from the person to whom he transfers it, and at the same time agrees that the note is good, or will be paid at maturity, or that it will be collected by due process of law against the maker, this is an undertaking in substance, entirely for his own benefit and advantage, and the contract is valid, although it rests entirely in parol, and is not within the statute of frauds." In California and Dakota the statute in express terms excepts this class of promises from the operation of the statute.

¹ *Dows v. Swett*, 120 Mass. 322.

In this case the court, after speaking of transfers as collateral security or

in conditional payment, said: "In the latter class of cases the transaction is as if the debtor said, 'I owe you a debt. Take this note and collect it if you can. If you get the money on it, that will pay you. If you do not, I will myself pay you what I owe.' In all such cases the defendant's promise is in effect to pay his own debt, and it is not necessary that such promise should be in writing, though incidentally the debt of a third person is guaranteed. And many of the decisions of courts which at first sight may appear to hold that an oral guaranty of the note of another, which is transferred on account of a debt due from the guarantor, is not within the statute of frauds, on careful examination will be found not to rest on that principle, and not to be necessarily inconsistent with our own conclusion in the present case. For example, in *Milks v. Rich*, 80 N. Y. 271; 36 Am. Rep. 615, EARL, J., after stating that 'the reasoning to take this promise out of the statute is quite subtle, and I should have much difficulty in yield-

parently opposed to the doctrine of the cases first cited in this section, may be reconciled with, or at least distinguished from them. In that case the defendant who was indebted to the plaintiffs for goods purchased of them by him to the amount of two hundred dollars, and for which they held his due bill, made an arrangement with them to surrender to him the due bill, upon his delivering to them the note of one Robinson for the same sum, payable to them or order, *the defendant verbally agreeing that he would pay the note, if Robinson did not.* This arrangement was carried into effect by the delivery of the note of Robinson to the plaintiffs, payable to them, and the surrender to the defendant of the due bill. The maker of the note having failed to pay it, in an action to recover the same of the defendant, it was held that his promise was collateral, and within the statute. It is evident that the original liability of the defendant for goods sold was merged in the due bill, and when the due bill was surrendered to him and the note of a third person taken in its place and stead, under the arrangement detailed, *the defendant ceased to be liable*

ing it any assent, but for the authorities which I think ought now to control,' goes on to say: 'The defendant's promise may be regarded in effect, not as a collateral promise to answer for the default of Marsh, but as a promise to pay the plaintiff the money he had had, in case Marsh did not pay him, like the promise of one to pay his own debt in case a third person did not pay it.' In *Bruce v. Burr*, 67 N. Y. 237, the decision rests on the same distinction, and both cases refer for authority to *Cardell v. McNiel*, 21 N. Y. 336, where *COMSTOCK, C. J.*, in delivering the opinion of the court, said: 'In mere form it was certainly a collateral undertaking. . . . But looking at the substance of the transaction, we see that the defendant paid in this manner a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of Cornell. In reality, he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him, and thereby dis-

charge him.' In all these cases, it will be observed that the court carefully put the decision on the express ground that the original debtor is not discharged, and his debt is not extinguished until the note is actually paid. So in *Pennsylvania*, in *Taylor v. Preston*, 79 Penn. St. 441, *WOODWARD, J.*, a high authority, says: 'The statute does not require the promise to be in writing where it is in effect to pay the promisor's own debt, though that of a third person be incidentally guaranteed; it applies to the mere promise to become responsible, but not to actual obligations,'—*i.e.*, of the promisor. 'Buying the land, the promise to pay for it, whatever the form, was a promise to pay their own debt. It was not only a stipulation to pay a debt which Preston owed, but a stipulation to pay the price of property they had bought.' To the same effect are *Townsend v. Long*, 77 Penn. St. 147; 18 Am. Rep. 438; and *Malone v. Keener*, 44 id. 109." See also *King v. Summitt*, 73 Ind. 312; 38 Am. Rep. 145.

to the plaintiffs in any form, as both in law and in fact in the absence of proof to the contrary the note was accepted in payment of the original debt, and Robinson was substituted as debtor in place of the defendant, so that the defendant's promise to pay the note, if Robinson did not, was a promise on his part to pay the debt of another, and not a mere promise to pay his own debt.

The true test for determining whether a guaranty indorsed upon a note is an original undertaking or a collateral promise, within the statute of frauds, is not whether it was indorsed before the delivery of the note, but *whether the promise of the maker of the note and that of the guarantor were parts of one and the same original transaction*. Thus where, three days after the execution and delivery of promissory note from A to H, T indorsed thereon, in pursuance of a previous agreement, "I guarantee the payment of the within note," upon the faith of which previous agreement H had sold and delivered to A certain horses, it was held that such indorsement was not within the statute of frauds.¹ When the owner of a note, as a part of the terms of the sale thereof, guarantees its payment, his contract is not within the statute of frauds, for the reason that the promise is made upon a new and original consideration moving between the creditor and the party promising, in an independent dealing between them.² Under this rule a verbal promise by the assignee of a building contract, to pay a debt of the assignor, was held to be part of the subject-matter, and not within the statute of frauds.³

SEC. 162. Contract for Del Credere Agency.—*A contract for a del credere agency is not a promise to answer for the debt of another within the statute.* In *Coutourier v. Hastie*,⁴ PARKE, B., said: "The other and only remaining point is whether the defendants are responsible by reason of their charging a *del credere* commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless if they had for a percentage guaranteed the debt owing, or

¹ *Howland v. Aitch*, 38 Cal. 133. 673; *Swan v. Nesmith*, 7 Pick. (Mass.)

² *Wyman v. Goodrich*, 26 Wis. 21. 220; *Sherwood v. Stone*, 14 N. Y.

³ *Rabberman v. Wisekamp*, 54 Ill. 267; *Bradley v. Richardson*, 23 Vt. 179. 720; *Wolff v. Koppel*, 5 Hill (N. Y.)

⁴ 8 Exch. 40; affirmed, 5 H. L. C. 460.

performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents — namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given, and the case resembles in this respect those of *Williams v. Leper*¹ and *Castling v. Aubert*.² We entirely adopt the reasoning of an American judge (MR. JUSTICE COWEN) in a very able judgment on this point in *Wolff v. Koppel*.³

In *Wickham v. Wickham*,⁴ WOOD, V. C., said: “When I look at the whole of the case (*Coutourier v. Hastie*) I cannot but conclude that the judges considered that an agent entering into a contract in the nature of a *del credere* agency, entered in effect into a new substantial agreement with the persons whose agency he undertook, that the agreement so entered into by him was not a simple guaranty, but a distinct and positive undertaking on his part on which he would become primarily liable, otherwise I cannot see how the learned judges could arrive at the conclusion that the undertaking was not within the statute.” The promise of a factor who, having possession, sells the goods under a *del credere* commission, agreeing to guarantee the sales, rests upon the consideration of his duty and responsibility growing out of his employment, and is not within the statute.⁵

SEC. 163. Goods Furnished to an Infant. — The rule is that in order to make an undertaking to pay the debt of another a guaranty, the liability of the party for whom the guaranty is given must be a clear and ascertained legal liability; consequently if goods are furnished to or money is paid on behalf

¹ 3 Burr. 1886; 2 Wils. 308.

² 2 East, 325.

³ 5 Hill (N. Y.) 458.

⁴ 2 K & J. 479.

⁵ *Inman v. Inman*, 6 Mo. App. 384.

of an infant, or a married woman or any person laboring under a legal disability, on the promise of the defendant to be answerable, the undertaking is original and not collateral, for the infant cannot be liable, and there is no privity between the plaintiff and the infant.¹ But this rule does not apply where the promise is to pay a debt for necessities which the minor had previously contracted. Thus in a Massachusetts case² a father orally promised the plaintiff that if he would forbear demanding of his son the amount of a debt which the son had previously contracted for necessities, it was held that the promise was collateral and within the statute. As the rule is predicated upon the ground that as there is no liability on the part of the infant, there is no debt of the third person, and consequently the promise is original, it follows as a necessary inference that in all cases *where liability does exist* upon the part of the infant, the promise is collateral and within the statute.

When the party in whose behalf the promise is made is not liable at all for the debt or duty in reference to which the promise is made, it is evident that the statute does not apply, *because there is no debt to which the promise can be collateral*, or in reference to which it can be regarded as an undertaking to answer for the debt, default, or miscarriage of another, and in all such cases the promise is an original undertaking on the part of the promisor, although he derives no advantage therefrom, and an action of *indebitatus assumpsit* will lie against him without regard to the special promise, and the statute of frauds having no application, written evidence of the promise is unnecessary.³

SEC. 164. Rights under Parol Guaranty.—In England, it is held that money paid under a parol guaranty cannot be recovered;⁴ but it has recently been held in Connecticut,⁵ and,

¹ *Duncomb v. Tickridge*, Aleyn. 94; (Mass.) 365. See also *Clark v. Levi*, Harris v. Huntback, 1 Burr. 373; 10 N. Y. Leg. Obs. 184.

King v. Summit, 73 Ind. 312; Drake v. Fleurellen, 33 Ala. 106; Chapin v. Lapham, 20 Pick (Mass.) 467; Roche v. Chaplin, 1 Bailey (S. C.) 419; Mease v. Wagner, 1 McCord (S. C.) 395. ³ *Prentice v. Wilkinson*, 5 Abb. Pr. (N. Y.) N. S. 49; *Mease v. Wagner*, 1 McCord (S. C.) 395.

⁴ *Griffith v. Young*, 12 East, 513; *Shaw v. Woodcock*, 7 B. & C. 73. ⁵ *Simpson v. Hall*, 47 Conn. 417.

² *Dexter v. Blanchard*, 11 Allen

as we believe, correctly, that a recovery may be had in such cases, the law implying that such payment was made at the request of the person promised for. And in England it appears that the courts can exercise summary jurisdiction over one of their officers who has given such a guaranty, as attorney, by compelling him to perform it.¹ Where the fact that a guaranty has been given is admitted by the payment of money into court, proof that it was in writing is dispensed with.²

SEC. 165. Dissolution or Alteration of Contract.—The statute does not contain any provision requiring that a contract which must be in writing, shall be dissolved by writing, and it seems, therefore, that such a contract may, before breach, be wholly waived and abandoned by a parol agreement, so as to prevent its being sued upon.³ But if another contract is substituted for it, it must be valid, and must be in writing, if it comes within the class of contracts required by the statute to be so proved,⁴ and any *alteration* in the terms of an agreement required to be in writing, must also be evidenced by writing.⁵

SEC. 166. Application of the Statute to Foreign Contracts.—An action cannot be maintained upon a contract made in a foreign country, which is valid there, but which could not, on account of the statute, be sued on if made here.⁶ The rule seems to be well established, that so much of the law as affects the rights and merits of the contract, all that relates *ad litis decisionem* is adopted from the foreign country; but so much as affects the *remedy* only, all that related *ad litis ordinationem*, is taken from the *lex juri* of the country where the action is brought.⁷

¹ *In re Greaves*, 1 C. & J. 374, n. (a); *Evans v. Dunscombe*, 1 id. 372; *Senior v. Butt*, and *Payne v. Johnson*, cited in *Evans v. Dunscombe*, *ante*.

² *Middleton v. Brewer, Peake*, 20; and see *Prec. in Ch.* 208, 374.

³ *Hobson v. Cowley*, 27 L. J. Exchq. 205; *Goss v. Lord Nugent*, 5 B. & Ald. 66; *Lavery v. Turley*, 30 L. J. Exchq. 49.

⁴ *Moore v. Campbell*, 10 Exchq.

323; *Noble v. Ward*, L. R. 2 Exchq. 135.

⁵ *Pearson v. Henry*, 5 T. R. 6; *Mitchinson v. Hewson*, 7 id. 348.

⁶ *Leraux v. Brown*, 12 C. B. 801; *Williams v. Wheeler*, 8 C. B. (N. S.) 299.

⁷ *Huber v. Sleiner*, 2 Sc. 326; *Addison on Contracts*, 176; 2 Wm. Saunders, 399; 1 Smith's L. C. 7th ed. (Eng.) 658, notes to *Moystyn v. Fabrigas*.

SEC. 167. **False Representations as to the Solvency of Another.**—In England, as well as in Alabama, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, Oregon, Vermont, Virginia, West Virginia, and Wyoming, it is expressly provided by statute, substantially, that no action shall be brought to charge any person by reason of any representation or assurance made concerning the character, conduct, ability, trade, or dealings of any other person, unless such assurances, etc., were made in writing, signed by the party to be charged. But in the other States no such provision exists, and the rule which has existed ever since *Pasley v. Freeman*,¹ was decided, holding that an action lies for a false representation as to the credit and responsibility of another, whereby another person is induced to give him credit, *it has been held that the statute does not apply to this class of actions*, and such was the rule in England² prior to the statute 9 Geo. 4, chap. 14, as well as in those States in which the provision of the English statutes in this respect has been adopted;³ and the very circumstance that legislative action has been deemed necessary to avoid liability in such cases, would seem sufficient to put the question at rest in those States where the legislature has not deemed it proper to interfere. It will be noticed that the statute applies only to representations relative to third person, *and made for the purpose of obtaining credit for him*, and representations relative to the quality, cost, or value of property owned by a third person do not come within the statute, especially when not made for the purpose of obtaining credit for him, but rather for the purpose of enabling him to sell the property.⁴

¹ *Pasley v. Freeman*, 3 T. R. 51.

² *Foster v. Charles*, 6 Bing. 396; *Tapp v. Lee*, 3 B. & P. 367; *Haycroft v. Creasey*, 2 East, 92.

³ *Warren v. Barker*, 2 Duv. (Ky.) 155; *Benton v. Pratt*, 2 Wend. (N. Y.) 385; *Upton v. Vail*, 6 John. (N. Y.) 181; *Wells v. Renway*, 28 Barb. (N. Y.) 466; *Rumsey v. Lovell*, Anth. N. P. (N. Y.) 26; *Williams v. Wood*, 14 Wend. (N. Y.) 126; *Allen v. Addington*, 7 Wend. (N. Y.) 9; *Gough v. Dennis*, Lalor Suppt. (N. Y.) 55; *Zabriskie v. Smith*, 13 N. Y. 322; *Van Bruck v. Peyser*, 2 Rob. (N. Y.) 468; *Viele v.*

Goss, 49 Barb. (N. Y.) 96; *Ewins v. Calhoun*, 7 Vt. 79; *Weeks v. Burton*, 7 id. 67; *Patten v. Gurney*, 17 Mass. 182. See also *Adams v. Anderson*, 4 H. & J. (Md.) 558; *West v. Wilcox*, 1 Day (Conn.) 22; *Hart v. Tallmadge*, 2 id. 381; *Russell v. Clarke*, 7 Cr. (U. S. C. C.) 69.

⁴ *Medbury v. Watson*, 6 Met. (Mass.) 246. In *Norton v. Huxley*, 13 Gray (Mass.) 385, the court held that the statute applies only to cases where the representations were made *with the intent that such person might obtain credit, money, or goods*.

Thus, in the case first cited in the last note.¹ In an action by A against B, the declaration alleged that B, intending to deceive and defraud A, falsely and fraudulently affirmed to A, who desired to purchase a tannery, that he (B) well knew such a tannery as A wanted, which was worth \$4,000; that the owner paid that sum for it, and would sell it for what it cost him; that he (B) would aid A in buying it for that sum, and that A relying upon B's affirmations relating thereto, and not knowing the contrary nor the value of the tannery, purchased the same of the owner, and paid \$4,000 therefor, but that B's representations were false; that the tannery was not worth \$4,000, and that the owner only paid \$3,000 for it, which was more than it was worth when A so bought it of him. The declaration also alleged knowledge on B's part that his representations were false, and that A was damaged thereby. It being insisted that the case came within the statutes relative to representations as to the character, etc., of third persons, the court held that this section of the statute did not apply, and that the action could be maintained, although the representations were verbal. But false representations as to the *condition* of the *title* to property of a third person, with an assurance that because of such condition, the person to whom they are made *would be safe in giving him credit*, is within the statute.² Thus, in the case last cited the plaintiff was induced to lend money to a third party by the defendant's representation that he had in his possession the title deeds to an estate, which he said such third party had lately bought, and that nothing could be done without his knowledge, and *that the plaintiff would be perfectly safe in making the loan*, it was held to amount to a representation that the third party's credit was good, and therefore was within the statute.³ Representations by an agent⁴ or officer⁵ of a corporation as to its pecuniary standing or ability come within this section of the statute. Thus, where the agent of an insurance company made false representations as to the pecuniary responsibility

¹ Medbury v. Watson, *ante*.

² Swann v. Phillips, 8 Ad. & El. 457.

³ See Lyde v. Barnard, Tr. & G. 250, where, under a similar state of

facts, the Court of Exchequer were divided upon the question.

⁴ Wells v. Prince, 15 Gray (Mass.) 562.

⁵ McKinney v. Whiting, 8 Allen (Mass.) 207.

of a company in which he desired to have the plaintiff insure, and in which, by reason of such representations the plaintiff did insure, it was held that the action was within the statute.¹ And the same was held where a treasurer of a corporation made false representations to the plaintiff as to the solvency of such corporation, for the purpose of inducing him to take a note of the corporation signed by him as agent.² But a representation that the makers of certain notes which a third person takes as collateral security for a debt are good, does not come within this section of the statute,³ nor does a representation, express or implied, that the *signatures* to a note are genuine.⁴ But it seems that representations as to the credit and ability of the maker of a note, made by a person with a view of inducing such person to indorse the note, so that the person making the representations could get it discounted for his own use, are within the statute, and do not form a basis for an action unless in writing.⁵ In an action for money had and received, where the *gist* of the action is the defendant's false representations, in reference to the financial standing of another, the statute of frauds is available as a defence, unless the representations were in writing.⁶

SEC. 168. Statute Applies to Corporations.—It is not necessary that the "other person" spoken of in the statute should be a natural person. An artificial person is equally within the meaning of the statute.⁷ Hence, if the representations are such that the case would be governed by the statute, if the company were a natural person, the fact

¹ Wells v. Prince, *ante*.

² McKinney v. Whiting, *ante*.

³ Belcher v. Costello, 122 Mass. 189.

⁴ Cabot Bank v. Morton, 4 Gray (Mass.) 156.

⁵ Mann v. Blanchard, 2 Allen (Mass.) 386. See also Kimball v. Comstock, 14 Gray (Mass.) 508, where it was held that a fraudulent representation that a person is of good credit, for the purpose of enabling him to purchase goods on credit, is within the statute; although the representation was made in order to enable such third person to pur-

chase the goods, to pay the defendant a debt which was owing him from such third person.

⁶ Hunter v. Randall, 62 Me. 423.

⁷ Devaux v. Steinkeller, 6 Bing. (N. C.) 84; Boyd v. Croydon Ry. Co., 4 id. 669; McKinney v. Whiting, 8 Allen (Mass.) 207; Rust v. Bennett, 39 Mich. 521; Pharmaceutical Society v. London &c. Association, 4 Q. B. Div. 313; People v. May, 27 Barb. (N. Y.) 238; British Ins. Co. v. Commissioners of Texas, 31 N. Y. 32; People v. Utica Ins. Co., 15 Johns. (N. Y.) 381; People v. Rector, 23 N. Y. 44.

of its being an artificial one will make no difference.¹ While the stockholders of a corporation are not liable for its debts, and do not stand in such a relation to it that their promise to pay its debts can be said to be an original undertaking,² yet if a stockholder contracts with a person on behalf of the corporation, and agrees to become personally responsible to the other party to the contract, it has been held that his undertaking was original, although the corporation is also liable for the debt. Thus, where the plaintiff, at whose house a pauper who had been injured was left directly after the injury, applied immediately to the overseer of the poor to support him, and the overseer sent word, in his official capacity, to the plaintiff, to take good care of the pauper, and that if the latter did not pay him, he, the overseer, would see that he had his pay; it was held that this promise was an original promise, not within the statute of frauds, and was binding upon the town.³ So where A and B were both members of a religious society, and B, in the course of his duty as steward of the society, said to A: "I want you to board W (the minister); if you will do it, I will see that you shall be well paid, and have the money for it." A gave credit to B, not knowing that he was an officer of the society, but B did not suppose that he was becoming personally liable. It was held that the contract was not within the statute of frauds, and that A could recover in an action against B for W's board.⁴ In a case in the United States Supreme Court,⁵ a contractor for a railroad bridge agreed with a stockholder that the work should be done by a day certain; that the contractor should thereupon receive the money and notes of the stockholder, which were, when paid, to go towards payment of the indebtedness of the railroad company to the contractor; that this agreement should in no way affect the agreement with the railroad company on which an action was then pending. It was held that the undertaking of the stockholder was original, and not collateral, and, therefore, that a parol alteration of its terms

¹ *Bush v. Sprague*, Mich. S. C. 1883.

² *Trustees v. Flint*, 13 Met. (Mass.) 539; *Quin v. Hanford*, 1 Hill (N. Y.) 82.

³ *Blodgett v. Lowell*, 33 Vt. 174.

⁴ *Bushee v. Allen*, 31 Vt. 631.

⁵ *Emerson v. Slater*, 22 How. (U. S.) 28.

before breach was good. In an Iowa case¹ the defendants advertised that, by reason of their being stockholders in a certain bank they would redeem its notes, whereupon the notes acquired credit, and circulated freely. It was held an original promise, and not within the statute. The doctrine of this case can only be sustained upon the ground that such advertisement operated as an assumption by the stockholders of the indebtedness of the corporation upon a sufficient consideration, and that thereafter credit was given to them, rather than to the corporation, by the bill-holders and those to whom the bills were passed. In a Pennsylvania case,² where the directors of a corporation transferred part of their stock, and resigned their directorship, that their transferees might be elected in their stead; and the transferees verbally promised, in consideration therefor, to pay the debts of the corporation, it was held that such promise was within the statute of frauds, and could not be enforced. In Maine, a contract made by one of a committee of five, chosen by a parish to build a church in the name of the whole, is not binding on the corporation, and therefore not upon the other contracting party. And he having entered upon the performance, if other members of the parish agree in writing to secure to him the payment of the amount of his contract, according to its terms, one-half when he shall have completed the work, and the balance in sixty days thereafter, this is an original and not a collateral promise. The labor to be performed in completing the work is a sufficient consideration.³

¹ *Tarbell v. Stevens*, 7 Iowa, 163.

² *Maule v. Bucknell*, 50 Penn. St. 39.

³ *Adams v. Hill*, 16 Me. 215.

CHAPTER V.

AGREEMENT IN CONSIDERATION OF MARRIAGE.

SECTION.

169. Promise to Marry not Within the Statute.
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188. Post-nuptial Settlement.
189. Promise must be Absolute.

SECTION 169. **Promise to Marry not Within the Statute.**— Mere promises to marry are not within the statute, and need not be reduced into writing in order to be binding,¹ but may be made by parol,² *unless it appears that it was expressly agreed that the contract is not to be performed in one year,*³ in which case it clearly comes within the statute relating to that class of contracts, and evidence is admissible to show whether the contract was or was not to be performed within one year,⁴

¹ *Harrison v. Cage*, 1d. Raym. 386; Salk. 24; 5 Mod. 411; *Cock v. Baker*, Str. 34.

² *Taylor on Evid.* 909; B. N. P. 280 c; 2 Sel. N. P.; *Cock v. Baker*, 1 Str. 34; *Harrison v. Cage*, 1 Ld. Raym. 386; *Short v. Statts*, 58 Ind. 29.

³ *Derby v. Phelps*, 2 N. H. 515; *Lawrence v. Cook*, 56 Me. 193; *Nichols v. Weaver*, 7 Kan. 373.

⁴ WALLACE, D. J., in *Ullman v. Meyer*, U. S. C. C. (S. D. N. Y.), of whose opinion an abstract is given in Alb. L. J., No. 631, p. 164, says: "As

and if not, there seems to be no good reason why the statute should not apply to this as well as to other contracts, the rule being that this clause of the statute applies to all agreements where each party stipulates to do something, as well as to contracts to pay money.¹ But the rule being that if the contract *may* be performed within a year it is not within the statute unless there is an express agreement that it shall *not* be performed within that time,² it is clear that this clause does not apply to this class of contracts, *unless an express*

an original proposition, it may be debated whether the statute of frauds was ever intended to apply to agreements to marry. They are agreements of a private and confidential nature, which in countries where the common law prevails, are usually proved by circumstantial evidence; and at the time the English statute was passed, were not actionable at law, but were the subjects of proceedings in the ecclesiastical courts to compel performance of them. Nevertheless, at an early day after such actions became cognizable in courts of law, the defence of the statute of frauds was interposed under that clause of the statute which denies a right of action upon any agreement made upon consideration of marriage, unless the agreement is in writing; and though it was held that such clause only related to marriage settlements, there seems to have been no doubt in the minds of the judges that promises to marry were within the general purview of the statute. In our own country, in *Derby v. Phelps*, 2 N. H. 515, the question was directly decided, and it was held that, although the defence could not be maintained under the marriage clause of the statute, it was tenable under the clause requiring all agreements not to be performed within a year to be in writing. To the same effect are *Nichols v. Weaver*, 7 Kan. 373, and *Lawrence v. Cook*, 56 Me. 193. The question has never been presented in our own State, and the ruling upon the trial was made under the impression that the exception in the third clause of our statute

was meaningless, unless intended to relate to all the clauses. It was entirely unnecessary, if limited to the particular clause in which it is placed, because, by the settled construction of the statute, the clause did not apply to excepted classes of promises. 1 *Ld. Raym.* 387; 1 *Str.* 35. When English statutes — such as the statute of frauds — have been adopted into our own legislation, the known and settled construction of these statutes has been considered as silently incorporated into the acts. *Pennock v. Dialogue*, 2 *Pet. (U. S.)* 1. A more careful examination has satisfied me that the only purpose of inserting the exception was by way of explanation, and to remove any doubt as to the meaning of the clause by incorporating into it expressly what would otherwise have been left to implication. While the letters of the parties show a marriage engagement, the terms of the engagement and the time of the marriage are not indicated sufficiently to take the case out of the statute. The evidence offered to show that the promise of the defendant was not by its terms to be performed within a year was sufficient to present a question of fact for the jury. As this question was withdrawn from their consideration, there must be a new trial."

¹ *Cabot v. Hoskins*, 3 *Pick. (Mass.)* 83; *Lapham v. Whipple*, 8 *Met. (Mass.)* 59.

² *Moore v. Fox*, 10 *John. (N. Y.)* 244; *Dresser v. Dresser*, 35 *Barb. (N. Y.)* 573.

agreement that it shall not be performed in one year is shown, and the fact that the marriage is not to transpire until the happening of a certain event which it is not expected will happen within a year does not bring it within the statute. Thus in a Connecticut case,¹ the plaintiff in her declaration in one count set up a contract to marry, entered into between herself and the defendant on the first day of June, 1846, by which the defendant promised to marry her upon his return from a whaling voyage, which it was expected would occupy about eighteen months. It was insisted by the defendant that the promise alleged in this count was within the statute of frauds, and the trial judge charged the jury that it was so, unless they should find that there had been a previous mutual contract to marry, without any specification as to the time of its performance, which was afterwards postponed until the defendant returned from his voyage. But the court held that, while the charge of the court was otherwise correct, yet it was erroneous as to the contract being within the statute of frauds, if only as stated in the count referred to, STORRS, J., saying: "We think that part of it was erroneous, in which the jury were instructed, that the contract, as stated in the second and third counts, was within the statute of frauds, and therefore must be in writing. It is now well settled, that it was not an agreement made upon consideration of marriage within that statute.² Nor, in our opinion, is the agreement, as alleged in those counts, one which, by the true construction of that statute, was not to be performed within one year from the making thereof. It is not alleged in any form, that it was made with reference to, or that its performance was to depend on, the termination of a voyage which would necessarily occupy that time. It is only alleged, that it was expected by the parties, that the defendant would be absent for the period of eighteen months. But this expectation, which was only an opinion or belief of the parties, and the mental result of their private thoughts, constituted no part of the agreement itself; nor was it connected with it, so as to explain or give a construction to it, although it naturally would, and probably

¹ Clark v. Pendleton, 20 Conn. 495.

² Cock v. Baker, Bul. N. P. 280; S. C. 1 Str. 34.

did, form one of the motives which induced them to make the agreement. The thing thus anticipated did not enter into the contract, as one of its terms; and according to it, as stated, the defendant, whenever he should have returned, after having embarked on the voyage, whether, before or after the time during which it was thus expected to continue, would be under an obligation to perform his contract, with the plaintiff. As it does not therefore appear, by its terms, as stated, that it was not to be performed within a year from the time when it was made, it is not within the statute.¹ It is unnecessary for us to determine what would be the effect of proof that the event, upon which the performance of a verbal contract depended, *could not by possibility take place within a year from the making thereof*, when it did not appear from the contract itself that it was not to be performed within that time; because there was no claim, in the present case, which raised that point."

*The contracts contemplated by this clause of the statute are those which are made in consideration of the marriage itself, and contracts merely in contemplation or expectation of marriage are not within the statute.*² This distinction is illustrated by several well considered American cases. Thus in an Indiana case,³ a husband and wife, having orally agreed before marriage that the survivor, after marriage, should not claim any of the estate left by the decedent; in an action by the widow against the husband's administrator to recover the statutory allowance to a widow out of a deceased husband's estate, it was held that the agreement was not within the statute, so far as it related to provisions in consideration of marriage, but otherwise as to the provisions of the statute relating to sales of real estate; but that the agreement not being severable, could not be enforced against the widow. In a Connecticut case,⁴ it appeared that the parties on the eve of marriage agreed that certain notes which Mrs. Riley, then single, held against Mr. Riley should not be extinguished by

¹ Anon., 1 Salk. 280; 1 Ld. Raym. 316; Holt. 326; Peter v. Compton, Skin. 353; Fenton v. Emblers, 3 Burr. 1278; Moore v. Fox, 10 John. (N. Y.) 244; Peters v. Westborough, 19 Pick. (Mass.) 364; Wells v. Horton, 4 Bing. 40; Linscott v. McIntire, 15 Me. 201.

² Lassence v. Tierney, 1 Mac. & G. 551; Warden v. Jones, 2 De G. & J. 76; aff'g S. C. 23 Beav. 487.

³ Rainbolt v. East, 56 Ind. 538; 26 Am. Rep. 40; Child v. Pearl, 43 Vt. 224.

⁴ Riley v. Riley, 25 Conn. 154.

the marriage, but should remain her separate property, collectible out of his estate, if she would forbear to insist on their payment before marriage. In delivering the opinion of the court, ELLSWORTH, J., says: "As to the objection derived from the statute of frauds and perjuries, we think there is no ground for it. *The ante-nuptial promise was made in consideration of forbearance, and not in consideration of marriage*, though it was made in contemplation of marriage, which is not inconsistent with the claim of the appellant's counsel, that a promise in consideration of marriage must be in writing. *Marriage was not the meritorious cause of Riley's promise*, the marriage obligation was already perfect, and the promise in question was made upon the assumption that it was so, and for the exact purpose of saving the notes from the effect of the marriage when the marriage contract should be executed. No advancement or benefit was to accrue to either party in the event of the marriage, any more than if it did not take place, and hence it is not possible to consider marriage as the consideration of the promise. It was the debt, the forbearance of it; and this forbearance having been extended upon the request of Riley, there is no reason why his estate should not be liable." *But where the marriage is the sole consideration of the contract*, it is within the statute, whether made between the parties themselves, or a third person.¹ Thus in *Brown v. Conger*,² it appeared that it was mutually agreed between the plaintiff and one Isaac C. Brown, *that in consideration that the plaintiff would marry him*, he would give her one-third of all his property of every kind, which he represented to be of the value of \$13,000. The plaintiff in pursuance of such contract married Brown and lived with him until the time of his death, and Brown not having performed his part of the contract in his lifetime, or made provision therefor in his will, a bill for specific performance was brought against the executor of his estate; but the court held that, *as the contract was made upon the consideration of marriage solely*, it was void, and that marriage is not alone such a part performance as will take it out of the statute.³

¹ *Jorden v. Money*, 5 H. L. C. 207; *re Willoughby*, 11 Paige Ch. (N. Y.) 257.
Brenner v. Brenner, 48 Ind. 202; *Dy-*

gert v. Remershnider, 32 N. Y. 629;

Henry v. Henry, 27 Ohio St. 121; *in*

² 8 Hun (N. Y.) 625.

³ *Dung v. Parker*, 52 N. Y. 496.

SEC. 170. Consideration for Promise Need not be Expressed.

—Marriage is a good consideration to support a promise, but it is not necessary that the agreement should expressly state that the promise was made in consideration of marriage, *if from the evidence it is sufficiently proved that such was the consideration*.¹ Thus, where A being about to marry B, the uncle of A addressed him by letter as follows: "I am glad to hear of your intended marriage with B, and, as I promised to assist you at starting, I am happy to tell you that I will pay you £150 yearly during my life, and until your annual income derived from your profession shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require," and the husband's income never amounted to 600 guineas, it was held that the letter contained a good consideration to support an action against the executors of the uncle for arrears of the annuity.²

SEC. 171. Memorandum Must be Complete.—The memorandum need not be of a formal character, but it must be complete in itself, or specific performance will not be decreed.³ "Part performance, to take a case out of the statute of frauds, always supposes a complete agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement."⁴

The putting a deed into the hands of a solicitor with instructions to prepare a conveyance is not enough to take a parol agreement out of the statute.⁵ Where, previously to an intended marriage, the intended husband gave instructions in his own handwriting for a settlement, which was prepared but not executed, it was held that there was no memorandum within the statute.⁶

¹ *Hammersley v. De Biel*, 12 C. & F. 45.

² *Shadwell v. Shadwell*, 7 Jur. (N. S.) 311; and see *Saunders v. Cramer*, 3 Dr. & War. 87.

³ *Watson's Comp. of Eq.* 551.

⁴ *Lady Thynne v. E. of Glengall*, 2 H. L. C. 158, *per* LORD BROUGHAM.

⁵ *Bawdes v. Amhurst*, Prec. Ch. 402; *Montacute v. Maxwell*, 1 P. Wms. 618; 1 Str. 236; *Redding v. Wilkes*, 3 Bro. C. C. 400.

⁶ *Caton v. Caton*, L. R. 1 Ch. 137; *affd. ib.* 2 H. L. 127; and see *post*, chapter on the memorandum or note of the contract.

SEC. 172. **Bond.**—Where a bond or deed is given, either by the intended husband to his intended wife, or *vice versa*, it may, though suspended during the marriage, be specifically enforced after the death of the covenantor by the covenantee.¹

Where a man, by deed, covenanted to pay a woman an annuity for her life, payable half-yearly, for her separate use, and free from anticipation, and afterwards married the annuitant, and died leaving her surviving, it was held that the annuity was not extinguished, but only suspended by the marriage, and that the widow was entitled to recover arrears accrued subsequently to the death of her husband.²

SEC. 173. **May be Proved by Letters.**—The promise may be made by letters³ though written to a third person,⁴ and a

¹ *Acton v. Peirce*, 2 Vern. 480; *Cannel v. Buckle*, 2 P. Wms. 243.

² *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 83.

³ *Wankford v. Fotherley*, 2 Ver. 322; *Luders v. Anstey*, 4 Ves. 501; 5 Ves. 213.

⁴ *Moore v. Hart*, 1 Ver. 110, 200. In *Seagood v. Meale*, Prec. Ch. 560, some stress was laid upon the operation of the letter, as an *encouragement to the party to marry*; and in the case of *Ayliffe v. Tracy*, 2 P. Wms. 65, this operation as *influencing the intended husband to conclude the match*, was considered as necessary to the obligatory effect of the letter, within the statute of frauds. The case was as follows: The plaintiff courted one of the daughters of Sir Thomas Halsewood, and treated with the father about the marriage; the father consented to the marriage, and wrote to his daughter intimating that he had met the plaintiff, Mr. Ayliffe, and had agreed to give him as a portion £3,000, which the plaintiff (he said) seemed fully to assent to, and that they were to meet the next day, when the affair was to be fully concluded; and subscribed his name to the letter. Accordingly, the father and intended husband met and agreed to the marriage, and the father gave money to the daughter to buy her wedding clothes, and the wedding-day

having been appointed, the father died before that day, having made his will long before this treaty for the marriage, and given his daughter only £2,000, the daughter did not show this letter to her intended husband, whom she afterwards married; and the £2,000 was paid to the plaintiff, the husband, but he made no settlement, nor was he required to make any on his wife. The LORD CHANCELLOR was of opinion, that these circumstances amounted to nothing more than a mere communication, and had no ingredient of equity; the husband, his lordship said, had made no settlement; he did not know of this letter, it being written to his daughter; and that, therefore, he could not be supposed to have married in confidence of this letter; that he had accepted the £2,000 legacy as the portion, and at that time had demanded no more; and that the other daughter had but £1,500 portion. See this case very differently reported in 9 Mod. 3. Upon a somewhat similar principle, where an uncle by letter promised his niece £1,000 portion, but in the same letter dissuaded her from marrying the person intended, the Lords Commissioners, Rawlinson and Hutchins, Vern. 202, would not decree the payment, but left the plaintiff to his action at law. *Douglass v. Vincent*, 2 Vern. 202. But it is not so easy to

written promise which has been subsequently revoked does not require a memorandum or note in writing to revive it,

account for the determination by the same judges in the same term in the case of *Cookes v. Mascall*, 2 Vern. 200, which case was as follows: A marriage was in treaty between the plaintiff Cookes and the defendant Mascall's daughter, it being intended that Sir Thomas Cookes would make a considerable settlement on the plaintiff, his kinsman; proposals were made for mutual settlements, and it was thereby agreed that Mascall should settle £40 per annum for the present, and that Edward Cookes, the father, should settle the reversion of his estate at Wick, after the death of him and his wife, and should allow his son £20 per annum for maintenance in the meantime, and Mascall was to settle reversions of copyholds after the death of himself and his wife, of the value of £80 per annum. In 1684, a meeting was appointed, and held at Worcester, in order to a full agreement; the proposals were then considered, and all parties seemed to allow and approve thereof. In October, 1684, Cookes, the father, with one Baker, an attorney, came over to Mascall's house at Fordebigg, in order to make a final arrangement touching the settlement to be made on the intended marriage. Mr. Baker having conversed with both parties, proceeded to draw the agreement into articles in writing to be mutually signed by the parties; but before the same were ready for execution, Mascall and Cookes disagreed; and Mascall by his answer swore positively, that upon reflecting that Sir Thomas Cookes had refused to make any settlement on his kinsman, as it was pretended he would, and that Cookes the father also refused to settle a further estate upon the plaintiff, to answer the reversion that Mascall was to settle, expectant on the death of his mother, he refused to proceed any further, in order to perfect the agreement, and never signed it. But Cookes put up what Baker had writ-

ten into his pocket, and so they parted, and had no further meeting nor treaty; but Cookes the father swore, that after the articles were drawn, they were read over and agreed to, and that Mascall promised to meet at another time to execute; that young Cookes was afterwards permitted to come to Mascall's house, and in December, 1684, married his daughter, Mascall being privy to it, helping to set them forwards in the morning, and entertaining them, and seeming well pleased with the marriage, upon their return to his house at night. Upon this case, Cookes the father, having by his answer offered to perform the agreement on his part, the court *thought fit* to decree Mascall also to perform the agreement, according to what was contained in the writing drawn by Baker, though it was not signed by Mascall, as was intended it should have been, nor any other agreement reduced into writing. In *Montacute v. Maxwell*, 1 P. Wms. 618, the plaintiff brought a bill against the defendant her husband, setting forth that the defendant, before her intermarriage with him, did promise that she should enjoy all her own estate to her separate use, that he had agreed to execute writings to that purpose, and had instructed counsel to draw such writings, and that when they were to be married, the writings not being perfected, the defendant desired this might not delay the match, in regard his friends being there, it might shame him; but engaged upon his honor she should have the same advantage of the agreement as if it was in writing, drawn in form by counsel, and executed; upon which the marriage took effect, and afterwards the plaintiff wrote a letter to the defendant, her husband, putting him in mind of his promise, to which the defendant her husband wrote her an answer under his hand, expressing that he was always willing she should enjoy her own fortune, as if sole, and

but it may be revived by parol.¹ In the case last cited the father wrote a letter signifying his assent to the marriage of

¹ *Bird v. Blossie*, 2 Vent. 361.

that it should be at her command. To this bill the defendant pleaded the statute of frauds, and averred that he never signed any promise or agreement before marriage, for her enjoying any part of her estate separately, which he pleaded in bar of any relief or discovery. It was urged against this plea, that the promise was on the plaintiff's side, executed by her intermarriage; and was, therefore, like the several cases in which equity did relieve and compel a mutual execution; that the letter written by the defendant, though after marriage, was an evidence under his hand of the agreement before the marriage, and so took it out of the statute. On the other side, it was said that the express words of the statute made all such promises in consideration of marriage void, unless they were in writing, signed by the parties; and that there was the greatest reason for it, since in no case could there be supposed so many unguarded expressions and promises used as in addresses in order to marriage, where many passages of gallantry usually occur, and it was therefore provided by the statute, that all promises made in consideration of marriage should be void unless signed by the party. That it was very wrong to call marriage the execution of the promise, when until the marriage it was not within the statute; and the statute makes the promise in consideration of marriage void; therefore, to say that the marriage was an execution which should render the promise good, was quite frustrating the statute; which the court took notice of and approved. And the LORD CHANCELLOR declared, that in cases of fraud, equity should relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former;

in this, or such like cases of fraud, equity would relieve; but when, as in the case before him, there was no fraud, but only a reliance upon the honor, word, or promise of a party, the statute making those promises void, equity would not interfere; nor were the instructions given to counsel for preparing the writings material, since after they were drawn and engrossed, the parties might refuse to execute them, and as to the letter, it consisted only of general expressions, as "that the estate should be at the plaintiff's command, or at her service: indeed, had it recited or mentioned the former agreement, and promised the performance thereof, it had been material; but as this case was circumstanced, the plea should be allowed: and as the plea was in bar of a discovery as to all matters, which if discovered and admitted might be barred by the statute, so far might the statute be pleaded in bar of such discovery. But according to the report of the same case in *Strange*, 1 Str. 236, the plaintiff afterwards amended her bill, by further charging that in order to induce her to marry him, without a previous settlement, and to secure the performance of his promise in executing it afterwards, the husband had promised to take the sacrament on it, and that he did take the sacrament on the marriage accordingly. That after the marriage he wrote a letter, wherein he promised to make such settlement, and that he was ready to sign the writings, according to her desire. To this he confessed that he did take the sacrament, but said he did it only in compliance with a custom established in the parish church (of which he was a member) of receiving the sacrament on their marriages, and not to give any sanction to this pretended agreement: and as to the letter, that he did not remember the particulars; but if he had written any thing con-

his daughter with J S, and that he would give her £1,500, and afterward by another letter, upon a further treaty concern-

cerning his readiness to sign any writings, it only related to some proposals he had made of settling a sum of £1,500 on her, and which he did soon after sign. He then pleaded the statute of frauds and perjuries again. But the LORD CHANCELLOR was of opinion that the case was very much altered by these new circumstances. That at first it stood purely on the parol promise before marriage; upon which there was no color to relieve the plaintiff. But that such parol promise on marriage was a sufficient consideration to support a settlement made agreeable to it after marriage. That this has been frequently determined; that it was also a sufficient consideration to establish a promise made in writing after marriage: *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; *Argenbright v. Campbell*, 3 H. & M. (Va.) 144; *Chichester v. Vass*, 1 Munf. (Va.) 98; that there was great evidence of such a promise made in writing after marriage; the defendant did not deny his writing, but declared himself ready to execute the writings as she desired; he avoided it, however, by saying that they referred to proposals of settling £1,500, which was impossible, because it appeared that she never desired any such settlement. And though he had said he had signed that settlement, it did not appear when he did it; and his lordship was very suspicious that he had done it since the amended bill. His answer to the charge of receiving the sacrament, in confirmation of his promise, was not at all satisfactory. He could have no occasion to promise receiving the sacrament, but on that account; and though he might receive it in compliance with the custom of his church, yet that was very consistent with his laying hold of that solemn act of devotion, to testify his sincerity. The plea was ordered to stand for an answer.

According to the report of the same

case in Eq. Ca. Abr. (1 Eq. Abr. 19), the husband privately countermanded the instructions given by him for drawing the settlement, and then drew in Lady Montacute to marry him, and from the loose statement in *Precedents* in Chancery. (Prec. in Chan. 526), it seems that some such decided act of fraud was imputable to the defendant. For the CHANCELLOR is there represented to have said, that if the parties rely wholly upon the parol agreement, neither party can compel the other to the specific performance, for the statute of frauds is directly in their way. But that if there is any agreement for reducing the same into writing, and that is prevented by the fraud and practice of the other party, this court will, in such case, give relief; as where instructions are given, and preparations made for the drawing of a marriage settlement; and before the completion thereof the woman is drawn, by the assurances and promises of the man to perform it, to marry without a settlement.

We perceive in this case, under the different views which the books give us of it, an anxiety in the court to prevent the statute from being enervated by dangerous exceptions; and we must regard the decision as wholly proceeding on the proof of actual fraud. It was fully seen that if the marriage could be considered as an execution of the contract, to take the case out of the statute, this clause of the statute would be made a perfect nullity. For it is clear that the compulsory execution of the supposed agreement could never be called for in equity, until the marriage, which was the only consideration of making it, and without which it could have no application, was celebrated, so that if the celebration of the marriage were an answer to the statute, the clause could never be enforced, since the exceptions out of it would always arise, together with the occa-

ing the marriage, receded from the proposals of his first letter, but at a later time he declared that he would agree to

sions for its application. In a case determined a few years afterwards (*Sansum v. Butter*, 1 Bac. Abr. 119), the same doctrine on this subject was maintained. On the marriage of the plaintiff with the defendant's daughter, the defendant promised to give her £450 portion, and accordingly paid the plaintiff £200 in part, but took a bond from him for it, till a suitable settlement should be made, and the defendant himself gave particular directions concerning the settlement, which was drawn accordingly and engrossed; but before it was executed, the plaintiff's wife died, and the bill was brought to have the £200 bond delivered up, and the remaining part of the portion paid; the defendant pleaded the statute of frauds and perjuries, the agreement not having been reduced to writing, and signed by the parties; and by way of answer denied that the £200 was paid in part of the portion, but said that it was lent to the plaintiff, and that the bond was given for securing the re-payment. The plea was allowed, notwithstanding it had been insisted that the agreement was executed by the marriage; for that if the marriage should be looked upon as an execution of the agreement on one side, so as to take the case out of the statute, it would entirely evade it; for that all promises of this kind suppose a marriage either already had, or to be had. The authority of these cases, and the rational grounds on which they proceeded, seem not to have been broken in upon, even at times when the doctrine of part performance has been most favorably received by the courts, and may now, it is conceived, be considered as out of controversy. But though these parol promises, made before and in consideration of marriage, fall obviously within the statute of frauds, and as the authorities decisively show, ought not to be taken out of it, by any evidence in proof of

their solemnity and repetition, or by the preparations made, or directions given, for carrying them to their accomplishment, or by the consequential fact of the marriage; yet it appears from the expressions of LORD CHANCELLOR PARKER, in the above case of *Montacute v. Maxwell*, as reported in *Strange*, that a verbal promise on marriage is a sufficient consideration to support a settlement made agreeable to it after marriage. And his lordship added, that it had been frequently so determined. The indulgent inclination of the courts of equity towards these settlements after marriage has carried them a great way; for the inference from this doctrine is, that the consideration for these settlements after marriage, derived from the existence of these prior agreements, does not depend upon the legal obligation to the performance of these agreements, since the statute has made them remediless. Substantively, they have no validity, but in this auxiliary light they are capable of giving validity to what would be incapable of standing alone against the claims of creditors or purchasers provided the verbal promises proved, and the settlement made discover a clear correspondence. In a case, indeed, in which there was a double infirmity in the promise made before marriage, the same effect was given to it. In *Lavender v. Blackstone*, 2 Lev. 146, a promise made by an infant on his marriage to settle his estate when of age, was held a sufficient consideration to support the settlement after marriage made in pursuance of such promise. And in the late case of *Dundas v. Dutens*, 1 Vez. Jun. 196; and see *Pitcairn v. Ogbourne*, 2 Vez. 375; also *Shaw v. Jakeman*, 4 East, 201, the CHANCELLOR was of opinion in favor of the settlement against the husband's creditors, notwithstanding it was urged at the bar and admitted by the court, that a parol agree-

what was proposed in his first letter, and the letter was held a sufficient promise in writing, and that his last declaration had set up the terms of the first letter again.

SEC. 174. **Marriage is not Part Performance.**—Marriage alone does not amount to an act of part performance, so as to take a parol contract, entered into before and made in consideration of the marriage, out of the statute.¹ If it were so, there would be an end of the statute, which says that a contract in consideration of marriage will not be binding unless it be in writing. But if marriage were to be considered as part performance, every parol contract followed by marriage would be binding.² While equity will lend its aid to a party to defeat a fraud notwithstanding the statute of frauds, yet in order to induce such aid something more than a merely moral wrong must be established. LORD MANSFIELD, in an English case³ in which a bill was brought to secure the specific performance of a contract made by the defendant who was about to marry, that his wife should enjoy all her own estate to her separate use after the marriage, in refusing the aid of the court, said: “In cases of fraud equity should relieve, *even against the words of the statute*, as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this and such like cases of fraud equity would relieve, but where there is no fraud, only relying upon *the honor, word, or promise of the defendant*, the statute making those promises void, equity will not interfere.”

ment previous to marriage is absolutely void, and that a subsequent marriage is not a part execution of such an agreement to take it out of the statute of frauds and perjuries. Roberts on Frauds, 190–200.

¹ Montacute v. Maxwell, 1 P. Wms. 620.

² Brown v. Conger, 8 Hun (N. Y.) 625; Montacute v. Maxwell, 1 P. Wms. 618; 2 Cox, 236; Redding v. Wilks, 3 Bro. C. C. 400; Dundas v. Dutens, 1 Ves. J. 199; 2 Cox, 240.

³ Lassence v. Tierney, 1 Mac. & G. 572; 2 H. & T. 135, *per* LORD CRANWORTH, L. C.; see also Hammersley v. De Biel, 12 C. & F. 45; Warden v.

Jones, 23 Beav. 487; *affd.* 2 De G. & J. 76; Cooper v. Wormald, 27 Beav. 266; Caton v. Caton, L. R. 1 Ch. 137; *ib.* 2 H. L. 127. In *Jeston v. Key*, L. R. 6 Ch. 613, MELLISH, L. J., said: “There was a marriage contract between the husband and the wife’s father. They both agreed to make a settlement, and this agreement was not performed by either party. *But the contract was partly performed by the marriage.*” This, however, is, it is submitted, inconsistent with the above cases, none of which were referred to in argument, and the case itself did not turn upon any parol promise in consideration of marriage.

SEC. 175. Part Performance Independently of Marriage.—

There is a distinction between the cases in which there is no part performance *except by the marriage* and those *where there is part performance independently of the marriage*, as where a contract to settle property is carried out. In the latter the part performance may be such as to take the case out of the statute.¹ In order to bring a case within the rule it must be proved that the parol contract which it is sought to enforce *formed part of the general arrangement on which the marriage took place*, and was not a separate transaction.² In this class of cases the courts are not inclined to scrutinize these ancillary acts with much severity, or require that they should in themselves be of much importance.³ Where, previously to the defendant's marriage, it was agreed that £500, the property of the wife, should be settled upon her, and the marriage took place before the settlement was executed, but afterwards a draft settlement was prepared of which the husband approved, and on which he acted during his wife's life, it was held by LORD HARDWICKE that there were strong circumstances to take the case out of the statute.

Again, where a father, shortly before the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to them on their marriage, and after the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed the title-deeds to the husband, who expended money on the property, it was held that there was sufficient part performance to take the case out of the statute.⁴ In *Neale v. Neale*,⁵ taking possession and making permanent improvements by the husband and wife were held a sufficient part performance of an antenuptial verbal promise by the father of the husband to convey land to the wife, made in consideration of the intended marriage. In *Surcome v. Pinniger*,⁶ a father, before the marriage of his daughter, told her

¹ *Hammersley v. De Biel*, 12 C. & F. 64 n.; *Lassence v. Tierney*, 1 Mac. & G. 572, *per* LORD COTTENHAM; *Surcome v. Pinniger*, 3 D. M. G. 574, *per* TURNER, L. J.; *Warden v. Jones*, 23 Beav. 494, *per* ROMILLY, M. R.

² *Goldicutt v. Townsend*, 28 Beav. 450, *per* ROMILLY, M. R.

³ *Taylor v. Beech*, 1 Ves. S. 297.

⁴ *Surcome v. Pinniger*, 3 D. M. G. 575; and see *Simmons v. Simmons*, 6 Hare, 352.

⁵ 9 Wall. (U. S.) 1.

⁶ 3 De G. M. & G. 571.

intended husband that he should give them certain leasehold property on their marriage. After the marriage he put the husband in possession, and told the tenants to pay their rents to the husband, who also laid out some money on the property. This, it will be seen, was a parol gift in anticipation of the marriage; the subsequent acts were held by the lord justices a good part performance, *per* L. J. TURNER: "In this case there has been a part performance by the delivery up of possession to the husband—a fact which has always been held to change the situation and rights of the parties—and there has been a considerable expenditure by him on the property. There is, therefore, here what was wanting in *Lassence v. Tierney*, viz., acts of part performance besides the marriage. The difficulty in these cases is that the statute of frauds presents an obstacle to suing upon the agreement. But it has been held in many cases that if there be a written agreement after marriage, in pursuance of a parol agreement before the marriage, this takes the case out of the statute; so does also part performance." The recent case of *Ungley v. Ungley*¹ is still more emphatic. A father, in contemplation of the marriage of his daughter, verbally promised to give her a certain house as a present, and at once after the marriage put her and her husband in possession. The father was the owner of the premises, which were leasehold, subject to a charge in favor of a building society, payable in installments. He paid those which fell due in his lifetime, and at his death there was a balance of £110, which fell due shortly after his death. It was held by MALINS, V. C., that the verbal promise having been proved, the possession was a part performance, which took the case out of the statute of frauds; that the intent of the donor was to give the house free from incumbrances, and so the £110 was payable out of the personal estate of the deceased. This could hardly be called a *contract* made upon consideration of marriage; it was rather a gift in anticipation thereof; and yet possession, without the making of improvements, was held a sufficient part performance, probably because the marriage itself was to be regarded as a strengthening circumstance. In *Hammersley v. De Biel*² the lady's father and her intended husband made a verbal agree-

¹ L. R. 4 Ch. Dev. 73.

² 12 Cl. & Fin. 64.

ment prior to the marriage, by which the father agreed to settle certain property on his daughter, and the husband agreed to settle a certain jointure upon her. The intended husband executed his settlement as he had promised, and the marriage took place. It was held by LORD CH. COTTENHAM that this execution of the settlement in pursuance of his contract by the husband, being an act done by him over and above the marriage, was a sufficient part performance to take the father's verbal agreement out of the statute, and it was accordingly enforced. On appeal to the House of Lords, LORD CAMPBELL and LORD LYNTHURST were strongly of the same opinion with LORD COTTENHAM, but the decision below was actually affirmed upon another view of the case.¹ In *Warden v. Jones*,² where the antenuptial verbal agreement was between the intended husband and wife alone, and not between the husband and another person, it was held by ROMILLY, M. R., that the execution of a settlement by one of the parties was not a sufficient part performance to render the agreement binding as against the other. The distinction made by the M. R. in this case would probably not be accepted and followed in those American States which have so largely increased the wife's capacity to contract by various statutes, provided the doctrine of the preceding case (*Hammersley v. De Biel*) was approved and adopted. If the execution of a written instrument, like a settlement of property, is an effectual part performance of a verbal antenuptial agreement between one of the spouses and a third person, there can be no reason, by the modern law respecting married women which prevails in those States, why the same result should not follow in the case of a verbal antenuptial agreement between the two intended spouses. In *Duval v. Getting*,³ a father, in contemplation of her marriage, made a verbal gift of land to his daughter; the marriage and subsequent possession by the daughter and her husband were held to constitute a part performance. In *Gough v. Crane*⁴ a verbal antenuptial agreement was made by a woman and her intended husband to the effect that he should be entitled

¹ *Hammersley v. De Biel*, 12 Cl. & Fin. 45.

² 23 Beav. 487.

³ 3 Gill. (Md.) 138.

⁴ 3 Md. Ch. 119.

absolutely to all her things in action, in consideration of a yearly allowance to be paid by him to her for pin money. At the marriage the wife's bonds were delivered to the husband, and he afterwards paid her the pin money as agreed. After her death this agreement was enforced against her representatives, the Maryland court of appeals holding that the delivery of possession was a good part performance. This decision has been criticized on the ground that, as the husband was entitled by law to the possession of his wife's choses in action, the fact of his possession did not indicate any contract, and therefore lacked the first essential element of a part performance, and the decision is clearly opposed to the distinction taken by the court in *Warden v. Jones*, *supra*.

The doctrine of part performance, as applicable to promises made in consideration of marriage, was very fully discussed in *Caton v. Caton*.¹ There, previously to a marriage, the intended husband and wife agreed in writing that the husband should have the wife's property for life, paying her £80 a year for pin money, and that she should have it after his death, and he gave instructions for a settlement upon that foothold. The settlement was accordingly prepared, when the parties agreed that they would have no settlement, the husband promising, as the wife alleged, that he would make a will giving her all her property. The marriage took place, and the husband made a will accordingly, which he afterwards revoked. It was held by LORD CRANWORTH that, under the circumstances, there was no contract to make a will, and that there had been no part performance.² His lordship said: "The courts of equity require specific performance of a parol contract for the sale or purchase of land when that contract has been in part performed, because if the statute were insisted upon, it would be to make it the means of effecting instead of preventing fraud. The right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract. The ground on which the court holds that part performance takes a contract

¹ L. R. 1 Ch. 137; *affd.* L. R.; *ib.* 2 H. L. 127; see the remarks of MILLINS, V. C., on this case in *Coles v. Pilkington*, L. R. 19 Eq. 179.

² On the appeal to the House of

Lords, LORD CRANWORTH's decision was affirmed on the ground that there was no memorandum in writing, and the question of part performance was not argued.

out of the purview of the statute is that when one of two contracting parties has been induced or allowed by the other to alter his position on the faith of the contract, as, for instance, by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced or allowed the person contracting with him to act and expend his money.”¹

SEC. 176. Representations of Third Party Referring to Marriage.—If one person holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other person consents to celebrate the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, the court will give effect to the proposal.

Thus where proposals of marriage written by the lady's brother, acting by her father's authority, stated that “Mr. J. P. Thompson (the father) also intends to leave a further sum of £10,000 in his will to Miss Thompson to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of the father. These are the bases of the arrangement, subject of course to revision; but they will be sufficient for Baron De Biel (the intended husband) to act upon,” and Baron De Biel, upon receiving the proposals, provided a jointure as required by them for his intended wife, and then married her, and the sum of £10,000 was not left by Mr. Thompson; it was held that his estate was liable to pay it.²

In *Bold v. Hutchinson*,³ the estate of a deceased father was charged with the payment of a sum of money which he had by parol promised to leave by will, LORD ROMILLY said: “Moral obligations in matters of this description, as they are treated in courts of equity, are co-extensive with and not different from legal obligations, where they are expressed in clear and distinct language. No doubt vague and ambiguous

¹ And see *Williams v. Williams*, F. 45; affg. S. C. nom.; *De Biel v. Thompson*, 3 Beav. 475.

² *Hammersley v. De Biel*, 12 C. & G. 558. ³ 20 Beav. 250; affd. 5 De G. M. & G. 558.

representations might be made to persons on marriage which might create expectations and belief, which the person making them might be morally, though not legally, bound to execute; but where the matter is clearly and distinctly expressed, then, in my opinion, the legal obligation follows the moral obligation, and is co-extensive with it.”¹

Again where, upon the treaty for a marriage, the father of the lady wrote to the husband, “I still adhere to my last proposition, viz., to allow Elizabeth £100 a year . . . and at my decease she shall be entitled to her share of whatever property I may die possessed of,” it was held that this was a contract binding on the father, but that it did not include freehold property.”²

SEC. 177. By Whom Enforced.—Such representations may be enforced not only by the persons to whom they were made, but also by the issue of the marriage. Thus where, previously to a marriage, the solicitors to the father of the intended wife stated in a letter that the father did not propose to exercise a certain power of appointment, and the fund to which the wife would become entitled in default of appointment was comprised in the settlement made on the marriage, and the father afterwards exercised his power in favor of his other children, it was held, under the circumstances, that the child of the marriage was entitled to have brought into the settlement, out of the father’s estate, a sum equal to that which would have come under the settlement in default of appointment.³

SEC. 178. Representation Must be Clear.—In order to make a third person liable upon his representations or promises, the person seeking to enforce them must show distinctly that clear and sufficient representations or promises were made;⁴ a vague representation is not enough, and there must be a reasonable certainty as to the amount.

In *Kay v. Crook*,⁵ a father, on the treaty for the marriage of his eldest son, promised by letter to settle a sum of money

¹ See also *Saunders v. Cramer*, Dr. 106; *affd. ib.* 473; 13 W. R. 335, & War. 87; *Warden v. Jones*, 23 Beav. 761.
487; *affd.* 2 De G & J. 1176.

² *Laver v. Fielder*, 32 Beav. 1.

³ *Walford v. Gray*, 11 Jur. (N. S.)

⁴ *Randall v. Morgan*, 12 Ves. 67;
Maunsell v. White, 4 H. L. C. 1039.

⁵ 3 Sm. & G. 407.

forthwith, and to recognize his son in common with the rest of his family in the future provisions of his will. The sum of money was settled, and the marriage took place on the faith of the representations in the letter. By his will the testator made a substantial provision for his son, but much less than equal to those made for his other children. It was held that the promise was so vague as to the amount that consistently with it the testator might have given all his property to a stranger, and that the promise was satisfied by the provision in the will. STUART, V. C., said: "A vague representation is not enough. If the plaintiff can show a representation by his father that he would leave him a sum certain by his will, and if he contracted a marriage on the faith of that representation, he is entitled in this court to have that sum made good out of his father's assets." There is not here (what was relied upon in the case of *Hammersley v. De Biel*)¹ a certain sum specified as to the amount of the provision.²

Where a father, prior to the marriage of his daughter, in a correspondence with her intended husband, stated that all his property would be equally divided amongst his children at his decease; but in a settlement executed prior to the marriage there was no expression of any such intention, it was held that all that was intended to be binding on the father was embodied in the settlement.³

SEC. 179. Parol Evidence Admissible to Prove Promise.—Such an agreement may be enforced although the letters containing the promise have been lost, if their existence, and the substance of their contents, is clearly established by evidence.⁴

SEC. 180. Marriage Cannot Take Place on Faith of Representations.—A parol promise, made prior to a marriage, cannot be enforced, if the marriage did not take place by reason of any reliance on such promise, or if it was not acted on as a reason and consideration for the marriage,⁵ nor will a written

¹ 12 C. & F. 45.

² See also *Jameson v. Stein*, 21 Beav. 5; *Laver v. Fielder*, 32 Beav. 1; *Loffus v. Maw*, 3 Giff. 603; *McAskie v. McCay*, 2 I. R. Eq. 452.

³ *Lexley v. Heath*, 1 D. F. & J. 489,

affg. S. C. 27 Beav. 523; and see *Sands v. Soden*, 10 W. R. 765.

⁴ *Gilchrist v. Herbert*, 26 L. T. (N. S.) 381.

⁵ *Goldicutt v. Townsend*, 28 Beav. 445; *Jameson v. Stein*, 21 Beav. 5;

promise be enforced, if the person seeking to enforce performance of it did not know of it when the marriage took place, as the marriage cannot be supposed to have taken place in consideration of the promise.¹

SEC. 181. Party Making Representation Refusing to be Bound. — Although a mere representation of an intention to do something by an instrument revocable in its nature will, if acted upon by the person to whom the representation is made, be enforced, yet if the person making the representation refuses definitively to bind himself to perform his promise, the court will not enforce the specific performance of the promise. Thus, where the testator on the marriage of one of his nephews told him that he had left him certain estates by will, and subsequently on being applied to to make a settlement, wrote to the nephew as follows: "My sentiments respecting you continue unalterable; however, I shall never settle any part of my property out of my power so long as I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estates will come to you at my death, unless some unforeseen occurrence should take place. I have never settled anything on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made;" and shortly afterwards the marriage took place; and the marriage settlement (of which the testator was a trustee) recited the promise contained in the letter, and the testator having quarrelled with his nephew left the estates to other persons; it was held in the House of Lords that there was no contract which could be enforced. The case was decided on the short principle that there never was any engagement on the part of the uncle that he would bind himself to leave the property to his nephew. LORD COTTENHAM pointed out that it could not be argued that the testator, who cautiously insisted on reserving to himself power while he "existed," had given up his power, and that too by the very letter in which he made the reservation; and his lordship distinguished the case from *Hammersley v. De*

Caton v. Caton, L. R. 1 Ch. 137; *affd.*
L. R. 2 H. L. 127.

¹ *Ayliffe v. Tracy*, 2 P. Wms. 65.

Biel¹ on the ground that in that case there was a contract which was partly performed by the execution of a settlement by the intended husband, and by the marriage.²

It has been said that if a person possesses a legal right, the court will not interfere to restrain him from enforcing it, although between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it, and the person to whom the representations were made has acted on them.³ This, however, seems to be inconsistent with the decision in *Hammersley v. De Biel*.⁴ And it is to be noticed that this case was not referred to by any of the counsel or law lords in *Jorden v. Money*, see *Prole v. Soady*.⁵

SEC. 182. Expression of Wish by Husband.—Where a suitor wrote to the mother of the lady as follows: “If your daughter has or may have money, my wish and intention is that it should be settled for her sole and entire use,” and consent was given to the marriage, in the faith that the intention thus expressed would be fulfilled, and the marriage took place without a settlement; the court ordered the wife’s property to be settled in the usual way, *STUART, V. C.*, saying: “It is clear that the marriage took place on the faith of the promise expressed in this letter to settle the whole of the young lady’s property, present and future, for her separate use. The defendant, therefore, is as much bound in the eye of this court, as if he had executed a settlement containing such stipulations.”⁶ But where an intended husband, who was an infant, wrote to the trustee of the intended wife on Tuesday, that he especially wished his wife’s property entirely settled on herself, and that the marriage was to take place on the Saturday, and it took place, unknown to the trustee, on the Wednesday, without any settlement, it was held that

¹ 12 C. & F. 45.

² *Maunsell v. White*, 4 H. L. C. 1039; see also *Moorhouse v. Colvin*, 5 Beav. 341; affd. 21 L. J. Cap. 782; *Kirwan v. Burchell*, 10 Ir. Ch. Rep. 63; *Caton v. Caton*, L. R. Ch. 137; affd. L. R. 1 H. L. 127.

³ *Jorden v. Money*, 5 H. L. C. 185.

⁴ 12 C. & F. 45.

⁵ 2 Giff. 1; *Loffus v. Maw*, 3 Giff. 603; *McAskie v. McCay*, 2 I. R. Eq. 452.

⁶ *Alt v. Alt*, 4 Giff. 84; and see *Payne v. Mortimer*, 1 Giff. 118; affd. 4 De G. & J. 447; *Loffus v. Maw*, 3 Giff. 592; *Skidmore v. Bradford*, L. R. 8 Eq. 134.

this letter contained no settlement or agreement for a settlement binding on the husband or wife.¹

SEC. 183. False Representation of Fact. — If a representation is made upon the circumstances of a person about to form a connection in marriage, and that representation is of such a nature that, if not made good, or if varied, it will materially affect the circumstances in life of that party, the court will hold the party bound to make good that representation, even at the suit of individuals concerned in fraudulently defeating such a representation upon which that connection was proceeding.² Thus, where the agent of the intended husband made out a schedule of his debts, to be laid before the father of the intended wife, and concealed a large debt due to himself, he was afterwards restrained from enforcing the debt.³ So where a mortgagee aided in concealing his mortgage upon an estate settled in contemplation of marriage, he was postponed to the objects of the settlement.⁴ Again, where a note was given to the intended husband by his brother for a large sum of money, as the balance of accounts between them, when no such balance existed, and the marriage took place on the faith of that sum being owing, the brother was charged with the pretended balance.⁵

SEC. 184. Fraud not Allowed to be Covered by the Statute. — If a person by means of fraud prevents the due execution of an agreement, the statute will not apply. Thus, where the defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing, which comprised the terms of the agreement, but afterwards designing to elude its force, and free himself from it, he ordered his daughter to affect good humor, and persuade the plaintiff to deliver up the writing, and then marry him; and she accordingly did so, the plaintiff afterwards brought his bill for relief, and obtained a decree on the ground of fraud.⁶

¹ Beaumont v. Carter, 32 Beav. 586.

² De Manneville v. Crompton, 1 V. & B. 356, per LORD ELDON.

³ Neville v. Wilkinson, 1 Bro. C. C. 543.

⁴ Berrisford v. Milward, 2 Atk. 49.

⁵ Montefiori v. Montefiori, 1 W. Bl. 363; see also Jorden v. Money, 5 H. L. C. 210.

⁶ Mullet v. Halfpenny, cited Peachey on Settlements, 82; and see Cookes v. Mascall, 2 Vern. 200.

In *Money v. Jorden*,¹ the defendant, a bond creditor of the plaintiff, promised, on the plaintiff's marriage, never to enforce it, and the marriage took effect on the faith of such assurance. ROMILLY, M. R., held that the defendant was bound to give effect to the promise, and granted an injunction to restrain her from suing on the bond. On appeal to the Lords Justices,² their lordships differed, KNIGHT BRUCE, L. J., agreeing with the Master of the Rolls that there was sufficient ground for the interposition of the court, while LORD CRANWORTH, L. J., held that the declarations being of intention merely, and not of fact, were not such representations as to bind the creditor. In the House of Lords,³ LORD CRANWORTH adhered to his opinion, saying that the doctrine "that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things, as existing at the same time,"⁴ does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do,⁵ and LORD BROUGHAM took the same ground. LORD ST. LEONARDS differed, both upon the facts and the law; thinking,⁶ that it was utterly immaterial whether there was a misrepresentation of fact, as it actually existed, or a misrepresentation of an intention to do, or to abstain from doing, an act which would lead to the damage of the party induced to act upon the faith of that representation; that if an intention is declared, with reference, for example, to a marriage, not to enforce a given right, and the marriage takes place on that declaration, there is a binding undertaking. The decision of the Master of the Rolls was reversed.⁷

¹ 15 Beav. 372.

² 2 D. M. G. 318.

³ Nom. *Jorden v. Money*, 5 H. L. C. 185.

⁴ *Pickard v. Sears*, 6 Ad. & El. 469.

⁵ P. 214.

⁶ P. 248.

⁷ See the remarks upon this case in *Piggott v. Stratton*, Johns. 356, where WOOD, V. C., said that it was decided,

partly on the ground of the statute of frauds, and S. C. 1 De G. F. & J. 51, where LORD CAMPBELL said that the *ratio decidendi* of the case was, that where a person possesses a legal right, a court of equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his inten-

SEC. 185. **Written Agreement after Marriage.**—A written agreement made after marriage, in pursuance of a parol promise made before marriage, is sufficient as against the person making it.¹ But a post-nuptial settlement, made in pursuance of a parol ante-nuptial agreement, is not binding as against creditors.² There are some *dicta* to be found in the cases which support the contrary proposition.

In *Dundas v. Dutens*,³ LORD THURLOW seemed to think that a post-nuptial settlement of the wife's property, reciting a parol ante-nuptial agreement to make a settlement, could be enforced against creditors.⁴

In *De Biel v. Thomson*,⁵ LORD LANGDALE, M. R., said that in the case of *Randall v. Morgan*,⁶ SIR WM. GRANT expressed great doubt whether a letter written after the marriage, referring to a parol agreement before the marriage, would be sufficient to give validity to a promise which of itself produced no obligation; but that LORD HARCOURT, in the case of *Hodgson v. Hutchenson*,⁷ thought that a letter after the marriage, considering the transactions before, was, in that case, sufficient.

On appeal,⁸ LORD COTTENHAM referred to the cases of *Hodgson v. Hutchenson*,⁹ *Taylor v. Beech*,¹⁰ and *Montacute v. Maxwell*,¹¹ as deciding that a written promise after marriage to perform a parol agreement made before, would be binding within the statute.¹² But the actual decisions in these cases turned on acts of part performance. In *Surcome v. Pinniger*,¹³ where TURNER, L. J., expressed an opinion to the same effect, the decision was also grounded upon acts of part performance; and in *Barkworth v. Young*,¹⁴ the marriage took

tion to abandon it; and see *Stephens v. Venables*, 31 Beav. 128; *Loffus v. Maw*, 3 Giff. 604.

¹ *Taylor v. Beech*, 1 Ves. S. 297; *Montacute v. Maxwell*, 1 P. Wms. 618; 2 Cox, 236; *Barkworth v. Young*, 4 Drew. 1; *Hammersley v. De Biel*, 12 C. & F. 64, n.

² See May on Voluntary and Fraudulent Alienation of Property, p. 346.

³ 2 Cox, 235; 1 Ves. J. 196.

⁴ See the remarks of GRANT, M. R., upon this case in *Randall v. Morgan*, 12 Ves. 74.

⁵ 3 Beav. 474.

⁶ 12 Ves. 73.

⁷ 5 Vin. Abr. 522, pl. 34.

⁸ *S. C. Nom. Hammersley v. De Biel*, 12 C. & F. 64, n.

⁹ 5 Vin. Abr. 522, pl. 34.

¹⁰ 1 Ves. S. 297.

¹¹ 1 P. Wms. 618; 2 Cox, 236.

¹² On the appeal to the House of Lords, 12 C. & F. 45, the defence under the statute was abandoned.

¹³ 3 D. M. G. 571.

¹⁴ 4 Drew, 12.

place on the faith of representations made by a third party.

On the other hand, in *Spurgeon v. Collier*,¹ it was held that a settlement made *after* marriage was voluntary, proof of its having been made in pursuance of a parol contract failing, and that even if such promise had been proved to have existed, it would not have supported the settlement, LORD NORTHINGTON saying: "If such a parol agreement were to be allowed to give effect to a subsequent settlement, it would be the most dangerous breach of the statute, and a violent blow to credit. For any man, on the marriage of a relation, might make such a promise, of which an execution never could be compelled against the promisor, and the moment his circumstances failed he would execute a settlement pursuant to his promise, and defraud all his creditors."

In *Warden v. Jones*,² the point was expressly decided, and the decision of LORD THURLOW in *Dundas v. Dutens*³ dissented from.

The facts were as follows: Previously to a contemplated marriage, the intended husband and wife went to a solicitor to have a settlement prepared of some railway stock, of which the intended wife was the registered proprietor, but which was subjected to a mortgage, and the certificates of which were in the hands of the mortgagee. The solicitor not being able to prepare the settlement before the time fixed for the marriage, the husband told the wife that it would be equally good if made afterwards, and no settlement, or agreement for a settlement, was made in writing before the marriage. Shortly after the marriage a settlement was executed, whereby the husband covenanted to invest part of the proceeds of the stock upon trust for the benefit of his wife and children. He sold the stock, paid off the mortgage, and invested the stipulated amount, according to his covenant. It was held that the settlement was voluntary and fraudulent, and therefore void as against creditors, and that the wife had no equity to a settlement.

LORD CRANWORTH, on the appeal,⁴ said: "The argument here was, first, that the parol agreement being proved, the

¹ 1 Edén, 55.

³ 2 Cox, 235; 1 Ves. J. 196.

² 23 Beav. 487; affd. 2 De G. & J.

⁴ 2 De G. & J. 84.

parties were under a moral, though not legal, obligation to perform it, so that the settlement could not be fraudulent. To this, however, the judgment of LORD NORTHINGTON in *Spurgeon v. Collier* affords a conclusive answer.¹

SEC. 186. Not Revocable. — It is stated by Atherley² that a promise by letter or in writing will be enforced even though the person making it dissents from the marriage, and declares that he will give the parties nothing; and this rule is sustained by *Wonckford v. Fotherley*,³ but is subject to the exception that it is to be applied only where a mutual attachment has been permitted to grow up under the sanction of the promisor.⁴ In the case cited by Atherley in support of the rule,⁵ the treaty for the settlement upon the basis of a letter of the lady's father was depending for a long time, and in the meantime the parties married. The father, before they went to the church, revoked his promise, and said he would give them nothing, SOMERS, LORD-KEEPER, said he looked upon this as nothing, *after the young people's affections were engaged*, regarding such a tardy revocation as a fraud upon those who, reposing faith therein, had permitted their relations to each other to suffer an irrevocable change.

SEC. 187. Time of Performance. — Where no time is specified in which the contract is to be performed, it must be performed within a reasonable time after the marriage is consummated.⁶ Thus, in the case last cited, the defendant promised that if the plaintiff married his daughter, he would endeavor to do her equal justice with the rest of his daughters, as fast as it was in his power with convenience; and it was held that he was bound to perform the promise within a reasonable time after the marriage, and was bound to make an advancement to the plaintiff and his wife equal to the largest made to any of his daughters, and that in determining what is a reasonable time, his property and the circumstances were to be considered.

¹ See also *Gulliver v. Gulliver*, 2 Jur. (N. S.) 700; *Spicer v. Spicer*, 24 Beav. 367; *Hogarth v. Phillips*, 4 Drew. 360; *Cooper v. Wormald*, 27 Beav. 266; *Goldicutt v. Townsend*, 28 Beav. 445; *Mignan v. Parry*, 31 Beav. 211.

² Atherley, *Marriage Settlement*, 84.

³ Freem. Ch. 201.

⁴ *D'Aquillar v. Drinkwater*, 2 V. & B. 234.

⁵ *Wonckford v. Fotherley*, Freem. Ch. 201.

⁶ *Chichester v. Voas*, 1 Munf. (Va.) 98.

SEC. 188. **Post-nuptial Settlement.**—It has been held in England that a post-nuptial settlement made upon and reciting a parol ante-nuptial contract, is valid as against the creditors of the person contracting;¹ but the rule now seems to be both in England² and in this country,³ that such settlement is not good as against prior creditors, but is good as between the parties.⁴ In *Randall v. Morgan*,⁵ a contrary doctrine was intimated, but the weight of authority is the other way; and in New Jersey⁶ it has been held that, upon proper proof of such ante-nuptial agreement, the court would give effect to a post-nuptial settlement made in pursuance of it, even against the creditors of the husband.

SEC. 189. **Promise must be Absolute.**—In order to give effect to such a promise, it must be absolute in its terms. Thus, in *Randall v. Morgan*,⁷ the father of the wife, in a letter to her husband before their marriage, said: "The addition of £1,000, three per cent stock, is not sufficient to induce me to enter into a deed of settlement. Whether Mary remains single or marries, I shall allow her the interest of £2,000, at four per cent; if the latter, I may bind myself to do it, and to pay the interest at her decease to her and her heirs." It was held that, taking the whole letter together, there was no contract to enforce.

¹ *Dundas v. Duten*, 1 Ves. J. 196.

² *Warden v. Jones*, 2 De G. & J. 76; *Spicer v. Spicer*, 23 Beav. 487; *Bovy's Case*, 1 Vent. 193.

³ *Davidson v. Green*, Riley (S. C.) Eq. 219; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; *Borat v. Carey*, 16 Barb. (N. Y.) 136; *Winn v. Albert*, 5 Md. 66; *Smith v. Green*, 3 Humble (Tenn.) 118; *Blow v. Maynard*, 2 Leigh (Va.) 29; *Andrews v. Jones*, 10 Ala. 400; *Izard v. Izard*, Bailey (S. C.) Eq. 228; *Wood v. Savage*, 2 Doug. (Mich.) 316; *Battersbee v. Farrington*, 1 Swanst. 113.

⁴ *Reade v. Livingston*, *ante*; *Warden v. Jones*, *ante*; *Bovy's Case*, 1 Vent. 193; *Spicer v. Spicer*, 24 Beav. 367. Also cases cited in n. 3. *Argenbright v. Campbell*, 3 H. & M. (Va.) 144; *Montacute v. Maxwell*, 1 P. Wms. 618; *Hammersley v. De Biel*, 12 Clr. 745; *Lavender v. Blackstone*, 2 Lev. 147.

⁵ *Randall v. Morgan*, 12 Ves. 67. See also *Shaw v. Jakeman*, 4 East, 201.

⁶ *Satterthwaite v. Ensley*, 4 N. J. Eq. 489.

⁷ 12 Ves. 67.

SECTION IV.

INTEREST IN LANDS.

“No action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them . . . unless the agreement upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith, or some other person thereto authorized in writing.”

CHAPTER VI.

INTEREST IN LANDS.

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SECTION 190. Historical View of Alienation of Estates in Lands.—In the rudest state of society in all countries, some formality beyond mere words signifying the consent of the parties, was always necessary to the transfer of property in land, the object being to give notoriety to a transaction which was to determine the reciprocal rights and obliga-

tions of the parties to this important description of property.¹ With regard to movables, the things being susceptible of manual delivery, a mere parol expression of consent has at all times been deemed sufficient to consummate and publish the transfer; but where lands or houses are the subject of the conveyance, the transferee must come to the thing, which remains stationary and unchanged, and the conversion of the property and change of title require to be effected and promulgated by an ostensible relinquishment by the one party and occupation by the other, accompanied by expressions to testify the intention, and to make the transaction amount to a delivery of the possession. In the first ages of man in his social state, the history of most nations makes mention of authorized ceremonies accompanying the transfers of property in land, sometimes popular and arbitrary, and sometimes judicial, and transacted before magistrates.² As the possession of land carried with it, in the feudal times, a reciprocity of personal duties, some notoriety and solemnity in the conveyance of this species of property seems to have been very proper under a system of polity, in which the transfer of land implied an investiture as well as a grant. The subject of these transmutations being either corporeal or incorporeal, and things untangible and incorporeal being incapable of actual delivery, the notoriety of this actual delivery was, therefore, where the subject was not corporeal, supplied by the solemnity of an instrument in writing, sealed and delivered. Such things were said to lie not in livery, but in grant, as reversions, remainders, rents, advowsons, commons, and such like hereditaments. But manors, houses, and lands, being things of a corporeal existence, and susceptible of a specific transfer, were, therefore, necessary to be transferred by livery of seizin. While society was in its rudiments, and writing uncommon, the notoriety of the

¹ As to feudal tenures and the jealousy with which they were guarded, see Bract. lib. 2, Cap. 584; Lib. Feud. 5, tit. 13; 4 tit. 45, edit. Cujac. These tenures received a severe blow in the reign of Edward First, by the passage of the statute *Quia Emptores* which combined the power of alienation in the vassal with

the preservation of the fruits of the tenure to the land; and were finally destroyed by stat. 12th Charles Second, by which the restraint upon the testamentary disposition of lands was removed.

² *Vide* Heineccius, Rom. Antiq. lib. 2, tit. 1, No. 19, 20; and see 23d chapter of Genesis.

livery was chiefly relied upon till the formality of a written instrument came into use, as an authentication of the livery and seizin, and brought with it some relaxation of the old ceremonies.

The first feudal grants are said to have been gratuitous, whereby the donor parted only with the *dominium utile* or *usufruct* to the vassal, reserving to himself the *dominium directum*; and, on account of the favor which prompted the gift, there seems to have been much humility in the form of acceptance by the donee, who, being chosen for his personal qualifications or deserts, received from the hands of the superior himself his investiture (therefore called the *investitura propria*), in the presence of the *pares curiae*, and on the land itself, with a rigorous exaction and observance of those circumstances of ceremony which were calculated to impress the memory of the transaction on the witnesses. The first departure, in practice, from the rigor of the primitive observances, seems to have been a *symbolical* delivery of the possession; though from the great inconvenience in many cases, of making the corporeal transfer, this substitution must be but little short of the antiquity of the direct method by livery and seizin on the land itself; and, indeed, it seems to have been the usage of very remote times.¹ As it was the intention of the words, which were used before writing was adopted, to declare the tenor of the grant, and the nature and obligation of the investiture; so, when the practice added writing to the transaction, such writing did only record the fact and the intention of the parties, in a form extremely short and simple.²

It is easy to apprehend how rapidly this simple document would assume a more complicated shape, and modify itself to the more intricate wants and interests of mankind, by qualifying the grant with express stipulations and conditions. And we can readily suppose that it would soon make the principal figure in all conveyances of land, and

¹ Thus the delivery of a shoe was the symbol of the transfer of the land of Elemelech to Boaz. The purchase by Jeremiah of Hanameel's field was ratified by an instrument, subscribed and sealed, Genesis, chapter 22, but this seemed to be only a

memorial of the transaction, and a method of recording the testimony of the ocular witnesses.

² See the account of the *breve testatum* in the Book of Feuds, 1 tit. 4; and Craig, lib. 2, Dieg. 2, No. 16.

become the standing evidence of the change of the property. It was the natural effect of this altered state of things, to substract from the feudal investiture much of its sanctity and publicity; the *improper investiture*, as it was called, being received from the attorneys or stewards of the lord, instead of the lord himself, came into common practice; attestation of common witnesses, instead of the *pares curiae*, was received; and, as these witnesses, being not the *pares curiae* of the particular manor, served as well for one as another, all the lands lying in one county, and intended to be conveyed, might pass by the livery of one parcel in the name of them all.

The ancient form of conveyance thus gradually declined from the dignity of the *proper investiture*, and yet, slight as it had become in respect to its ceremonial, the ingenuity of men was very early at work in inventing substitutionary methods of evading the necessity of making the livery of seizin by themselves or their attorneys. It is said by a sensible writer,¹ that "earlier than the time of Littleton, it had come into fashion to transmit land by attornment if there was a tenant, and by a lease and release if there was none; in the first of which cases, the form of getting the consent of the tenant of the ground, to the transfer, supplied the place of that livery, which could not be given; and, in the other case, the grantor gave to the grantee an imaginary lease, in order to put him into possession, and the next minute released." In each of these methods by attornment,² and lease and release, an act was done of an osten-

¹ Dalrymple on Feudal Property, ch. 6, § 3.

² The ceremony of attornment seems at all times to have produced more danger than security to property. The statute 4 Ann. c. 16, § 9, has, therefore, made all grants and conveyances good without attornment, and thus removed the necessity for making it: but its efficacy as an act of notoriety and evidence yet remained, and, as it appears, continued to be made an ill use of; for the statute 11 Geo. 2, c. 19, § 11, reciting that the possession of estates was rendered very precarious, by the fre-

quent and fraudulent practice of tenants, in attorning to strangers, who claim title to the estates of their respective landlords or lessors, who are thereby put out of the possession of their respective estates, and put to the difficulty and expense of recovering the same by action at law; it is therefore, thereby enacted, that all such attornments shall be void, and the possession not altered; but it is also thereby provided, that the same act shall not extend to effect any attornment made pursuant to any judgment at law, or decree, or order of a court of equity, or made with

sible kind to notify the change of property; for the attorning in one case, and the actual entry upon the lease in the other, was still a *ceremony*, though but slight in comparison of the old formalities which took place upon the feudal feoffment. While the ancient forms of transmission and investiture were thus declining into shadows, the practice of creating secret trusts and confidences (for such were uses at the common law) for evading the pressure of the feudal burdens, which were daily becoming less tolerable, as social and political changes diminished their utility and their recompense, and for escaping the consequences of attainders and convictions, which, multiplied with the contests of factions and the struggles of liberty, were threatening to become universal. "Which practice," says LORD BACON,¹ "was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land, did not know against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds, the husband of his courtesy, the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt, and the poor tenant of his lease."

The method pursued for remedying these inconveniences, while it failed of accomplishing its immediate purpose, nearly caused all the ancient notorious method of transfer, and even its very shadows and substitutes, to disappear, by giving effect to new and secret conveyances. The statute of the 27th Hen. 8, c. 10, called the Statute of Uses, which had been preceded by many partial attempts to attain the same object,² by fastening upon the interest of the *cestui que* use the same obligations, and subjecting it to the same remedies

the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagees after the mortgage has become forfeited.

¹ Use of the Law, 153.

² To remedy the inconveniences of these creations of uses and trusts, in respect to lands, a multitude of statutes were enacted for making the *cestui que* use to be considered, for the particular purpose then in the contemplation of the legislature, the real owner of the land. Thus, the 50th Edw. 3, c. 6; 2 Ric. 2, sess. 2, c. 3; 19 Hen. 7, c. 15, subjected the

land to be extended by the creditors of *cestui que* use; 1 Ric. 2, c. 9; 4 Hen. 4, c. 7; 1 Hen. 6, c. 3; 1 Hen. 7, c. 1, allowed actions for the freehold to be brought against the *cestui que* use if in the actual pendency of the profits; 11 Hen. 6, c. 5, made the *cestui que* use liable to the action of waste; 1 Ric. 3, c. 1, gave legal effect to his conveyances and leases, made without the concurrence of his feoffees; and 4 Hen. 7, c. 17; 19 Hen. 7, c. 15, made him answerable for the feudal perquisites, and gave the lord the wardship of his heir.

in a variety of particular instances, as had before accompanied exclusively the legal ownership, at once identified the use with the legal property in the land, or, as it is expressed, "*transferred the use into the possession*"; or, in other words, annexing the possession to the use. Before this statute, *equitable* estates were created without *livery*, or *entry*, or *attornment*, and by virtue of this statute, these equitable estates, as soon as they were created, became clothed with the legal interest, so that *legal* estates became grantable without *livery*, *entry*, or *attornment*. The bargain and sale came now, therefore, to be the general method of conveyance, which, having once raised the use upon the valuable consideration, left the statute to do the rest of the work: and so completely does form and solemnity seem at this juncture to have been lost sight of, that it appears, according to some authorities, and that of LORD COKE among others, that even lands might, in the interval between the statute of uses and enrolments, have been transferred by a parol bargain and sale.¹ Nor does it appear that such unsolemn modes of conveyance, where the customs of boroughs have sanctioned them, received a decided and universal prohibition till the great statute of Charles the Second, which is the subject of this treatise, was enacted. In the meantime, it should be remarked, that the evil, which it was the direct purpose of the statute to prevent, eluded its intention in the new shape of a trust, the courts having determined a use upon a use, not to be executed or converted into the legal estate by the statute. The easy and informal transfer of real property, by the secret method of a bargain and sale unrecorded, called for the legislative interference by the statute of enrolments, whereby it was made² necessary to register in court these conveyances of the freehold, which were thenceforth required to be in writing, under seal. But this statute omitted to extend its provisions to bargains and sales for terms of years, the consequence of which omission was the total disappointment of its salutary purpose by the conveyance by lease and release, not then, indeed, for the first time invented, but for the first time founded on a lease made by a bargain and sale, to save the necessity of the entry, by the help of the use executed by the statute.

¹ See 2 Inst. 675; 1 Leon. 18.² 27 Hen. 8, c. 16.

Amid all these changes, however, under which the old feudal fabric of conveyance had sunk into desuetude, the transfer by parol, if the act of livery accompanied, existed potentially, until the statute of frauds and perjuries, by the clauses which form the subject of this chapter, imposed universally the necessity of writing upon all conveyances of lands, or interests in lands, for more than three years. As the registering was avoided by the lease and release, so the necessity of writing might have been eluded by parol declarations of trusts, but the statute of frauds and perjuries had this danger also in view, and by the seventh and eighth sections, already treated of in a separate chapter of this treatise, made all actions, declarations, and assignments of trusts, void; and, upon the whole, the statute would have restored the notoriety without the inconvenience of the feoffment by livery of seizin, had it seemed, in other respects, proper to the framers thereof to have extended the provision to the registration and recording of what it has required to be in writing.¹

The passing of this statute is, however, properly regarded as a new and important era in the law in respect to contracts, trusts, and translations, of or concerning property in land: and past experience having proved the fertility of invention in suggesting means of eluding similar restraints, the courts seem resolved to make the wisdom of this law effectual, by discountenancing subtle distinctions and evasive exceptions. Epithets of a harsh kind have sometimes been thrown upon it; and to some it has seemed to be a miscellany of unconnected provisions: its objects were certainly numerous and extended, and subsequent experience and modern refinement may find something in the matter to be supplied or altered, and something in the language to be corrected, but a general and simultaneous view of its enactments, will disclose, to the diligent and unpresumptuous student, a totality of plan and

¹ By an act of the 2d Ann. c. 4, a register is directed to be kept of all deeds and conveyances affecting lands in the West Riding of Yorkshire. Another statute of the same Queen, 6th Ann. c. 35, has established a similar register in the East Riding. A third, viz. 7th Ann. c. 20, does the same for the county of Middlesex.

And, by the statute 8 Geo. 2, c. 6, the benefit of a similar provision is extended to the North Riding of Yorkshire. Registration has been made universal in Scotland, with great advantage to that country. See Darymple on Feuds, chap. 6, § 4. And in this country it is required in all the States.

structure, and a wise and uniform purpose of protecting and purifying the daily commerce of mankind.

The temptation, indeed, to convey so important a property as land without writing is but small; even when the talent of writing was rare, the livery of seizin was seldom unaccompanied by the charter of feoffment; but as the use of this accompanying instrument, by becoming *general* did not, therefore, become *essential*, while, on the other hand, it made the livery a transaction of less impression and solemnity, the possibility of swearing a man out of property of land seemed to be such as might prove a temptation to the needy and profligate. An end, therefore, has been anxiously put to the chances and opportunities of both fraud and perjury, in respect to the conveyance of interests and estates in land, except as to a lease for one, two, or three years, which is all that is left to the uncertainty of verbal testimony.¹

SEC. 191. Application of the Statute.— This section does not refer to agreements which operate as an immediate transfer or conveyance of an estate or interest in lands, but to contracts which contemplate the making or execution of a grant, transfer, or conveyance at some future time.² Nor does it embrace contracts *relating* to land but which do not confer an *interest* therein. The question as to what constitutes an interest in lands, within the meaning of this section, is a vexed one, and one which has often been before the courts, with varying results, so that no general rule, affording an invariable test for determining what contracts relating to lands are within the statute, can be given; so that the only guide in this respect, which can be given, is a reference to the class of contracts which have been held by the courts to come within the statute, or not to be subject to its operation. But it would seem that it may safely be said, that *a contract which involves the title to land, or anything which is permanently connected therewith*, comes clearly within the provisions of this section; but *contracts which, although they relate to matters which are connected with land, yet are only temporarily a part thereof, do not come within the statute*; and under these rules arise the distinctions between contracts

¹ Roberts on Frauds, 264-270.

² Sugd. V. & P. 94.

relating to matters *fructus naturales* and those which are merely *fructus industriales*, and contracts relating to fixtures which the tenant or owner of the land has a right to remove, and those which he has not. This portion of the fourth section of the statute refers to agreements for the sale and purchase and acquisition of lands, tenements, or hereditaments, or any interest in or concerning them not operating as an immediate transfer or conveyance of any estate or interest, but as contracts to make or execute a grant, or transfer, or conveyance, at some subsequent period.¹

SEC. 192. Instances of Agreements Within the Statute.—Agreements for leases and for the sale, assignment, or surrender of leasehold estates, being contracts for a grant or transfer of an estate or interest in land, are within this clause of the statute, and must consequently be authenticated by a signed writing.² Where anything is done which substantially amounts to a sale or parting with an interest in land, the contract is within the statute.³ Where it was agreed between the plaintiff, who was the tenant of a farm, and the defendant, that the plaintiff should surrender her tenancy and prevail on her landlord to accept the defendant as tenant in her place, and that the defendant should then pay her for so doing £100, it was held that the contract amounted to a sale of an interest in land, within the statute. As it appeared, however, that the plaintiff had given up the land, and that the defendant had succeeded to her interest, and had afterwards admitted that he owed her £100, it was held that the £100 might be recovered on an "accounts stated."⁴ Contracts for the letting and hiring of furnished houses and lodgings by the day, week, or month, are contracts for an interest in land, and must be authenticated by a signed writing,⁵ because if carried out, it would amount to a demise; yet a mere contract for board

¹ Sugd. Vend. 94, n.; Blood v. Hardy, 15 Me. 61; Patterson v. Cunningham, 12 Me. 506; Scotten v. Brown, 4 Harr. (Del.) 324. This extends to the sale of a pew. Vichi v. Osgood, 8 Barb. (N. Y.) 130.

² Anon., Ventr. 361; Poulteney v. Holmes, 1 Str. 405; Olmstead v. Niles, 7 N. H. 523; Folsom v. Great Falls

Co., 9 N. H. 355; Bliss v. Thomson, 4 Mass. 488; Sherburne v. Fuller, 5 Mass. 133; Hughes v. Moore, 7 Cr. (U. S. C. C.) 176.

³ Kelly v. Webster, 12 C. B. 290.

⁴ Cocking v. Ward, 1 C. B. 868.

⁵ Inman v. Stamp, 1 Stark. 12; Edge v. Strafford, 1 C. & J. 391.

and lodging as an inmate of the house, although the lodger is to have a separate room, is not,¹ nor is a mere contract by the occupant of a house to take a lodger giving him certain specified rooms, although it implies a license to go upon the land.² Agreements to furnish houses entered into between a landlord and an intended lessee or tenant, where the occupation of the house forms the substance of the contract, and the furnishing of it is bargained for only in connection with such occupation, are within the fourth section.³ Where an oral agreement was made between the plaintiff and the defendant for a lease of a ready-furnished house, and the house being only partially furnished, the defendant promised to send in more furniture, and the plaintiff took possession of the house, and the furniture not being put in, he brought his action to recover damages for the breach of the defendant's promise, it was held that the promise formed part of an entire contract for an interest "in or concerning lands, tenements, and hereditaments, and ought consequently to have been expressed in writing."⁴ If the agreement does not form part of a contract for the letting and hiring of a house, it is then of course only a sale and purchase of goods and chattels, and has nothing whatever to do with an interest in land.

SEC. 193. Agreements between Landlord and Tenant.—Agreements to make alterations and repairs in buildings entered into between a landlord and tenant, where the principal subject-matter of the agreement is the letting of the buildings, *and the improvements and alterations are accessorial thereto, and contracted for only in connection with the lease*, are contracts involving an interest in land within the statute, and cannot be enforced unless in writing.⁵ Thus, where the

¹ Wright v. Stavert, 2 E. & E. 721.

² CROMPTON, J., in Wright v. Stavert, ante; Wells v. Kingston-upon-Hull, 10 C. & P. 402.

³ Vaughan v. Hancock, 3 C. B. 766; Simmons v. Simmons, 12 Jur. 8; Botswick v. Leach, 3 Day (Conn.) 476; Perrine v. Leachman, 10 Ala. 140; Hawley v. Moody, 24 Vt. 603.

⁴ Mechelen v. Wallace, 7 Ad. & El. 49. The sending in of the furniture

was held, however, to be a condition precedent to the defendant's right of action for the rent agreed upon. 7 Ad. & El. 54, n. (b).

⁵ Vaughan v. Hancock, 3 C. B. 766; Scoggin v. Slater, 22 Ala. 687; Dubois v. Kelly, 10 Barb. (N. Y.) 496. In Smith v. Goulding, 6 Cush. (Mass.) 154, it was held that an agreement not to claim damages for the flowage of land by a dam which a person was

plaintiff, being in the possession of premises for an unexpired term, agreed to give up possession to the defendant for the balance of the term upon his agreeing to do certain repairs, and the defendant was let into possession and occupied for the balance of the term, but neglected to make the repairs, it was held that the contract related to an interest in land, and consequently, being within the statute, an action for its breach could not be maintained.¹ But an agreement to pay an additional sum in consideration that the landlord will make certain alterations in the premises, has been held not to be within the statute. Thus, where a tenant who was in the actual occupation of premises under a lease, verbally agreed with the landlord that if he would put another story on the house he would pay him £10 per year upon the cost of the addition, in addition to the rent, it was held that the absence of a written contract was no objection to a recovery of such additional rent.² In such cases, the tenant being in actual possession, the contract is treated rather as a contract for work and labor, than for an interest in land. But, if the sum so to be paid is treated as *rent*, the contract would come within the statute, because, as rent issues out of the land, it is treated as an interest in land.³

about to erect, did not confer an interest in land; but only amounted to a waiver of a claim for damages, and, therefore, need not be in writing. So in *Short v. Woodward*, 13 Gray (Mass.) 86, it was held that an agreement to take a certain annual compensation for damages occasioned by flowing lands by a dam, did not confer an interest in land, and, therefore, might be made by parol. But in these instances the agreement merely amounts to a license, and may be revoked by parol at the will of the owner of the lands affected by the flowage. Where a contract for the making of repairs, or even the assignment of a lease, *Griffith v. Young*, 12 East, 514; *Seaman v. Price*, 1 Ry. & M. 195, is executed, while no action can be maintained on the special contract, yet an action will lie for materials furnished, work and labor done, etc. *Cooking v. Ward*, 1 C. B. 368; *Kelly v. Webster*, 12 C. B. 283; *Eastham v. Anderson*,

116 Mass. 526; and where the law raises a promise, it is not within the statute, although it is raised from an agreement concerning an interest in lands, or otherwise within the statute. *Pike v. Brown*, 7 Cush. (Mass.) 133; *Goodwin v. Gilbert*, 9 Mass. 510; *Felch v. Taylor*, 13 Pick. (Mass.) 133; and under this rule it follows that an agreement, either on the part of the landlord or tenant, to do an act, which the law makes it their duty to do in the absence of an express contract, is not within the statute; and in this view it is held that a parol agreement by a tenant to leave the premises in as good condition as he found them, is not within the statute. *Halbut v. Forest City*, 34 Ark. 246.

¹ *Buttermere v. Hayes*, 5 M. & W. 456.

² *Hoby v. Roebuck*, 7 Taunt. 157; *Price v. Leyburn*, Gow. 109.

³ *Brown v. Brown*, 33 N. J. Eq. 650; *Angell v. Duke*, L. R. 10 Q. B.

SEC. 194. **Contracts Relating to Land not Within the Statute.**

— A contract for the manufacture of brick upon the land of another from the clay of which the soil is composed, the brick to remain the property of the owner of the land until the clay and brick used in their manufacture are paid for, is held not to be a contract for an interest in land;¹ and in Massachusetts² and some other States³ it is held that a sale of growing fruit, or trees to be gathered or cut and removed by the vendee, is not a sale of an interest in land.⁴ So in Indiana it is held that a verbal contract by the owner of land with another that he may set out fruit trees (500 peach) on his land, and have one-half the produce thereof, after part performance, is not within the statute;⁵ and the same is held in Maryland as to a sale of growing fruit,⁶ and in Massachusetts⁷ as to a sale of mulberry trees growing upon the vendor's land and raised to be sold. So the sale of buildings and other fixtures, *erected by a tenant, and which he has a right to remove*, is held not to be within the statute.⁸ The principal difficulty, says MR. TAYLOR,⁹ in interpreting what is meant by an interest in lands has arisen in applying that term to cases where trees, growing crops, or other things *annexed to the freehold* form the subject of the contract; and here the decisions of the courts, so far from furnishing a safe guide, only assist in confusing the student, since, to use the words of

174; *Morgan v. Griffith*, L. R. 6 Exchq. 70.

¹ *Brown v. Morris*, 83 N. C. 251.

² *Nettleton v. Sykes*, 8 Met. (Mass.) 34; *White v. Frost*, 102 Mass. 375; *Drake v. Wells*, 11 Allen (Mass.) 141; *Whitmarsh v. Walter*, 1 Met. (Mass.) 313; *Douglass v. Shummay*, 13 Gray (Mass.) 498; *Giles v. Simonds*, 15 id. 441; *Delaney v. Root*, 99 Mass. 546; *Nelson v. Nelson*, 6 Gray (Mass.) 385; *Parsons v. Smith*, 5 Allen (Mass.) 578; *Clafin v. Carpenter*, 4 Met. (Mass.) 580.

³ *Purner v. Piercy*, 40 Md. 212; *Byassee v. Reese*, 4 Met. (Ky.) 372; *Cain v. McGuire*, 13 B. Mon. (Ky.) 340.

⁴ But see *post*, § 197. Sale of growing trees.

⁵ *Wiley v. Bradley*, 60 Ind. 62.

⁶ *Purner v. Piercy*, 40 Md. 212.

⁷ *Whitmarsh v. Walker*, 1 Met. (Mass.) 313.

⁸ *Horsfall v. Hey*, 2 Exchq. 778; *Hallen v. Runder*, 1 C. M. & R. 266; *Keyson v. School District*, 35 N. H. 477; *Forbes v. Hamilton*, 2 Tyler (Vt.) 356; *Frear v. Hardenburgh*, 5 John. (N. Y.) 272; *Howard v. Easton*, 7 id. 205; *Benedict v. Beebe*, 11 id. 145; *Lower v. Winters*, 7 Cow. (N. Y.) 263; *Mitchell v. Bush*, 7 id. 185; *Barnes v. Pevine*, 15 Barb. (N. Y.) 247; *Clark v. Schultz*, 4 Mo. 235; *Scoggin v. Slater*, 22 Ala. 687; *Zeikafosse v. Hulick*, 1 Morris (Iowa) 175; *Cassell v. Collins*, 23 Ala. 676; *Green v. Vardiman*, 2 Blackf. (Ind.) 324; *Beach v. Allen*, 14 N. Y. S. C. 441; *Thouverin v. Lea*, 26 Tex. 612.

⁹ 2 Taylor on Evidence, § 754.

LORD ABINGER,¹ "no general rule is laid down in any of them which is not contradicted by some other." Indeed, none of the courts, either in this country or in England,² have agreed upon any uniform test by which to determine the merits of this question. In some of the cases they have endeavored to solve it by reference to the law of emblements, and have held that whatever will go to the executor cannot be considered as an interest in land.³ In other cases the test has been whether the property in dispute could have been seized in execution at common law,⁴ and in others a distinction has been drawn between products of the soil, *fructus industriales*, and those which are *fructus naturales*,⁵ while in others the decisions have rested partly on the legal character of the principal subject-matter of the contract, but principally on the consideration *whether, in order to effectuate the intention of the parties, it is necessary to give the vendee an interest in the land*,⁶ and this seems to be the most consistent and reliable test which can be given. Where a contract relates to an interest in lands, any collateral contract which if it stood alone would not be within the statute, falls with it. Thus, a contract to let a furnished house

¹ Rodwell v. Phillips, 9 M. & W. 505.

² Sugden's Vendors and Purchasers, 141-158.

³ In Rodwell v. Phillips, 9 M. & W. 505, LORD ABINGER seemed to regard this as the test, and said: "Growing fruit would not pass to an executor, but to the heir; it could not be taken by a tenant for life, or levied in execution under a writ of *feri facias* by the sheriff; therefore it is distinct from all those cases where the interest would pass, not to the heir at law, but to some other person."

⁴ Dunn v. Furgeson, Hayes Exchq. Rep. 543; Jones v. Flint, 10 Ad. & El. 758; Rodwell v. Phillips, *ante*.

⁵ Jones v. Flint, *ante*; Evans v. Roberts, 5 B. & C. 832; Slocum v. Seymour, 36 N. J. L. 138; Home v. Batchelder, 49 N. H. 204; Putney v. Day, 6 id. 430; Kingsley v. Holbrook, 45 id. 313; Frank v. Harrington, 36 Barb. (N. Y.) 415; Green v. Armstrong, 1 Den. (N. Y.) 550; Warren v. Leland,

1 Barb. (N. Y.) 542; Owens v. Lewis, 46 Ind. 488; Buck v. Pickwell, 27 Vt. 157; Daniels v. Bailey, 43 Wis. 566; Fitch v. Burk, 38 Vt. 687; Sterling v. Baldwin, 42 id. 306; Kilmore v. Howlett, 48 N. Y. 509; Wood v. Shultis, 11 N. Y. S. C. 309. Indeed, it may be said to be well established that the sale of growing crops, the annual produce of land, and the result of periodical planting and cultivation, are not within the statute, and may be made by parol. Austin v. Sawyer, 9 Cow. (N. Y.) 39; Marshall v. Ferguson, 23 Cal. 65; Bernal v. Hovious, 17 id. 541; Mattock v. Fry, 15 Ind. 483; Brisky v. Hughes, 4 id. 146; Bull v. Grissey, 19 Ill. 631; Heavilon v. Heavilon, 29 Ind. 509. Although in some of the States a distinction is made as to *whether the crop, at the time of the sale, is ripe*, so as to require no farther nourishment from the soil. Bryant v. Crosby, 40 Me. 9.

⁶ Jones v. Flint, *ante*.

comes within the statute, and consequently a parol contract to put more furniture into the house cannot be enforced.¹ A parol contract to surrender a house and fixtures for a certain sum is within the statute, and even though the house is surrendered according to the agreement, the agreed sum cannot be recovered;² but an agreement by a landlord to pay a tenant for fixtures which the tenant has a right to remove, at their valuation at the expiration of the term, is not within the statute.³

SEC. 195. Sale of Growing Crops.—In the case of contracts for the sale of growing crops, it is of importance to determine whether the sale is of “an interest in land” within the fourth section, or of “goods, wares, and merchandise” within the seventeenth, and it is difficult to lay down any precise rule as to when a sale of growing crops is a sale of an interest in or concerning lands. LORD ABINGER, in *Rodwell v. Phillips*,⁴ said: “It must be admitted, taking the cases altogether, that no general rule is laid down by any one of them that is not contradicted by some other.”⁵ But it

¹ *Mechlen v. Wallace*, 7 Ad. & El. 49; *Vaughan v. Hancock*, 3 C. B. 766.

² *Kelly v. Webster*, 12 C. B. 163.

³ *Hallen v. Runder*, 1 C. M. & R. 266; *Lee v. Gansell*, 1 Q. B. D. 700.

⁴ 9 M. & W. 505.

⁵ And see *Jones v. Flint*, 10 Ad. & El. 753; 2 P. & D. 594; *Marshall v. Green*, L. R. 1 C. P. D. 35. Agreements for the sale and purchase of growing grass (*primae vesturae*), growing timber or underwood, growing fruit and hops, *not made with a view to its immediate severance and removal from the soil and delivery as a chattel to the purchaser*, has been held to be a contract for the sale of an interest in land, as it is not distinguishable from the land itself in legal contemplation until actual severance, and passes to the heir, and not the executor. *Crosby v. Wadsworth*, 6 East, 610; *Griffiths v. Puleston*, 13 M. & W. 358; *Carrington v. Roots*, 2 M. & W. 248; *Scorell v. Boxall*, 1 Y. & J. 398; *Sugd. Vend. ch. 3, § 2*; *Petch v. Tutin*, 15 M. & W. 115; *Rodwell v. Phillips*,

9 M. & W. 504; *Waddington v. Bristow*, 2 B. & P. 455; *Austin v. Sawyer*, 9 Cow. 39; *Green v. Armstrong*, 1 Den. (N. Y.) 550; *Cutler v. Pope*, 13 Me. 377; *Pierrepont v. Barnard*, 5 Barb. (N. Y.) 364. But *fructus industriales*, such as growing crops of turnips, potatoes, and corn; and the annual productions of the soil raised by the labor of man, which are seizable by the sheriff under a *feri facias*, and pass to the executor and not to the heir, are considered goods and chattels, and contracts for the sale of them are, from this their original nature, considered to be contracts for the sale of goods and chattels and not of an interest in land, although they are to remain in the soil and derive a nutriment therefrom until they have arrived at maturity, and the mere license to come upon the land for the purpose of gathering and securing the crop, which is incident to such a contract, is not a sale of an interest in land within the meaning of the statute. *Parker v. Staniland*, 11 East,

would seem that, in order to carry out the intention of the framers of the statute, the test to be applied in determining

362; *Warwick v. Bruce*, 2 M. & S. 208; *Mayfield v. Wadsley*, 3 B. & C. 357; 5 D. & R. 224; *Evans v. Roberts*, 8 D. & R. 614; 5 B. & C. 829; *Watts v. Friend*, 10 B. & C. 446; *Sainsbury v. Matthews*, 4 M. & W. 347; *Dunne v. Ferguson*, 1 Hayes, 541. And if fruit is sold at so much a bushel, and timber at so much a foot, with a view to its immediate severance from the soil and delivery as a chattle to the vendee, the contract is not a contract for the sale of an interest in land, but for the sale of goods and chattels, "the produce of the trees when they should be cut down and severed from the freehold." *Smith v. Surman*, 9 B. & C. 568; and the same has been held as to a sale of all the fruit in a certain orchard for a gross sum. *Purner v. Piercy*, 40 Md. 212. It is the same as if the parties had contracted for so much fruit already picked, and for so many feet of timber already felled. LORD ABINGER, 9 M. & W. 505; *ROLFE, B.*, *Washbourne v. Burrows*, 16 Law J. Exch. 266; 1 Exch. 115. And when there has been an actual severance and delivery of the produce, the value of it may be recovered under a common count in *indebitatus assumpsit* for goods sold and delivered. *Poulter v. Killingbeck*, 1 B. & P. 397; *Teall v. Auty*, 4 Moore, 542; *Purner v. Piercy, ante*. But where a man agrees to hire the land and take the crops growing thereon at a valuation, and to pay a certain sum for work and labor and materials expended in getting the lands ready for tillage, this is an entire contract for an interest in land, and the growing crops cannot in such a case be treated as goods and chattels. *Earl of Falmouth v. Thomas*, 1 C. & M. 89; *Harvey v. Grabham*, 5 Ad. & El. 62. But in New York it has been held that a contract between A and B, that A will carry on B's farm and sow and gather all the crops thereon for a

certain share of the crops, is not a contract relating to an interest in land, and that after A has entered upon the execution of the contract, B cannot revoke it, even as to the growing grass. *Hobbs v. Weatherwax*, 38 How. Pr. (N. Y.) 385.

Where a contract was entered into for the sale of a crop of corn on the land and the profit of the stubble afterwards, and the vendor was to have liberty for his cattle to run with the purchaser's, and the purchaser was to have some potatoes growing on the land and whatever lay grass was in the fields, and was to harvest the corn and dig up the potatoes, and the vendor was to pay the tithe, it was held, that this was not a contract for any interest in land, but a sale of goods and chattels as to all but the lay grass, and as to that, a contract for the agistment of the defendant's cattle. *Jones v. Flint*, 10 Ad. & El. 753; 2 P. & D. 594, S. C. The tendency of the courts now seems to be to hold that a sale of growing crops either of grain, vegetables, fruits, or roots, of whatever kind or description which mature at certain periods, and are of a perishable nature, is not a sale of an interest in lands, whether the same is mature or immature at the time of sale, or whether they are to be gathered by the vendor or vendee, but rather as an executory contract for the sale of goods, with a license to the vendee to enter and take away the same, which license, according to our courts, may be revoked at any time by the vendor. *Delaney v. Root*, 99 Mass. 548; but which according to the present English doctrine is irrevocable. *Marshall v. Green*, 1 C. P. Div. 35. But in any event, according to many of the cases, the contract is valid, and if the license is revoked before the delivery is complete, an action lies for its breach. *McCarty v. Oliver*, 14 U. C. C. P. 290; *Drake v. Welles*, 11 Allen (Mass.) 143;

whether a contract for the sale of a growing crop, whether *fructus naturales* or *fructus industriales*, or whether it is mature or immature, or whether it is to be severed by the vendor or the purchaser, is or is not within the fourth section of the statute, is, *did the seller contract to give the purchaser an estate in the land, or did he merely contract for the sale of the chattels, with or without a license to go upon the land for a particular purpose.*¹

SEC. 196. **Sale of Crops after being Severed.**— *Where the contract is, that growing crops shall be severed, and the property in them transferred immediately, then the contract is for a sale of goods within the seventeenth section, and not for a sale of an interest in land within the fourth section.*² In *Crosby v. Wadsworth*,³ it was decided that contracts for the sale of growing crops of grass and hops came within the fourth section, the ground of decision, which has been recognized in several subsequent cases, being *that the purchaser had an immediate exclusive right to the land for a specific period, namely, while the crops were growing to maturity, and until they were harvested.*⁴ In *Parker v. Staniland*,⁵ it was held that a contract by the owner of a close, cropped with potatoes, to sell them at so much a sack, the defendant to get them out of the ground immediately, was not a contract for an interest in the land, within the fourth section of the statute, the contract being for the sale of a mere chattel, and the land being considered as a warehouse for the potatoes till the defendant could remove them.⁶ In

Owens v. Lewis, 46 Ind. 488; *Kerr v. Connell*, Berton (N. B.) 151; *Whitmarsh v. Walker*, 1 Met. (Mass.) 316; *Giles v. Simonds*, 15 Gray (Mass.) 444; the rule being the same in this respect as in the case of the breach of a contract for the sale and delivery of ordinary chattels.

¹ COLERIDGE, LD. C. J., in *Marshall v. Green*, 1 C. P. D. 38.

² See 1 Wms. Saund. 395, notes to *Duppa v. Mayo*. In certain cases, however, it may be the intention of the parties that the purchaser shall have an interest in the land, and not merely an easement of the right to enter the land for the purpose of

harvesting and carrying away the subject-matter of the sale. See *Jones v. Flint*, 10 Ad. & El. 759.

³ 6 East 602, and *Wadington v. Bristow*, 2 B. & P. 452; and see *Jones v. Flint*, 10 Ad. & El. 753; 2 P. & D. 594.

⁴ See *Parker v. Staniland*, 11 East, 362; *Evans v. Roberts*, 5 B. & C. 829; 8 D. & R. 611; *Smith v. Surman*, 9 B. & C. 561; 4 Man. & R. 455; *Warwick v. Bruce*, 2 M. & Sel. 205; *Sainsbury v. Matthews*, 4 M. & W. 343; S. C. nom. *Stanbury v. Matthews*, 7 Dow. 23.

⁵ 11 East, 36.

⁶ See also *Cutler v. Pope*, 13 Me.

Washburn *v.* Burrows,¹ ROLFE, B., said: "When a sale of growing crops does, and when it does not, confer an interest in land, is often a question of much nicety; but certainly when the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, as corn, pulse, or the like, on the terms that he is to cut or deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel."²

SEC. 197. **Growing Trees.** — In the case of a sale of standing trees, which are to be severed by the vendor, and delivered to the vendee at so much a cord³ or per foot,⁴ or even for a gross sum, the fourth section of the statute has no application, because although the thing contracted for is a part of the realty at the time when it is contracted for, yet the contract only relates to the trees when severed and reduced to mere chattels, and the vendee does not contract for or acquire any interest in land whatever, any more than in the case of a sale of productions coming under the head of *fructus industriales* referred to in the previous section. Thus in *Smith v. Surman*,⁵ the contract was for the sale of trees *still standing*, at a certain price per foot. It was held that the contract was for the sale of chattels within the seventeenth section, and did not confer an interest in land within the fourth section. LITLEDAL, J., said: "The words in the

337; *Warwick v. Bruce*, 2 M. & Sel. 205; *Sainsbury v. Matthews*, 4 M. & W. 343; S. C. nom. *Stanbury v. Matthews*, 7 Dowl. 23.

¹ 1 Exch. 115.

² And see *Dunne v. Ferguson*, *Hayes*, 340.

³ *Kilmore v. Howlett*, 48 N. Y. 569.

⁴ In *Boyce v. Washburn*, 4 Hun (N. Y.) 792; an action was brought to recover the price of 206 logs, sold to the defendant. The defence was that the logs were delivered under a contract, by which the plaintiff's assignor agreed to deliver to the defendant all the market pine saw-logs that could be cut from the "Perry" lot, in Wilton, the logs to be delivered

at the defendant's saw-mill, at two dollars per log, in the years 1873 and 1874, and to be measured and counted at said mill, which logs the defendant agreed to accept and pay for; that the plaintiff's assignor cut a large number of logs from the lot, in addition to the 206, which he refused to deliver to the defendant, by means of which the defendant had sustained damage. Held, that this was not a contract for the sale of standing timber, and that it was not essential to its validity that it should be in writing, and therefore such defence could be established under it.

⁵ 9 B. & C. 561; 4 M. & R. 455.

(fourth) section relate to contracts for the sale of the fee simple, or of some less interest than the fee, which give the vendee a right to the use of the land for a specific period. If in this case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land within the meaning of the statute. The object of a party who sells timber is, not to give the vendee any interest in his land, *but to pass to him an interest in the trees, when they become goods and chattels*. Here the vendor was to cut the trees himself. His intention clearly was, not to give the vendee any property in the trees until they were cut and ceased to be part of the freehold.”¹ In *Marshall v. Green*,² the facts were very similar, the only distinction being that the trees were to be cut by the purchaser, but the court did not consider this to be of any weight, and decided that the contract was for the sale of goods. It seems also that in England a contract for the sale of gravel, stone, or other minerals, to be taken immediately, is within the seventeenth section.³ But in this country it is held that a sale of sand, gravel, etc., to be taken out by the vendee, is a sale of an interest in land and within the statute, unless in writing, and if the land is owned by two or more persons, a contract signed by *one* of the owners does not affect the right of the other owner to rely upon the statute.⁴ But in Iowa it has been held that a license to take minerals from another’s land is not within the statute when the licensor has taken and holds possession of the land, and the license is admitted by the licensor himself,⁵ but a distinction is made when the licensee has not acted under the license, and where he has entered upon its execution, and in the former case the statute is held to apply.

The principal conflict arises where *growing* trees are sold

¹ See the remarks of BAYLEY, J., on this case in the *Earl of Falmouth v. Thomas*, 1 C. & M. 105; and of LORD ABINGER in *Rodwell v. Phillips*, 9 M. & W. 505.

² L. R. C. P. D. 35.

³ *Coulton v. Ambler*, 13 M. & W. 403; and see *Dart. V. & P.* 5th ed. 203.

⁴ *O'Donnell v. Brehen*, 36 N. J. L. 257. See also *Johnson v. Kellogg*, 7 Heisk. (Tenn.) 272; where a memorandum of a sale of an interest in a sandbank was held insufficient because it failed to give the time of purchase, or the location of the sandbank.

⁵ *Anderson v. Simpson*, 21 Iowa, 399.

to be severed by the vendee himself, and upon the question whether such a sale is within the fourth section of the statute, there is considerable conflict of doctrine in the courts of this country. In Massachusetts the question is made to depend upon the circumstance whether the parties intend an immediate and present transfer of the title in the trees or not. If the former, the sale is treated as within the provision of the statute relating to an interest in land, *but if the parties do not intend that the title in the trees shall pass to the vendee until they are severed*, although such severance is to be made by the vendee, it is treated as an executory contract for the sale of chattels merely when they are severed.¹ The rule is thus expressed

¹ *Nettleton v. Sikes*, 8 Met. (Mass.) 34; *Clafin v. Carpenter*, 4 id. 580; *Whitmarsh v. Walker*, 1 id. 313; *Delaney v. Root*, 104 Mass. 548; *White v. Foster*, 102 Mass. 375. There is no question but that growing trees are the subjects of grant and conveyance by deed as a part of the freehold and inheritance, even though no right in the soil on which they are standing passes thereby beyond that of having them stand thereon and derive nutriment therefrom till they are severed. *Clapp v. Draper*, 4 Mass. 266; *Putnam v. Tuttle*, 10 Gray (Mass.) 48; *Rich v. Zeilsdorf*, 22 Wis. 544; *Green v. Armstrong*, 1 Den. (N. Y.) 550. Trees, while growing, are essentially a part of the real estate or freehold on which they stand. But, while some of the cases hold a sale of them to be of an interest in land, other cases make a distinction between a sale of them to be presently cut, and where they are to remain unsevered for any length of time, holding it to be a sale of chattels in the one case, and of an interest in land in the other. But all agree that, if it is a sale of an interest in land, it comes within the 4th, and not the 17th, section of the statute. The court of New Jersey say: "I am satisfied that such sale (of standing trees by the owner of the freehold) is of an interest in land;" such trees "are a part of the inheritance, and can only become personalty by actual severance, or by severance in contemplation of

law as the effect of a proper instrument in writing." *Slocum v. Seymour*, 36 N. J. 139, 140, citing *Green v. Armstrong*, *ante*. So in *Vorebeck v. Roe*, 50 Barb. (N. Y.) 305, the court say: "It is well settled by authorities in this State, that trees form a part of the land, and, as such, are real property. And a contract for the sale of them is a contract for the sale of an interest in the land." In Vermont, it was held that so long as trees are annexed to the land, and are not in contemplation of law severed therefrom, they cannot be sold by verbal contract, although a sale of growing crops of annual culture is not a contract or sale of an interest in land. *Buck v. Pickwell*, 27 Vt. 164. But see *Sterling v. Bostwick*, 42 id. 306, where a different rule is announced by *BARRETT, J.* In Massachusetts, the court, in one case, say "a contract for the sale of standing trees, to be cut by the vendee, does not convey to him any interest in the land; and it is to be construed as passing an interest in the trees when they are severed from the freehold, and not an interest in the land." *Clafin v. Carpenter*, 4 Met. (Mass.) 583; *Parsons v. Smith*, 5 Allen (Mass.) 580. But this is limited and explained by the same court in *White v. Foster*, 102 Mass. 378, that such a sale of trees is an "executory contract for the sale of chattels, as they shall be thereafter severed from the real estate, with a license to enter on the land for the purpose of removal." And

in an early case :¹ "A contract for the sale of standing trees to be cut by the vendee does not convey to him any interest in

¹ Claffin v. Carpenter, *ante*.

in Delaney v. Root, 99 Mass. 548, the court say that a sale of trees or growing annual crops, to be severed from the land by the purchaser, does not convey any interest in the land; "and so far as it implies a license to enter upon the land, the license may be revoked before it is executed." In Poor v. Oakman, 104 Mass. 316, it is said "they (standing trees) become personal property by being cut, and the license to go upon the land and take them away becomes irrevocable. But, before they are cut, the license may be revoked, otherwise it would ex proprio vigore convey an interest in the land." And the cases of Giles v. Simmonds, 15 Gray (Mass.) 441, 444, and Whitmarsh v. Walker, 1 Met. (Mass.) 313, 316, are to the same effect. The cases of Huff v. McCauley, 53 Penn. St. 210, and Green v. Armstrong, *ante*, hold, that if the sale of trees is not made with a view to their immediate severance, it is a contract for the sale of interest in land. And Pattison's Appeal, 61 Penn. St. 294; McClintock's Appeal, 73 id. 865; Yeakle v. Jacob, 33 id. 376; Bowers v. Bowers, 95 id. 477, may be cited to the same point. The same is held in Vermont in Sterling v. Baldwin, 42 Vt. 306, although in a previous case, Buck v. Pickwell, 27 Vt. 157, it was held that the property in the trees did not pass until severed. In Connecticut, however, it seems that if the sale be of a part of the freehold, which may be separated therefrom, as of gravel, stones, timber, trees, and the boards and bricks of the houses to be pulled down and carried away, it would not be within the statute of frauds. Bostwick v. Leach, 3 Day (Conn.) 476, 484. In Indiana, it is held that no interest in standing trees which can be enforced passes until severance, and that a license to enter and cut them may be revoked at any time before they are severed. Armstrong v. Lawson, 73 Ind. 498; Owens

v. Lewis, 46 id. 488. And this was formerly the rule in Vermont. Buck v. Pickwell, *ante*, and such is the rule in Maine, Cutler v. Pope, 13 Me. 377; Erskine v. Plummer, 7 id. 447, as to trees; but crops ripe and ready to be severed are held to be chattels, and a sale of them before severance is held not to pass an interest in land. Bryant v. Crosby, 40 Me. 9. In New York, a sale of growing trees, grass, and other crops *fructus naturales* are held to be void as passing an interest in land. Green v. Armstrong, 1 Den. (N. Y.) 550; McGregor v. Brown, 10 N. Y. 114; Boyce v. Washburn, 4 Hun (N. Y.) 792; Kilmore v. Howlett, 48 N. Y. 569; Mumford v. Whitney, 15 Wend. (N. Y.) 380; Warren v. Leland, 2 Barb. (N. Y.) 614; Vorebeck v. Roe, 50 id. 302; Dubois v. Kelley, 10 id. 496; Smith v. N. Y. Centl. R. R. Co., 4 Keyes (N. Y.) 180; Bennett v. Lent, 18 Barb. (N. Y.) 347; Lawrence v. Smith, 27 How. Pr. (N. Y.) 327. But a parol license to cut standing trees is held not to be within the statute, and, when executed, is held to be irrevocable. Pierrepont v. Barnard, 6 N. Y. 279. So a contract to cut cord-wood standing on the vendor's land and to deliver it at so much a foot, is held not to be within the statute. Kilmore v. Howlett, 48 N. Y. 569. See also Boyce v. Washburn, 4 Hun (N. Y.) 792, where a similar doctrine was held as to a contract for logs. A contract to work a farm on shares is held not to be within the statute, and the license thus given after entry under the contract is irrevocable, even as to the growing grass. Hobbs v. Wetherwax, 38 How. Pr. (N. Y.) 385. Nor a contract for the sale of improvements upon land. Lower v. Winters, 7 Cow. (N. Y.) 263; Benedict v. Beebe, 11 John. (N. Y.) 145. In New Hampshire, it is held that a sale of growing trees which involves a future right on the part of the vendee to enter to

the land, and it is to be construed as passing an interest in the trees when they are severed from the freehold.”¹ In a

¹ See also *Parsons v. Smith*, 5 Allen (Mass.) 580.

sever them, whether the right is to be exercised within a certain specified time, or at an indefinite period, is within the statute. *Howe v. Batchelder*, 49 N. H. 204; *Kingsley v. Holbrook*, 45 id. 313; *Oakington v. Richey*, 41 id. 275; *Putney v. Day*, 6 id. 430; *Olmstead v. Niles*, 7 id. 522. In *Mississippi*, where a contract for the sale of trees has been executed by the vendee, that is, where he has entered and severed them from the land, the title thereto is held to have thus become vested in him and the contract effective. *Harrell v. Millner*, 35 Miss. 700. And the vendee has an irrevocable license to enter and take them away. *Owens v. Lewis*, 46 Ind. 488; *Pierrepont v. Barnard*, 6 N. Y. 279; *Drake v. Wells*, 11 Allen (Mass.) 141; *Barnes v. Barnes*, 6 Vt.; *Poor v. Oakman*, 104 Mass. 316; *Heath v. Randall*, 4 Cush. (Mass.) 195; *Russell v. Richards*, 10 Me. 429; *McNeal v. Emerson*, 15 Gray (Mass.) 334; *Smith v. Benson*, 1 Hill (N. Y.) 176. Several of the American cases hold that a sale of *growing crops not yet mature*, being a mere sale of chattels, is not within the statute, although made by parol, though no reason is given if with the crops the sale carries a right to occupy the land for them to grow and mature, why it would not be like the sale of trees with a right to have them stand for a definite or unlimited time, unless, as some of the English cases imply, such crops, *after their sale*, partake of the character of emblements. *Whipple v. Foot*, 2 Johns. (N. Y.) 418; *Stewart v. Doughty*, 9 id. 108; *Austin v. Sawyer*, 9 Cow. (N. Y.) 40, 42; *McGregor v. Brown*, 10 N. Y. 114; *Warren v. Leland*, 2 Barb. (N. Y.) 213; *Bennett v. Scott*, 18 id.; *Newcomb v. Rayner*, 2 John. (N. Y.) 421 n. In one case in Illinois, the court seem to regard a sale of unmaturing crops as a sale of an interest in land. *Powell v. Rich*, 41 Ill. 469. But, in another,

they hold, *if the purchaser has accepted and received the growing crop by having the same marked off and separated from the rest of the field*, it would constitute a complete sale, and pass the property in the crop. *Graff v. Fitch*, 58 Ill. 377. The following English cases sustain the same doctrine, if they are *fructus industriales*. *Parker v. Staniland*, 11 East, 362, which was of potatoes to be taken at once. *Warwick v. Bruce*, 2 M. & S. 205, which was of potatoes in October; *Evans v. Roberts*, 5 B. & C. 836, of potatoes to be dug by the vendor; *Jones v. Flint*, 10 Ad. & El. 753, which was of corn and potatoes not yet mature, and were to derive their nutriment from the land, though a different doctrine in such cases had been held in *Emmerson v. Heelis*, 2 Taunt. 38. But if it had been growing grass, *Crosby v. Wadsworth*, 6 East, 602; or hops, *Waddington v. Bristow*, 2 B. & P. 452; or growing fruit, *Rodwell v. Phillips*, 9 M. & W. 592, it would, according to the cases cited, have been a sale of an interest in land, and not of merchandise. But as to hops, see remarks of PARKE, B., in *Rodwell v. Phillips*, *ante*, where in remarking upon the decision in *Waddington v. Bristow*, 2 B. & P. 452, that “hops are *fructus industriales*. That case would probably be decided differently now.” See also *Frank v. Harrington*, 36 Barb. (N. Y.) 415, where hops were held to be *fructus industriales*, and a sale of them on the vine, held not to be within the statute. So growing fruit has been held to come under the same head. *Purner v. Piercy*, 40 Md. 212. And, inasmuch as growing grass matures annually, and is valueless unless gathered when mature, and is more or less dependent for its growth and value upon the industry of man, as by its manurance, etc., it is believed that it would now be treated as *fructus industriales* and its sale not within the 4th

later case¹ the court limits and explains this rule thus: "A sale of trees is an executory contract for the sale of chattels as they shall be thereafter severed from the real estate, with a license to enter on the land for the purpose of removal." Until the trees or other growing crops are severed from the soil, no title passes to the vendee and the license is revocable,² otherwise it would *ex proprio vigore* convey an interest in the land.³ But after the trees are cut by the vendor they become personal property, and the license is irrevocable as it then becomes a license coupled with an interest.⁴ Thus in a case previously cited⁵ the plaintiff entered into a parol contract with the defendant, that the defendant should cut certain trees upon the plaintiff's land, peel them and take the bark to his own use, and pay therefor a certain price per cord. The defendant entered in pursuance of the contract, and cut and peeled the trees, but the plaintiff, after the contract was executed on the part of the defendant, forbade him from taking away the bark. But the defendant notwithstanding this, entered and took away the bark, and in an action of trespass brought against him therefor, it was held that no recovery could be had, because after the license had been executed by the defendant, the plaintiff could not revoke it. In Indiana,⁶ Maine,⁷ and Mississippi,⁸ practically the same doctrine prevails, it being held that under a parol sale of *growing trees*, no title to the trees passes to the vendee, and the license to enter and sever and remove them is revocable at any time, *but that after they have been severed by the vendor* the title thereto vests in him, and the license to take them away becomes irrevocable. That is, *after severance, the trees become chattels, and the license becomes then coupled with an interest in chattels upon the land, and cannot be revoked until the licensee has had a reasonable time to execute it.*

section under the principle upon which the case of *Marshall v. Green*, 1 C. P. D. 35, rests.

¹ *White v. Forster*, 102 Mass. 378.

² *Delaney v. Root*, 99 Mass. 548.

³ *Poor v. Oakman*, 104 Mass. 316; *Drake v. Wells*, 10 Allen (Mass.) 141.

⁴ *Poor v. Oakman*, *ante*; *Nettleton v. Sikes*, 8 Met. (Mass.) 34; *Claffin v. Carpenter*, *ante*. But if only a part

of the trees are cut, it may be revoked as to the residue. *Giles v. Simonds*, 15 Gray (Mass.) 441.

⁵ *Nettleton v. Sikes*, *ante*.

⁶ *Armstrong v. Lawson*, 73 Ind. 498; *Owens v. Lewis*, 46 id. 488.

⁷ *Cutter v. Pope*, 13 Me. 377; *Ersline v. Plummer*, 7 id. 447.

⁸ *Harrell v. Millner*, 35 Miss. 700.

In Pennsylvania¹ it is held that a contract for standing timber to be severed and removed at the discretion of the vendee, is a sale of an interest in land. *But if it is to be severed and removed at once, it is held to amount only to the sale of a chattel interest*, and therefore not within the fourth section of the statute.² Such also, is the rule in Connecticut,³ Kentucky,⁴ Maine,⁵ Maryland,⁶ and in Vermont.⁷ The

¹ *Huff v. McCauley*, 53 Penn. St. 210; *McClintock's Appeal*, 73 id. 365; *Yeakle v. Jacob*, 33 id. 376. In *Bowers v. Bowers*, 95 id. 477, it is said: "*A contract for standing timber on a tract of land, to be taken off at the discretion of the purchaser as to time, is an interest in land*, within the meaning of the statute of frauds, the transmission of which must be in writing." *Patterson's Appeal*, 61 Penn. St. 294. In that case, THOMPSON, C. J., says, the announcement that the timber growing on a man's land might be held by a contract in parol while the soil itself can only be legally transmitted by a written instrument, would strike even the unprofessional mind with surprise. The rigid requirements of the statute have, however, been so far relaxed by courts of equity that effect is sometimes given to verbal agreements for an estate or interest in land; but it is only in cases where the contract, in all its essential parts, is established by clear and unequivocal proof, and where it has been so far executed that it would be unjust and inequitable to rescind it; and this is done in order that the statute itself may not become an instrument of fraud. *Hazlett v. Hazlett*, 6 Watts. (Penn.) 464; *Woods v. Farmere*, 10 id. 195; *Moore v. Small*, 19 Penn. St. 461; *Hart v. Carroll*, 85 Penn. St. 508. To take a case of parol sale out of the statute, the terms of the contract, the land which forms its subject-matter, the nature and extent of the interest to be acquired therein, the consideration to be paid, etc., must all be fully and satisfactorily shown. Exclusive possession, taken and kept up in pursuance of the contract, is an indispensable ingredient

in every case. Hence it is that there cannot be a valid parol sale of land by one tenant in common to his cotenant in possession. *Spencer's Appeal*, 81 Penn. St. 317.

² *McClintock's Appeal*, ante.

³ *Bostwick v. Leach*, 4 Day (Conn.) 476.

⁴ *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Byassee v. Read*, 4 Met. (Ky.) 372.

⁵ *Cutler v. Pope*, 13 Me. 377; *Safford v. Ames*, 7 Me. 168; *Erschine v. Plummer*, 7 id. 447.

⁶ *Purner v. Piercy*, 40 Md. 212. See full statement of case and opinion of STEWART, J., post, p. 388.

⁷ In *Stanley v. Baldwin*, 42 Vt. 308, BARRETT, J., in a very able opinion, attacks somewhat the former doctrine in that State as held in *Buck v. Pickwell*, 27 Vt. 157, and says: "In *Buck v. Pickwell* no notice was taken by BENNETT, J., of the distinction which seemed to be established outside of Vermont and clearly stated in note 1. Greenl. Cruise, 55, § 45: 'The principle now most generally recognized seems to be this, that in contracts for the sale of things annexed to and growing on the freehold, if the vendee is to have the right to the soil for a time *for the purpose of further growth and profit, of that which is the subject of the sale*, it is an interest in land within the meaning of the statute, and must be proved in writing. But where the thing is sold in prospect of a separation from the soil immediately, or within a reasonable and convenient time without any stipulation for the beneficial use of the soil, but with a mere license to enter and take it away, it is to be regarded as substantially a sale of goods only,

ground upon which the cases holding this doctrine proceed is, that the contract is for the sale of *chattels* only, and that the circumstance that the trees are growing or standing upon the vendor's land at the time of the sale, but which are to be removed immediately, does not in any sense make it a contract for a sale of land or any interest in, or concerning land, and that the circumstance that the vendee has the right to enter upon the land to sever and remove the trees, does not bring it within this section (fourth) of the statute¹ upon the ground that such sale operates as a constructive severance of them, and a parol license to enter upon the land for such a purpose does not confer upon the licensee any interest in the land itself, but is rather a license coupled with an interest in a chattel upon the land, and only protects him against liability for such entry *so long as the license remains unrevoked*,² and by some of the cases whether the license is revoked or not, if the licensee has entered upon the execution of the license, upon the ground that *the license being coupled with an interest in chattels upon the land is irrevocable, if exercised within a reasonable period*.³ Thus in the case last cited, which may be regarded as a leading case, and as expressing the doctrine as now held in England, the plaintiff being tenant in fee of certain copyhold land, within a manor, by the custom whereof trees growing on the land were the property of the tenant in fee, having let the land to a yearly tenant, sold by parol to the defendant twenty-two specified trees growing on the land, upon the terms that they were to be cut down by the defendant, and "*got away as soon as possible*," and to be paid for at a certain future day. The defendant almost immediately entered upon the land and cut down six of the trees, and sold to a third person

although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a long time on the land."

¹ *Smith v. Bryan*, 5 Md. 141; *Purner v. Piercy*, 40 Md. 212; *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Byasse v. Reese*, 4 Met. (Ky.); *McClintock's Appeal*, 71 Penn. St. 365; *Drake v. Wells*, 11 Allen (Mass.) 141; *White v. Frost*, 102 Mass. 375; *Giles v. Simonds*, 15 Gray (Mass.) 441; *Par-*

sons v. Smith, 5 Allen (Mass.) 578; *Douglass v. Shumway*, 13 Gray (Mass.) 498; *Nettleton v. Sikes*, 8 Met. (Mass.) 34; *Whitmarsh v. Walter*, 1 id. 313; *Claffin v. Carpenter*, 4 Met. (Mass.) 580; *Nelson v. Nelson*, 6 Gray (Mass.) 385.

² *Armstrong v. Lawson*, 73 Ind. 498; *Owens v. Lewis*, 46 id. 488; *Delaney v. Root*, 90 Mass. 546.

³ *Marshall v. Green*, 1 C. P. Div. 35.

the tops and stumps of several of them. The plaintiff then *gave notice to the defendant that he forbade him to enter the land, or to cut down or carry away any of the trees*, and caused the gate to the field in which the trees were to be locked. The defendant disregarded the notice, and cut down the remainder of the trees, and carried away the whole twenty-two of them, and for this purpose broke open the locked gate. The plaintiff brought trespass and the court held¹

¹ *Marshall v. Green*, 1 Q. B. D. 35. We give the opinions of COLERIDGE, C. J., BRETT, J., and GROVE, J., entire, because the case is destined a leading one upon this head of the statute, and is not readily accessible to the great majority of lawyers. LORD COLERIDGE, C. J., said: "Upon these facts it is plain that if there was a contract in point of law, the plaintiff is wrong, for the property in the trees felled would be in the defendant, and the defendant would be right in going to take them away. If there was no valid contract, the defendant is wrong. The possession of the land was not in the plaintiff, but in that of his tenant. The question is whether, by reason of either the 4th or 17th section of the statute of frauds, a writing is requisite for such a contract as this. *First*, was it a contract or sale of lands, or any interest in, or concerning them? Many discussions have taken place upon the exact meaning to be attached to the words of this section, and many decisions have been given, all of which it may not be possible to fully reconcile. If the matter were *res integra*, much might be said in favor of the view taken by LITLEDALE, J., in *Smith v. Surman*, 9 B. & C. 561, 571, that they relate only to what may be termed conveyancing interests, that is, to contracts for the sale of the fee or of some less interest which would give the vendee a right to the use of the land for a specific period; but the matter is very far from being *res integra*, and contracts for certain natural products of the land have been held to fall within the 4th section, and it is now too late to dispute the correctness of such de-

cisions. What, then, is the test? I myself despair of giving a true test, or one that can be satisfactorily applied to every conceivable case. It is suggested that where you sell something which is to derive benefit from the land, you part with an 'interest' within the 4th section. This is an intelligible rule, but it is one that must vary according to times and seasons. I find in a book of great authority, which has received the sanction of that eminent lawyer, the late MR. JUSTICE WILLIAMS, in the notes to *Duppa v. Mayo*, Wms. Saunders, 1871 ed., p. 394, it is said 'that the principle of the decisions appears to be that *wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment afforded by the land*, the contract is to be considered as for an interest in land; but *where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land*, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods'; and, further, 'that it appears to be now settled that *with respect to fructus industriales (i. e. corn and other growth of the earth which are produced, not spontaneously, but by labor and industry), a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land*, is not a contract for the sale of any interest in land, but merely for the sale of goods. Growing trees, though planted by the hand of man, do not fairly come un-

that such a contract was not a contract for the sale of lands or any interest in or concerning them within the meaning of

der the designation of *fructus industriales*. I think we must look to the position of the matters at the time of the contract, and I think that where at the time of the contract it is contemplated by the parties that the purchaser should derive benefit from the land, then there is a contract within the 4th section; but if the thing purchased is to be immediately withdrawn from the land, then the parties having had no intention of dealing with any interest in or concerning land, the contract does not fall within that section.' Applying this to the present case, the contract of the 27th February was for trees 'to be got away as soon as possible.' Now a contract to sell trees to be cut down and carried away at once would seem, but for judicial decisions, nothing like a sale of an interest in land, and, as it seems to me, there is no sufficient pressure of authority to prevent us from holding that, which but for those decisions would seem clear, namely, that the present is not a case falling within the 4th section; indeed, there is some direct authority to assist us in arriving at the conclusion, which, in the absence of authority, would have seemed inevitable. The case of *Smith v. Surman*, 9 B. & C. 561, is a case only distinguishable from the present by the fact that the trees were to be cut by the vendor; and the *dicta* of LITTLEDALE, J., if well founded, as we think they are, which are to be found in the report of that case, are decisive of the present case, and confirmatory of our view of the law. The next question is whether, if this contract is within the 17th section, there has been a sufficient acceptance and actual receipt to satisfy the requirements of that section. This is a matter upon which there are an infinite number of reported decisions; the principle, however, which can, from an early period, be found in those decisions, is that there need not be an actual manual

receipt by the buyer of the whole article; it is enough if there has been a constructive acceptance and receipt. Was there here enough? Six of the trees were cut down before the countermand, and portions of them sold to a third person, without, it would seem, the actual knowledge of the plaintiff, but, as it must be taken, with his consent. What more could a purchaser do? Trees are bulky articles which cannot be carried away merely by the hand, and the purchaser cuts off their tops and stumps and sells them, thus showing by his conduct that he adhered to the contract. If anything short of actual manual receipt would do, what was done here was enough. He is allowed to deal with the goods as his own, and deals with them as only an owner has a right to deal. The cases of *Hodgson v. Le Bret*, 1 Campb. 233; *Anderson v. Scott*, id. 235, and the judgment of LORD KENYON in *Chaplin v. Rogers*, 1 East, 191, appear directly in point. LORD KENYON, in *Chaplin v. Rogers*, 1 East, 194, says: 'Where goods are ponderous, and incapable of being handed over from one to another, there need not be an actual delivery.' The defendant, therefore, had a perfect right to go upon the land and carry out his contract, by cutting down and carrying away, as he did, the whole of the trees he purchased. I do not rely upon the fact that the land was not then in the possession of the plaintiff, and, therefore, I express no opinion as to how far the fact that the plaintiff had no present interest in the land may strengthen the defendant's case."

BRETT, J., said: "It is admitted that if the trees were the property of the defendant by virtue of a valid contract, no action lies. Upon the facts, it appears that no contract in writing was signed by the plaintiff, and that the trees had not been taken away by the defendant before the plaintiff

the fourth section, and that it fell within the seventeenth section of the statute, and that the entry of the defendant

gave notice that he revoked the contract. It was said, first, that the contract was one within the 4th section of the statute of frauds, and, secondly, that if not within the 4th section, but within the 17th, there was no sufficient acceptance and actual receipt. A contract may concern land in various ways. It may relate to something in the land, to something affixed to the land, or to something both in the land and affixed to it. Certain tests have been applied for the purpose of determining whether or not a contract falls within the 4th section. Most of these tests are given in the note to *Duppa v. Mayo*, Wms. Saund., ed. 1871, 394, an addition which has the sanction of the authority of a learned, eminent, and profound lawyer, and which has just been referred to by the LORD CHIEF JUSTICE. In this case, the subject-matter of the contract, timber trees, was to be taken away by the buyer immediately; applying, therefore, the tests given in the notes to *Duppa v. Mayo*, the contract regards only trees, and is within the 17th section and not within the 4th. There was no writing; therefore we must ascertain whether there was acceptance and actual receipt before the countermand. That there was acceptance was hardly questioned. Was there evidence of actual receipt? I say was there evidence, because, though the question was tried by consent before the judge, it is left for this court to draw inferences from the facts. It appears that the vendor and owner of the trees was not in possession of the land, yet I think the case may be traced as though he were. Before the countermand, the defendant had a license to go on the land; he had a right to go there by reason of the parol contract; he went there and cut down six of the trees and lopped them. I do not rely upon the agreement to sell the stumps and tops, for I think the mere making of

a sub-contract would not be enough, but there was more than this. Where there has been no carrying away of the thing sold, the question is, has the vendee been in actual possession of the thing sold, and done something to the thing itself which could only legally be done by the owner? I incline to think that something done concerning the thing would not be sufficient evidence, to be left to a jury, of actual receipt. In *Hodgson v. Le Bret*, 1 Campb. 233, the goods were marked by the purchaser with his name; that was the act of an owner. In *Anderson v. Scott*, 1 Campb. 235, the plaintiff's initials were marked upon the casks in his presence, although they were upon the seller's premises. The fact that the plaintiff allowed or procured this to be done in his presence was evidence to show that he intended to be the owner of the casks. Here, before there was any revocation of the verbal contract, what was done sufficiently satisfied the requirements of the statute as to actual receipt. The contract, therefore, was binding, and the defendant is entitled to succeed."

GROVE, J., said: "I have a little to add. One point, however, I wish to notice. In case of this description, not only the subject-matter of the bargain is to be looked at, but also the intention of the parties as to the matter in respect of which they bargain. In *Smith v. Surman*, SERGEANT RUSSELL, in his argument, says: 'A sale of crops or trees, or other matters existing in a growing state in the land, may or may not be an interest in land according to the nature of the agreement between the parties, and the rights which such an agreement may give.' LITLEDALE, J., in the same case, 9 B. & C. 573, says: '*The object of a party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and*

and the severance by him of *six* of the trees, and the sale of the stumps and tops of several of them, afforded sufficient evidence of acceptance and actual receipt to satisfy that section, and consequently that the action was not maintainable, because *the entry being made under a license coupled with an interest in chattels* was lawful, and the notice given by the plaintiff was inoperative to defeat the defendant's right under the license, *as (under the circumstances) it was irrevocable.*¹ It will be observed that the distinction between the doctrine of this case, and that held in Massachusetts is, that the contract for the sale of standing trees is treated in *Marshall v. Green*, in the absence of any express or implied stipulation to the contrary, *as passing the title to the trees to the vendee immediately, and therefore treating them as chattels, and constructively severed instantly upon the completion of the contract of sale*, as effectually as they would be by a contract in writing, and also holding that, *if an immediate severance* is not contemplated by the parties, but the trees are to remain and derive a further benefit from the soil "from the further growth of the thing sold from further vegetation, and from the nutriment afforded by the land, the contract is to be considered as for an interest in land," *and that the license to enter and sever and remove the trees is irrevocable after the vendee has entered upon its execution.* While under the rule as adopted in Massachusetts, as we have seen,² *if the parties*

chattels. By considering what, in each case, was the object of the parties, many of the cases may, I think, be reconciled. Here the defendant *merely intended to buy the trees; he had no intention of being interested in the land; he merely wanted timber, and wished to have it severed from the land at once; he only bought so much wood.* I am, perhaps, hardly satisfied that the circumstance that the plaintiff was not in possession of the land was immaterial; it may be that the plaintiff had no right in the land except the right to remove the trees, and this may be a matter which strengthens the case for the defendant. It is not, however, needful to discuss this question in the present case, as I agree that independently of any considerations that may arise from the fact of

the land being then the plaintiff's tenant's, the defendant is entitled to the verdict."

¹ In *Anderson v. Simpson*, 21 Iowa, 390, it was held that a license given by the owner of lands to another to enter upon his lands to dig minerals therein, was irrevocable *after the license had entered upon its execution.* In *Brown v. Morris*, 83 N. C. 251, a contract under which one is to make brick on the land of another from the clay forming a part of the soil of such land, the property in the bricks to remain in the owner of the land until he has been paid for the clay and wood used in their manufacture, was held not to be a contract relating to an interest in land.

² *Ante*, p. 358.

intend a present transfer of the title to the trees, the contract is treated as for an interest in land, and while, *after the trees have been severed by the vendee*, the vendor cannot revoke the license to enter and remove them, yet he may at any time revoke it, before it has been executed, *or as to any trees not then severed*.¹ If the doctrine of constructive severance has any validity, and it seems to be generally adopted, there appears to be no good reason why it may not be as well effected by a parol as by a written contract, and the objection that if this doctrine is recognized, perpetual estates in land may be effected by parol, is without foundation, because it is confined to contracts where an *immediate severance is intended*, so that, if not carried into effect within a reasonable time, it ceases to be operative.

In Pennsylvania, Connecticut, Kentucky, Maryland, Maine, and Vermont, as we have seen,² the doctrine of *Marshall v. Green* is practically adopted. In New Hampshire it is held that a sale of growing trees is a sale of an interest in land, and can only be made in writing *where a right to enter and sever and remove them at any future time, fixed or indefinite*, is given.³ But it is held that, when a *valid* contract for their sale has been made, they are reduced to chattels and may be sold as such by the person to whom they have so been sold,⁴ as, where they are reserved by the grantor in a deed conveying the lands,⁵ or where the contract is in writing,⁶ provided it is not attempted thereby to confer upon the purchaser a right to enter, to sever, and remove the same at his discretion, without reference to the reasonableness or unreasonableness of his delay in doing so,⁷ and in the case last cited where the grantor reserved certain growing trees *to be cut and removed within a certain specified time after notice from the grantee*, it was held that by such reservation, *the trees were constructively severed* and became mere chattels, and passed to the administrator, and *a fortiori* would pass to a vendee under a parol

¹ *Ante*, p. 361.

² *Ante*, p. 358 n.; also *Smith v. Bryan*, 5 Md. 151.

³ *Kingsley v. Holbrook*, 45 N. H. 313; *Putney v. Day*, 6 id. 430; *Olmstead v. Niles*, 7 id. 522; *Howe v. Batchelder*, 49 id. 204.

⁴ *Kingsley v. Holbrook*, *ante*;

Bank of Lansingburgh v. Crony, 1 Barb. (N. Y.) 542; *Warren v. Deland*, 2 id. 613.

⁵ *Kingsley v. Holbrook*, 45 N. H. 313; *McClintock's Appeal*, 71 Penn. St. 367.

⁶ *Sterling v. Baldwin*, 42 Vt. 306.

⁷ *McClintock's Appeal*, *ante*.

sale otherwise valid under the seventeenth section.¹ In New York it is held that a parol sale of growing trees, grass, and other crops *fructus naturales* is a sale of an interest in land under the statute, and therefore void,² and this is also the rule in New Hampshire³ and New Jersey.⁴ In the latter State in the case cited, the court say: "Trees form a part of the land, and as such are real property. And a contract for the sale of them is a contract for the sale of an interest in land." But in New York it is held that a contract to cut trees standing on the vendor's land and deliver them to the vendee at a certain sum per cord,⁵ or to cut timber trees and deliver them to the vendee at a certain sum per foot,⁶ is not a contract for a sale of an interest in land, and a similar doctrine has been held as to a contract for carrying on a farm for a share of the crops, including grass⁷ and for the sale of improvements made upon land.⁸ In Illinois,⁹ as to growing crops, it has been held that a sale of them *before they are mature* is a sale of an interest in lands. But in a later case¹⁰ this rule has been so far qualified as to hold that, *where the purchaser has accepted and received the growing crop by having the same marked off and separated from the rest of the field*, the title to the crop passes to the purchaser a good title thereto, thus virtually bringing the doctrine of that court within the rule as adopted in *Marshall v. Green*. In Canada¹¹ it is held that a sale of growing trees is a sale of an interest in land, but in a more recent case¹² the question was consid-

¹ *Sterling v. Baldwin*, *ante*; *Kingsley v. Holbrook*, *ante*.

² *Green v. Armstrong*, 1 Den. (N. Y.) 550; *Smith v. N. Y. Cent. R. R. Co.*, 4 Keyes (N. Y.) 180; *McGregor v. Brown*, 10 N. Y. 114; *Lawrence v. Smith*, 27 How. Pr. (N. Y.) 327; *Boyce v. Washburn*, 4 Hun (N. Y.) 292; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; *Bernnett v. Scut*, 18 Barb. (N. Y.) 180; *Vorebeck v. Roe*, 50 id. 302; *Dubois v. Kelly*, 10 id. 496. In *Bishop v. Bishop*, 11 N. Y. 123, it was held that *poles* necessarily used in raising hops, which were taken down and piled in the yard for the purpose of gathering the crop, were a part of the land.

³ See p. 372.

⁴ *Slocum v. Seymour*, 36 N. J. L. 138.

⁵ *Kilmore v. Howlett*, 48 N. Y. 569.

⁶ *Boyce v. Washburn*, 4 Hun (N. Y.) 792.

⁷ *Hobbs v. Weatherwax*, 38 How. Pr. (N. Y.) 385.

⁸ *Benedict v. Beebe*, 11 John (N. Y.) 145; *Lower v. Winters*, 7 Cow. (N. Y.) 263.

⁹ *Powell v. Rich*, 41 Ill. 469.

¹⁰ *Graff v. Fitch*, 58 Ill. 377.

¹¹ *McCarthy v. Oliver*, 14 U. C. C. P. 290; *MacDonnell v. McKay*, 15 Grant (Ont.); *Lawrence v. Ervington*, 21 id. 261; *Ellis v. Grubb*, 3 N. C. Q. B. (O. S.) 611; *Hamilton v. McDonnell*, 5 id. 720.

¹² *Summers v. Cook*, 28 Grant (Ont.) 179.

ered with reference to the new phase adopted in *Marshall v. Green*, and while the court adhered to its previous doctrine, yet it was by a divided court,¹ so that the question may be said to be an open one. In that case the plaintiff, by a contract in writing, dated Oct. 15, 1873, agreed to sell to one Casselman all the merchantable white and red pine timber suitable for his purposes, standing, lying, or being on certain premises owned by the plaintiff for \$600, of which sum \$400 was payable on the date of the agreement, and the balance in one year. The contract provided that the timber should be cut and removed before the 15th of October, 1881. Casselman, his agents, representatives, or assigns, by the terms of the contract were authorized to enter upon the premises at all times during the eight years for the purpose of cutting and removing the timber. Casselman did not pay the \$200 stipulated to be paid in one year, and after the expiration of the year, assigned the contract to the defendant. The question presented was, whether the contract was for a sale of an interest in land, and therefore within the statute; and it was held by a majority of the court that it was, and the judge delivering the opinion of the majority. BLAKE, V. C., thus comments on the doctrine of *Marshall v. Green*: "I think we have in this case an unfortunate extension of the intelligible rule, that growing trees are an interest in land, and that a contract in respect of them falls within the same rules as

¹ PROUDFOOT, V. C., dissenting, and in an able opinion sustaining the rule as adopted in *Marshall v. Green*. He said: "LORD HARDWICKE treated a sale of standing timber as a sale of chattels although the purchaser had eight years to remove it in. *Buxton v. Lister*, 3 Atk. 383. And I notice also, that in *Stokeley v. Butler*, Hob. 173, the grantee of the trees not only had five years to remove them, but had also the right to make some pits on the land, and to convert the trees into timber where they stood. These cases and many others that might be cited seem to establish that *where the trees are dealt with separately from the land*, they will be considered as chattels, as the purchasers plainly intended they should be. This ques-

tion is entirely distinct from another much relied on in the argument, viz., whether the trees were not so connected with the soil as to be an interest in land, and so require a writing to evidence the contract under the statute of frauds. But it does not seem at all clear that a sale of trees is such an interest in land as requires a writing for the sale of them." After adverting to the case of *Marshall v. Green*, and its doctrine, he continued: "The true rule deducible from these cases would seem to be that *if the trees were purchased for the timber as they stood, and not with the intention of allowing them to increase in size and become more valuable from remaining on the soil*, they are to be treated as chattels."

a contract in respect to lands; and that it is to be regretted that this question is left to depend upon the length of time the party has to remove the property purchased. But be this as it may, *Marshall v. Green* would have to be almost indefinitely extended, if the clause 'the trees to be got away as soon as possible,' be enlarged so as to cover a period of eight years." A similar doctrine is held in New Brunswick.¹ MR. BENJAMIN, in his excellent treatise on Sales,² says the decision in *Marshall v. Green* seems open to some criticism. It must be supported either on the ground that it falls within the principle that the property was not to pass until it had been cut down, and that this was the inference drawn from the words "to be cut down as soon as possible," or else it must be taken to have introduced a limitation upon the principle that even where the property passes before severance in *fructus naturales*, yet, *if the evidence shows that they are to gain nothing by further growth in the soil*, then to sell them as they stand is not a sale under the fourth but under the seventeenth section.

SEC. 198. **Distinction between Growing Trees and Growing Crops.** — The distinction between growing trees and ordinary annual, biennial, or other crops *which mature at regular periods*, is quite marked, and is well illustrated by *Joy, B.*,³ in which the question was, whether a sale of a growing crop of potatoes was a sale of chattels, or of an interest in the land. He said: "The general question for our decision is, whether there has been a contract for interest concerning lands within the statute of frauds, or whether it merely concerned goods and chattels, and that question resolves itself into another, — whether growing crops are goods and chattels? In one case it has been held that a contract for potatoes did not require a note in writing *because the potatoes were ripe*; and in another the distinction turned upon the hand that was to dig them, so that if dug by A, they were potatoes; but if by B, they were for an interest in land. Such a course always involves the judges in perplexity, and the case in

¹ *Seegoe v. Perley*, 1 Kerr (N. B.) 439; *Kerr v. Connell*, Berton (N. B.) 151; *New Brunswick Lumber Co. v. Kirk*, 1 Allen (N. B.) 443; *Murray v. Gilbert*, 1 Hannay (N. B.) 548.

² Benjamin on sales, 3d Eng. ed., § 126.

³ *Ferguson v. Dunne*, 1 Hayes (Irish) 542.

obscurity. Another criterion must therefore be had recourse to, and fortunately the later cases have vested the matter on a more rational and solid foundation. At common law growing crops were uniformly held to be goods, and they were subject to all the leading consequences of being goods, as seizure on execution, etc. The statute of frauds takes things as it finds them, and prevails for lands or goods according as they were esteemed before its enactment. In this way the question may be satisfactorily decided. If before the statute a growing crop has been held to be an interest in lands, it would come within the fourth section; but if only goods and chattels, then it comes within the seventeenth section. And as we think that growing crops have all the consequences of chattels, and are like them subject to be taken in execution, we must rule the point saved, for the plaintiffs.”¹ “Growing crops,” says SARGENT, J.,² “for many purposes are, and always have been, considered chattels. They go to the executor upon the death of the owner of the land, and not to the heir, and they may be levied on and sold like other personal chattels. And this being the case when the statute was enacted, they continued to be so treated, and may properly be so now. But the word ‘land’ is a comprehensive term, including standing trees, buildings, fences, stones, and waters, as well as the earth we stand on, and pass under the general description of land; in a deed standing trees must be regarded as part and parcel of the land in which they are rooted and from which they draw their support; and upon the death of the ancestor they pass to the heirs as a part of the inheritance, and not to the executor as emblement, or as chattels. Neither can they be levied upon or sold on execution as chattels while standing. This being the case when the statute of frauds was passed, it has since then been properly held, we think, that a sale of growing trees with a right at any future time to enter upon the land and remove them, *does* convey an interest in land.”³ Whether a sale of crops *fructus industriales* while they are immature and still grow-

¹ See also Pattison's Appeal, 61 Penn. St. 294; Kingsley v. Holbrook, 45 N. H. 319.

² Kingsley v. Holbrook, 45 N. H. 319.

³ Putney v. Day, 6 N. H. 430; Olmstead v. Niles, 7 id. 522; Green v. Armstrong, 1 Den. (N. Y.) 550; Warren v. Leland, 2 Barb. (N. Y.) 614.

ing, are (says MR. BENJAMIN in his work on Sales) only chattels, but "goods, wares, and merchandise," has not, it is believed, been directly decided.¹ Both BAYLEY, J., and LIT-

¹ See *Glover v. Coles*, 1 Bing. 6; and *Owen v. Legh*, 3 B. & Ald. 470, both being cases of distress for rent. *Pitkin v. Noyes*, 48 N. H. 294.

"It seems pretty plain," says BLACKBURN, J., in his work on sales, "upon principle, that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9 Geo. 4, c. 14, if not of the 29 Car. 2, c. 3. The agreement is, that the thing shall be rendered into goods and then in that state sold; it is an executory agreement for the sale of goods, not existing in that capacity at the time of the contract. And when the agreement is, that the property is to be transferred before the thing is severed, it seems clear enough, that it is *not* a contract for the sale of goods, it is a contract for a sale, but the thing to be sold is not goods. If this be the principle, the true subject of inquiry in each case, is, when do the parties intend that the property is to pass: if the things perish by inevitable accident before the severance, whom do they mean to bear the loss? for in general that is a good test of whatever they intend the property to pass or not; in other words, if the contract be for the sale of the things after they have been severed from the land so as to become the subject of larceny at common law, it is at least, since the 9 Geo. 4, c. 14, a contract for the sale of goods, wares, and merchandises, within the 17th section of the statute of frauds. If the contract be for the sale of the things whilst they are attached to the soil and not the subject of larceny at common law, it is a contract for the sale of things, crops, fixtures, emblements, trees, or minerals, which may or may

not be an interest in land within the 4th section of the statute, but are not goods, wares, and merchandise within the 17th section. On the whole the cases are very much in conformity with these distinctions, though there is some authority for saying that a sale of emblements or fixtures vesting an interest in them, whilst in that capacity, and before severance, is a sale of goods within the meaning of the 17th section of the statute of frauds, and a good deal of authority that such a sale is not a sale of an interest in land within the 4th section, which, however, may be the case though it is not a sale of goods, wares, and merchandise within the 17th.

In reviewing the authorities, it is of some importance to remark how the question arose before the court, and whether the decision turned upon the legal effect of the contract proved in evidence, or upon the contract stated in the pleadings, for some misapprehensions seem to have arisen from neglecting this.

The first case that is generally cited on the subject is *Waddington v. Bristow*, 2 B. & P. 452, decided by the Common Pleas in 1801. It was an action against executors. The declaration was that the defendant's testator was possessed of land on which hops were then growing; that the plaintiffs bargained for and agreed to buy, and the testator agreed to sell all the hops *then growing*, to be delivered in pockets, etc. In proof of this declaration a document was produced, signed by both parties, which was in the following terms: 'Agreed to give the undermentioned gentlemen at the rate of £10 per cwt. for the quantities of hops as attached to their respective names, to be in pockets, and to be delivered at Whitstable.—Wm. Francis (the testator), about 23 acres.' This paper was not

TLEDALE, J., expressed an opinion in the affirmative in *Evans v. Roberts*, and MR. TAYLOR, in his *Treatise on Evidence*,¹

¹ Taylor on Ev. 875, § 1043, ed. 1878.

stamped, and the question was not whether it came within the statute of frauds or not, but whether it came within the exemption in the Stamp Act of agreements relating to the sale of goods, wares, and merchandises. LORD ALVANLEY thought it an agreement for the sale of goods, and something more, viz., an agreement not to sell the produce of the land to any one else before it was severed. HEATH, J., and ROOKE, J., thought a contract for the sale of non-existing goods was not within the exemption, and that as in this case the hops did not at the time of the sale exist as goods, it required a stamp. CHAMBRÉ, J., thought a contract for the sale of non-existing goods was within the exemption; he seems to have doubted whether the agreement proved was not within the exemption, but he agreed with LORD ALVANLEY that the agreement declared upon gave the purchaser an interest in the produce of the vendor's land. It seems probable that CHAMBRÉ, J., would have held the agreement declared on within the 4th section of the statute of frauds, but it seems difficult to treat this case as directly deciding anything.

In *Crosby v. Wadsworth*, 6 East, 602, in 1805, the action was trespass to the plaintiff's close growing grass and hay. The plaintiff claimed the hay under a parol contract; LORD ELLENBOROUGH expressed an opinion that it could not be an agreement within the 17th section, because the goods did not exist as such at the time of the contract; on this opinion he afterwards acted in *Groves v. Buck*, 3 M. & S. 178; and as has been already observed, it is now by act of Parliament, not law, whatever it might be then. But the judgment of the court was that an agreement conferring an exclusive right to the growing grass was an agreement for an

interest in land. It may be observed that on these pleadings the effect of the agreement was not material; if the agreement did not give an exclusive right to the growing grass, trespass would not lie; if it did, the statute applied: in either case the plaintiff failed.

In *Scorell v. Boxall*, 1 Y. & J. 396, in 1827, on similar pleadings, the Exchequer decided the same point the same way, where the subject-matter of the action was growing underwood.

In both those cases the court had to decide upon the contract as it was stated on the pleadings; but in many cases the question depends as to the legal effect of the contract proved. In general, when there is a contract for the sale of goods in a state not yet fit for delivery, it is considered that the property is not intended to be transferred to the purchaser until the seller has done all that he is bound to do to render the goods fit for delivery, unless a contrary intention clearly appear (*post*, part 2), and this rule must apply where the contract is for the sale of things not yet rendered into goods, but which are, if the agreement is pursued, to be rendered into goods. The intention of the parties must be presumed to be to transfer the property in the things when in a deliverable state, i.e. when severed from the soil, if that is to be done by the seller, and not before. There is no doubt on the authorities that such a contract, continuing executory till the subject-matter of the sale is converted into goods, is (now at least) a contract concerning the sale of goods, and not a contract for the sale of an interest in land.

Thus, in *Smith v. Surman*, 9 B. & C. 570, in 1829, the King's Bench held that a verbal agreement for the sale of timber then growing, and to be cut by the vendor, was a contract for the sale of goods within the mean-

treats the proposition as being perfectly clear in the same sense. BLACKBURN, J., on the contrary,¹ says that the prop-

¹ Blackburn on Sales, pp. 19, 20.

ing of the 17th section. LITLEDAL, J., said, in delivering judgment: 'The impression on my mind is that wherever the subject-matter at the time of the completion of the contract is goods, wares, and merchandises, the 17th section attaches upon it, although it has become goods, wares, and merchandise between the time of making and completing the contract, either by one of the parties having bestowed his work and labor upon his own materials, or by his having converted a portion of his freehold into goods and chattels.' In that case the timber was to be cut by the *vendors*. In *Sainsbury v. Matthews*, 4 M. & W. 343, in 1838, the Exchequer held that a contract for the sale of potatoes not yet at maturity, at so much per sack, to be dug by the purchaser, was not a contract passing any immediate interest at all, but a contract for the sale of goods at a future day. PARKE, B., said: 'The contract gives no right to the land, if a tempest had destroyed the crop in the meantime, and there had been more to deliver, the loss would clearly have fallen upon the defendant' (the vendor). 'It is only a contract for goods to be sold and delivered. The case is stronger than that of *Evans v. Roberts*, because here there is only a stipulation to pay so much per sack for the potatoes *when delivered*; it is only a contract for goods sold and delivered.' LORD ABINGER, C. B., said: 'I think this was not a contract giving an interest in land; it is only a contract to sell potatoes at so much a sack on a future day, to be taken up at the expense of the vendee. He must give notice to the vendor for that purpose, and cannot come upon the land when he pleases.'

The terms of the agreement by which the price was to depend on the number of sacks seem to be in this

case important, and to make the distinction between it and the following cases:—

In *Parker v. Staniland*, 11 East, 365, in 1809, the bargain was for the crop of potatoes in the ground in November, and the purchaser was to take them immediately; instead of taking them immediately, he dug and removed them at intervals, taking the last about Lady Day, by which time they were damaged by the frost. The purchaser paid for all the potatoes he had taken away, but refused to dig up or take away the potatoes in a part of the field where they were destroyed by frost. The vendor recovered a verdict for their price. No question could arise upon the 17th section, for there was both a part payment and a part acceptance and receipt, but a rule *nisi* for a non-suit was granted on the ground that the bargain was for an interest in land; no point seems to have been made about the risk of loss, perhaps because it was considered a clear thing that the damage arose from the gross negligence of the purchaser who should have dug them up before the winter. An objection to the form of action, which would probably have raised the same point in another shape, was overruled, because not taken at the trial. But though the fact of the point not being made may weaken the authority of the case, it seems that LORD ELLENBOROUGH did consider that the contract gave the purchaser property in the potatoes whilst yet unsevered from the soil, and that a property in them was not an interest in land, 'though,' said he, 'they were not in the shape of personal chattels, as not being severed from the land, so that larceny might be committed of them.'

In the very same week, June 6, 1809, the common pleas, in *Emmerson v. Heelis*, 2 Taunt. 38, decided the

osition is "exceedingly questionable," and that no authority was given for it in *Evans v. Roberts*. MR. TAYLOR cites no

reverse. In that case there was a sale by auction of a growing crop of turnips, to be dug by the purchaser, for a price less than £10, so that no question could arise upon the 17th section. There seems to have been no express agreement as to when they were to be removed, but in other respects the contract seems identical with that in *Parker v. Staniland*. The vendor brought an action against the purchaser for not taking these turnips away. On behalf of the defendant several objections were made, which were satisfactorily answered; but a great one was, that it was a contract for an interest in land, and that the only memorandum was that made by the auctioneer at the sale, and that the signature of the auctioneer would not bind the purchaser. The court, after argument and taking time to consider, decided that it was an interest in land, but that the signature of the auctioneer was binding. From the expressions used, it appears that the court thought the purchaser took an interest in the turnips whilst yet in the soil, and that it never occurred to them that there could be any difference between growing turnips which are emblements, and hops and growing timber, both of which were instanced by the court.

In *Rodwell v. Phillips*, 9 M. & W. 502, in 1842, the Exchequer thought that the following agreement, 'Thomas Phillips agrees to sell to Mr. Rodwell the crops of fruit and vegetables of the upper portion of the garden, from the large pear trees, for the sum of £30, and Lionel Rodwell agrees to buy the same at the aforesaid price, and has paid £1 deposit,' gave the purchaser an interest in the fruit before severance, and consequently required a stamp. The pears, however, in this case, were not emblements nor fixtures, but part of the freehold. In this case LORD ABINGER, C. B., said: 'This was the case of an

action upon a contract, setting forth that the plaintiff had bought of the defendant a quantity of fruit and vegetables, then growing and being in a certain close of the defendant's, at a certain rate agreed upon between them, the price of £30, and in consideration thereof, and that the plaintiff, at the request of the defendant, had then promised the defendant that he would accept and receive the said fruit and vegetables, and pay the defendant for the same at the rate or price aforesaid, the defendant then promised the plaintiff that he would permit and suffer the plaintiff, and the servants and agents of the plaintiff in that behalf, to enter into the said close, and with all necessary and convenient tools, utensils, and implements, to gather and take the said fruit and vegetables, as and when the same should be fit for being gathered and taken, and to allow him to have proper access to the said fruit and vegetables for the purpose aforesaid: and although the said fruit and vegetables afterwards, to wit, on the day and year aforesaid, became fit to be gathered and taken, and the plaintiff, with his servants and agents in that behalf, was then ready and willing to gather and take the same, and to pay for the same after the rate aforesaid, whereof the defendant then had notice; and although the defendant did then permit and suffer the plaintiff to gather and take a very small part, to wit, fifty bushels of the said fruit and vegetables, yet the defendant, not regarding his said promise, did not nor would permit or suffer the plaintiff, or his servants or agents in that behalf, to gather or take the residue of the said fruit, or any part of such residue, although often requested so to do. And then the declaration goes on to allege, that after the making of the said contract with the defendant, and confiding in his promise, the plaintiff entered into

authority for his opinion. The cases bearing on this point are *Mayfield v. Wadsley*¹ and *Hallen v. Runder*.² In the

¹ 3 B. & C. 357. (See *Knight v. The New England Worsted Co.*, 2 Cush. 289, 290.)

² 1 C., M. & R. 267; *Strong v. Doyle*, 110 Mass. 93.

and made certain agreements with divers other persons, for the sale to them of parcels of the said fruit, which, by the defendant's refusal to permit his servants to take the residue, he was unable to perform, and that he lost money by the contract.

When the contract was produced at the trial, it appeared that it was not so extensive in its provisions as set forth in the declaration. It was answered, that though the contract did not in terms express it, yet it implied all that was alleged in the declaration. Then the objection was taken, that it was not a contract for the sale of goods, wares, and merchandises, but of an interest in land, and therefore required a stamp; and I was of that opinion. There is a great variety of cases, in which a distinction is made between the sale of growing crops and the sale of an interest in land; and it must be admitted, taking the cases altogether, that no general rule is laid down in any one of them that is not contradicted by some other. It is sufficient, however, for us to say, that we think this case ought not to be governed by any of those in which it is decided that a sale of growing crops is a sale of goods and chattels. Growing fruit would not pass to an executor, but to the heir; it could not be taken by a tenant for life, or levied in execution under a writ of *fi. fa.* by the sheriff; therefore it is distinct from all those cases where the interest would pass, not to the heir-at-law, but to some other person. Undoubtedly there is a case (*Smith v. Surman*, 9 B. & Cr. 561) in which it appears that a contract to sell timber growing was held not to convey any interest in the land, but that was where the parties contracted to sell the timber at so much

per foot, and from the nature of that contract it must be taken to have been the same as if the parties had contracted for the sale of timber already felled. In this case there seems to be no doubt that this was a sale of that species of interest in the produce of the lands which has not been excepted by the stamp act, and that it is not a sale of goods and merchandise; and the contract is of a sufficient value to require a stamp.'

In general in this country it is held that the sale of a growing crop is of a mere chattel, and not within the statute of frauds as to land. *Newcomb v. Rayner*, 2 John. (N. Y.) 430; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Stanbaugh v. Yeates*, 2 Rawle (Penn.) 161; *Penhallow v. Dwight*, 7 Mass. 341; *Craddock v. Riddlesburger*, 2 Dana (Ky.) 205; *Whipple v. Foot*, 2 John. (N. Y.) 418. And this has been held as to a sale of mulberry trees then growing in a nursery. *Whitmarsh v. Walker*, 1 Met. (Mass.) 313.

The distinction between these cases, in which the property in the things was held to pass before they were severed from the soil, and *Sainsbury v. Matthews*, is precisely the same as that between an ordinary bargain and sale, and the case of *Simmons v. Swift*, 5 B. & C. 857.

As the parties may enter in fact into a contract giving an interest in crops whilst still unsevered, it is desirable to inquire whether such a contract is within either the 4th or 17th sections of the statute of frauds. It is to be observed that emblements are not part of the freehold or inheritance; they go to the executor, and not to the heir; they may be seized by the sheriff under a *fi. fa.*, and are certainly chattels, but they are not *goods*, but are so far a part of the soil that

former, an outgoing tenant obtained a verdict, which was upheld, on account for crops bargained and sold, against an incoming tenant, who had agreed to take them at valuation; and in the latter, counts for fixtures bargained and sold were held sufficient. But BLACKBURN, J., observes on these cases, first, that in *Hallen v. Runder* the court expressly decided that an agreement for the sale of fixtures between the landlord and the outgoing tenant was not a sale of *goods*, either within the statute of frauds, or the meaning of a count for goods sold and delivered; and, secondly, that in both cases the land itself was to pass to the purchaser, and the agreement was, therefore, rather an abandonment of the vendor's right to diminish the value of the land than a sale of anything. The learned author, in another passage,¹ says that

larceny at common law could not be committed on them. A contract then for the sale of growing crops as such is a contract for the sale of an interest in something that is a part of the soil, though not a part of the inheritance, and whether such an interest is within the meaning of the 4th section of the statute of frauds or not, depends on the sense in which the words 'lands, tenements, and hereditaments,' are there used.

In *Warwick v. Bruce*, 2 M. & S. 205, in 1813, in which the contract declared on was a contract for the sale of all the potatoes *then* growing on certain lands, LORD ELLENBOROUGH overruled an objection that the contract was within the 4th section of the statute of frauds. 'If,' said he, 'this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of its growing surface, it would be a contract for the sale of an interest in land. But here it is a contract for the sale of potatoes at so much an acre. The potatoes are the subject-matter of sale, and whether at the time of the sale they were covered with earth in the field or in a box, still it was a sale of a mere chattel.' It seems pretty clear that LORD ELLENBOROUGH thought that growing crops were not part of the land within the 4th section, though he

certainly never intimates an opinion that they were goods in any sense of the word before severance.

In *Evans v. Roberts*, 5 B. & C. 829, in 1826, the agreement was for the sale of a cover of potatoes, to be turned up by the vendor at the price of £5. No question would arise under the 17th section, as the price was below £10; but it was objected that it was a contract for the sale of an interest in land. HOLROYD, J., pointed out that the purchaser was to have nothing to do with the potatoes till they were raised; and, moreover, that the vendor might choose which cover the purchaser was to have, so that he could have no interest in any specific land; but though both these propositions seem pretty clear, and either of them would have disposed of the case, BAYLEY and LITTLEDALE, JJ., took the opportunity of giving their opinion on the case at some length. LITTLEDALE, J., among other things, expressed the opinion that 'land' in the 4th section 'meant land taken as mere land,' and this is in accordance with LORD ELLENBOROUGH's opinion; but BAYLEY, J., went further and stated that 'growing crops were mere goods and might be recovered under a count for goods bargained and sold.'"

¹ Blackburn, p. 17.

"they are certainly chattels, but they are not *goods*, but are so far a part of the soil that larceny at common law could not be committed on them," and LORD ELLENBOROUGH was also of this opinion.¹ This point must, it is apprehended, be considered as still undetermined.

In *Lee v. Gaskell*,² upon a tenant's bankruptcy, his trustee sold the fixtures to the plaintiff, who resold them to the defendant, the bankrupt's landlord. Held, following *Hallen v. Runder*, that the sale did not fall within either the fourth or the seventeenth section of the statute. "Fixtures," says COCKBURN, C. J., "although they may be removable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord or any one else as goods and chattels, because they are not severed from the freehold, so as to become goods and chattels." In *Lee v. Gaskell*, as in *Hallen v. Runder*, the fixtures were bought by the landlord, the only distinction between the cases being that in *Lee v. Gaskell* there had been an intermediate sale by the tenant's trustee. It remains, however, to be decided whether on a purchase of fixtures by a person who is not the landlord, the sale does not fall within the seventeenth section, although, in the passage above cited, COCKBURN, C. J., takes the contrary view. And by an interlocutory remark, he indicates an opinion that the sale of fixtures is nothing more than the sale of the right to sever.

SEC. 199. **Intermediate Class of Crops.** — It is sometimes a matter of doubt whether growing crops are properly comprehended in the class of *fructus industriales* or *fructus naturales*. There is an intermediate class of products of the soil, not annual, as emblements, not permanent, as grass or trees, but affording either no crop till the second or third year, or affording a succession of crops for two or three years before they are exhausted, such as madder, clover, teasles, etc. The only reported case on this subject is *Graves v. Weld*,³ which was argued by very able counsel, and decided, after consideration, by LORD DENMAN, who delivered the unanimous judgment of the court, consisting of himself and LITLEDALE, PARK, and PATTERSON, JJ. The facts were

¹ See his decision in *Parker v. Staniland*, 11 East, 365.

² 1 Q. B. D. 700.

³ 5 B. & Ald. 105.

that the plaintiff was possessed of a close under a lease for ninety-nine years, *determinable on three lives*. In the spring of 1830, the plaintiff sowed the land with barley, and in May he sowed broad clover seed with the barley. The last of the three lives expired on the 27th July, 1830, the reversion being then in the defendant. In January, 1831, the plaintiff delivered up the close to the defendant, but in the meantime had taken off, in the autumn of 1830, the crop of barley, in mowing which a little of the clover plant that had sprung up was cut off, and taken together with the barley. According to the usual course of good husbandry, broad clover is sown about April or May, and is fit to be taken for hay about the beginning of June of the following year. The clover in question was cut by the defendant about the end of May, 1831, more than a twelvemonth after the seed had been sown. The defendant also took, according to the common course of husbandry, a second crop of the clover in the autumn of the same year, 1831. The jury found, on questions submitted by the judge: 1st. That the plaintiff did not receive a benefit from taking the clover with the barley straw sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. 2d. That a prudent and experienced farmer, knowing that his term was to expire at Michaelmas, would not sow clover with his barley in the spring, where there was no covenant that he should do so; and would not, in the long run and on the average, repay himself in the autumn for the extra cost he had incurred in the spring. The case was argued by FOLLETT for the plaintiff, and GAMBIER for the defendant, and LORD DENMAN, in delivering the judgment of the whole court, said: "In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was that the tenant should be encouraged to cultivate by being sure of the fruits of his labor; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labor, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one; for the cultivator very often looks for a compensation for his capital and labor in the produce of successive years. It was there-

fore admitted by each that the tenant would be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. *And the latter proposition we consider to be law."*

The principal authorities upon which the law of emblements depends are Littleton, § 68, and Coke's Commentary on that passage. The former is as follows: "If the lessee soweth the land, and the lessor, after it is sowne and before the corne is ripe, put him out, yet the lessee shall have the corne and shall have free entry, egresse and regresse to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him." LORD COKE says: ¹ "The reason of this is, for that the estate of the lessee is uncertaine, and therefore lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed, in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he sets rootes or sow hempe or flax or any other *annuall* profit, if, *after the same be planted*, the lessor oust the lessee, or if the lessee dieth, yet he or his executors shall have *that yeare's crop*. But if he plant young fruit trees or young oaks, ashes, elms, etc., or sow the ground with acornes, etc., there the lessor may put him out notwithstanding, because they will yield *no present annual profit*." These authorities are strongly in favor of the rule contended for by defendant's counsel; they confine the right to things yielding present *annual* profit, and to that year's crop which is growing when the interest determines. The case of hops, which grow from ancient roots, and which yet may be emblements, though at first sight an exception, really falls within this rule. In *Latham v. Atwood*,² they were held to be *like* emblements, because

¹ Co. Litt. 55 a.

² 1 Cro. Car. 515.

they were "such things as grow by the manurance and industry of the owner, by the making of hills and setting poles": that labor and expense, without which they would not grow at all, seems to have been deemed equivalent to the sowing and planting of other vegetables.¹

According to the principles here established, it would *seem* that the crop of the first year in such cases would be *fructus industriales*, but that of subsequent years, like fruit on trees, planted by tenants, would be *fructus naturales*, unless requiring cultivation, labor, and expense for each successive crop, as hops do, in which event they would be *fructus industriales* till exhausted. But the law as to the application of the statute of frauds to sales of growing crops of this character, especially of crops subsequent to the first gathered, cannot be considered as settled.

SEC. 200. **Crops when Mere Accessories to the Land.**—In the *Earl of Falmouth v. Thomas*,² where a farm was leased, and the tenant agreed to take the growing crops and the labor and materials expended, according to a valuation, it was held that the whole was a contract for an interest in land under the fourth section, and that the plaintiff could not maintain an *indebitatus* count for goods bargained and sold to recover the price of the crops according to the valuation. LITLEDALE, J., expressed the same opinion in *Mayfield v. Wadsley*,³ saying that "where the land is agreed to be sold, and the vendee takes from the vendor the growing crops, the latter are considered part of the land." This rule seems founded on sound principles, for in such cases the fact of his having acquired an interest in the land is part of the consideration which moves the purchaser to buy the crops; or, as it is put in BLACKBURN on Sales,⁴ the purchaser pays for an abandonment by the lessor or vendor of the right to injure the freehold. He buys an interest "*concerning* land," and that is covered by the language of the fourth section. From what has been said in reference to growing crops or anything attached to the soil at the time when an agreement for its sale is entered into, it will be observed that the cases all

¹ 10 B. & C. 446; *Pitkin v. Noyes*,
48 N. H. 294, 303.

² 1 Cr. & M. 39.

³ 3 B. & C. 366.

⁴ Blackburn on Sales, 20.

agree, that *where the title does not pass until the crop or thing is severed*, the contract is for the sale of goods because in that case, while the crop is not mature, and may continue to derive nutriment and benefit from the soil, yet during this period the interest is in the vendor, and the title does not vest in the vendee until the crop ceases to derive further support from the soil, and has become a mere chattel,¹ even though the purchaser is to sever them.² In *Parker v. Staniland*,³ the sale was by the plaintiff on a certain lot of two acres at 4s. 6d. a sack, and the defendant was to get them immediately.⁴ The contract was held to be for the sale of chattels merely. Both LORD ELLENBOROUGH and BAYLEY, J., predicated their decision upon the ground that the crop was to be taken away *immediately*, and distinguished the case from *Crosby v. Wadsworth*⁵ and *Waddington v. Bristow*,⁶ where the sale of a growing crop of grass was held to be within the fourth section upon that ground. In *Warwick v. Bruce*,⁷ and *Sainsbury v. Matthews*,⁸ decided in Exchequer in 1838, twenty-five years after the decision by the King's Bench in the former case, the distinction suggested in *Parker v. Staniland* and *Smith v. Surman*, *ante*, was disregarded. In both cases the contract was for the sale of a growing crop of potatoes *not then mature*, and which were to be dug by the

¹ *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Safford v. Annis*, 7 Me. 168; *Cutler v. Pope*, 13 id. 377; *Killmore v. Howlett*, 48 N. Y. 569; *Huff v. McCauley*, 53 Penn. St. 206; *Boyce v. Washburn*, 4 Hun (N. Y.); *Smith v. Bryan*, 5 Md. 141; *Byasse v. Reese*, 4 Met. (Ky.) 372; *Claffin v. Carpenter*, 4 Met. (Mass.) 580; *Whitmarsh v. Walker*, 1 id. 313; *Knox v. Harlason*, 2 Tenn. Ch. 232; *Green v. R. R. Co.*, 73 N. C. 524; *Anonymous*, 1 Ld. Rayd. 182; *Smith v. Surnam*, 9 B. & C. 561; *Pitkin v. Noyes*, 48 N. H. 294; *Mayfield v. Wadsley*, 3 B. & C. 357; *Rodwell v. Phillips*, 9 M. & W. 505. In *Jones v. Flint*, 10 Ad. & El. 753, a crop of corn; in *Dunne v. Ferguson*, a crop of turnips; in *Frank v. Harrington*, 36 Barb. (N. Y.) 415, a crop of hops. See also *PARKE, B.*, in *Rodwell v. Phillips*, *ante*; in *Purmer v. Piercy*, 40 Md. 212, a crop of

peaches; in *White v. Frost*, 102 Mass. 375; *Claffin v. Carpenter*, *ante*, growing timber; in *Sainsbury v. Matthews*, 4 M. & W. 343; *Warwick v. Bruce*, *ante*; *Evans v. Roberts*, 5 B. & C. 829, a crop of potatoes.

² *Sainsbury v. Matthews*, *ante*; *Evans v. Roberts*, *ante*; *Marshall v. Green*, 1 C. P. D. 35.

³ *Parker v. Staniland*, 11 East, 362.

⁴ See also *Marshall v. Green*, *ante*, where the same doctrine was applied where growing trees were to be cut and removed immediately.

⁵ *Crosby v. Wadsworth*, 6 East, 602.

⁶ *Waddington v. Bristow*, 2 B. & P. 452.

⁷ *Warwick v. Bruce*, 2 M. & S. 205.

⁸ *Sainsbury v. Matthews*, 4 M. & W. 343.

purchasers. In the first case, the crop was sold for a gross sum, and in the latter at 2s. a sack. In the latter case the sale was held not to involve an interest in land, and the court went the extreme length of holding that the sale was of goods and chattels within the seventeenth section, PARKE, B., saying: "This is a contract for the sale of goods and chattels at a future day, the produce of certain land, and to be taken away at a certain time." And the same view of the question was taken by LITLEDALE, J., in *Evans v. Roberts*.¹ In a later case² the question arose whether certain crops of grass growing on a certain estate which were assigned as security, implied a transfer of an interest in land, and ROLFE, B., said: "When a sale of growing crops does, and when it does not, confer an interest in land, is often a question of much nicety; but certainly when the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, as corn, pulse, or the like, on the terms *that he is to cut or sever them from the land, and then deliver them to the purchaser*, the purchaser acquires no interest in the soil, which, in such case, is only in the nature of a warehouse for what is to come to him merely as a personal chattel."

So where a growing crop, *fructus industriales* produced annually by the labor and industry of man, is sold, the title thereto vesting in the purchaser before severance, the contract is not for the sale of an interest in land, but of goods and chattels within the seventeenth section;³ but, where the crop is *fructus naturales*, that is, the natural growth of the soil, as grass, timber, fruit on trees,⁴ in a majority of the cases, it is held that the contract is for the sale of an interest in lands when it is intended that the title thereto shall vest in the purchaser before severance.⁵

¹ *Evans v. Roberts*, 5 B. & C. 836.

² *Washburn v. Burrows*, 1 Exch. 107.

³ *Marshall v. Ferguson*, 23 Cal. 65; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Bryant v. Crosby*, 40 Me. 9; *Bernal v. Hovious*, 17 Cal. 541; *Mattock v. Fry*, 15 Ind. 483; *Bull v. Griswold*, 19 Ill. 631; *Brisker v. Hughes*, 4 Ind. 146.

⁴ But see *Purner v. Piercy*, 40 Md. 212, *contra*. Also *Marshall v. Green*, 1 C. P. D. 35, where a different principle is adopted.

⁵ As to grass, *Watkins v. Rush*, 3 Lans. (N. Y.) 234; *Carrington v. Roots*, 2 M. & W. 248; *Crosby v. Wadsworth*, 6 East, 602. As to timber, *Drake v. Wells*, 11 Allen (Mass.) 141; *White v. Frost*, 102 Mass. 375; *Whit-*

SEC. 201. **Crop not yet Sown.**—Where a contract is entered into between the owner of land and another, that the former will sow certain seeds on his land, and sell the same to such other person at a certain fixed price per bushel, pound, etc., or for a certain gross sum, the contract is treated by the English courts as being an executory contract for the sale of goods, etc., and not as a sale of an interest in lands. Thus where A agreed to supply B with a quantity of turnip seed, and B agreed to sow it on his own land, and to sell the crop of seed produced therefrom to A at £1 1s. the Winchester bushel; and the seed so produced at the price agreed exceeded in value the sum of £10, it was held that this contract was within the seventeenth section of the statute; “for,” said LORD TENTERDEN, “the thing agreed to be delivered would at the time of delivery be a personal chattel.”¹ A similar view seems to have been adopted in New Hampshire,² where a contract was entered into between the plaintiff and defendant, by which the defendant agreed to plant three acres of potatoes and deliver them to the plaintiffs, who were manufacturers of starch, at a certain sum per bushel, and the court treated the contract as one for the sale of goods, etc., within the seventeenth section, and left it for the jury to say whether the contract was essentially one for the labor and skill of the defendant in raising the potatoes, or substantially a sale of potatoes which he might raise himself, or procure otherwise. But in Indiana, in an early case,³ a contract between A and B that the former would sell the latter all the broom corn which the former should raise on twenty-five acres of his land in the year 1853, at the rate \$60 a ton, was held to be a contract within the fourth section of the statute. But it is difficult to understand how such a contract can in any sense be regarded as a contract for a sale of land or any interest therein. The vendee acquires no interest in the land, in any sense, but only *in the produce thereof after it is severed and has be-*

marsh *v. Walker*, 1 Met. (Mass.) 313; *Nettleton v. Sikes*, 8 id. 34; as to standing underwood, *Scovell v. Boxall*, 1 Y. & G. 396; growing poles, *Teal v. Auty*, 2 B. & B. 101; as to fruit on trees, *Rodwell v. Phillips*, 9 M. & W. 505. But see *Purner v. Piercy*, 40

Md. 212, where a sale of fruit on the trees was held not to be within the 4th section.

¹ *Watts v. Friend*, 10 B. & C. 446.

² *Pitkin v. Noyes*, 48 N. H. 294.

³ *Bowman v. Conn*, 8 Ind. 58.

come a chattel; therefore it is believed that the rule adopted in the first two cases cited is the true one, and that a contract for the produce of a certain piece of land or a certain number of acres thereof, to be raised and severed by the vendor, is a contract for chattels within the seventeenth section, and not for an interest in lands within the fourth section. In New York¹ the doctrine stated above was applied in a case where a contract was made for the delivery of a certain number of bushels of hop roots, although at the time, they were in the ground. At one time the question whether the crop was ripe or not seems to have been considered material. But this is no longer regarded; and it appears also to be immaterial whether the price is to be estimated by the quantity sold, or by the acre; or whether the crop is to be harvested by the vendor or purchaser.²

SEC. 202. Sale of Crop before being Severed; Distinction between *Fructus Naturales* and *Fructus Industriales*.—Where the contract is for the sale of crops before they are severed from the soil, and which are still to derive nutriment from it, a distinction is drawn between a contract for the sale of *fructus naturales*; such as growing grass, *primae vesturae*, growing timber, or underwood, or growing fruit, which is within the fourth section as a contract for an interest in land; and a contract for the sale of *fructus industriales*, such as growing crops of corn, potatoes, or turnips, not produced spontaneously, but raised by the labor of man, which are seizable by the sheriff under a writ of *feri facias*, and pass to the executor and not to the heir, which is within the seventeenth section, as a contract for the sale of goods, wares, and merchandise. The leading case on this point is *Evans v. Roberts*.³ The agreement was for the sale of a growing crop of potatoes, to be turned up by the plaintiff, the vendor. The

¹ *Webster v. Zielly*, 52 Barb. (N. Y.) 482.

² *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 M. & Sel. 205; *Sainsbury v. Matthews*, 4 M. & W. 343; S. C. nom. *Stanbury v. Matthews*, 7 Dowl. 23; *Evans v. Roberts*, 5 B. & C. 829; 8 D. & R. 611; *Hallen v. Runder*, 1 C. M. & R. 266; *Dunne v. Fer-*

guson, 1 Hayes, 541; *Marshall v. Green*, L. R. 1 C. P. D. 35.

³ 5 B. & C. 829; 8 D. & R. 611, overruling in part *Emmerson v. Heelis*, 2 Taunt. 38. *Bricker v. Hughes*, 4 Ind. 146; *Sherry v. Picken*, 10 id. 375; *Kilmore v. Howlett*, 48 N. Y. 569; *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Safford v. Armis*, 7 Me. 168; *Smith v. Bryan*, 5 Md. 141.

action was *assumpsit* for "crops of potatoes bargained and sold," and it was held that this was not a contract for the sale of any lands, tenements, or hereditaments, or any interest in or concerning them, but a contract only for the sale or delivery of things which, at the time of delivery, should be goods and chattels. The grounds of decision were, that the effect of the contract was to give the purchaser a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; and also that growing potatoes are emblements, and, as such, chattels, which go to the executor of tenant in fee simple, and not to the heir, and may be taken in execution under a *fiери facias*.

SEC. 203. **Rule in Jones v. Flint.**—In *Jones v. Flint*,¹ the contract was for sale of a crop of corn on the plaintiff's (the vendor's) land, and the profits of the stubble afterwards; the plaintiff was to have liberty for his cattle to run with the defendant's; and the defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields; the defendant was to harvest the corn, and dig up the potatoes. It was held that it did not appear to be the intention of the parties to contract for any interest in the land, and that the contract was therefore not within the fourth section of the statute, but was for a sale of goods and chattels as to all but the lay grass, and as to that, a contract for the agistment of the defendant's cattle; the court saying that if the lay grass was excluded the parties must be taken to have been dealing about goods and chattels, and that an easement of the right to enter the land, for the purpose of harvesting and carrying them away, was all that was intended to be granted.² And therefore, according to the foregoing rules, parol contracts for the sale of growing fruit,³ growing grass,⁴ growing poles,⁵ and

¹ 10 Ad. & El. 753; 2 P. & D. 594. *fructus naturales* and *fructus industria-*

² And see *Dunne v. Ferguson*, *Hayes*, 540. *les* seems to be demonstrated.

³ *Rodwell v. Phillips*, 9 M. & W. 501. But see *Purner v. Piercy*, *ante*, where a contrary doctrine is held. And this would also seem opposed to the principle adopted in *Marshall v. Green*, *ante*, in which the distinction between

⁴ *Crosby v. Wadsworth*, 6 East, 602; *Carrington v. Roots*, 2 M. & W. 248; *Watkins v. Rush*, 2 Lans. (N. Y.) 234.

⁵ *Teall v. Auty*, 4 Moo. 542; 2 Brod. & B. 101; *Kingsley v. Holbrook*. 45 N. H. 313.

growing underwood,¹ before being severed, have been held to be within the fourth section of the statute,² as these are *fructus naturales* and would not pass to the executor, but to the heir, and could not be levied in execution under a writ of *feri facias* by the sheriff; and the contract confers on the purchaser an exclusive right to the land during a limited time, and for given purposes.

SEC. 204. **Rule in Waddington v. Bristow.**—In *Waddington v. Bristow*,³ it was held that a contract for the sale of growing hops was a contract for the sale of an interest in land. This case is, however, of questionable authority; and in *Rodwell v. Phillips*,⁴ PARKE, B., said, referring to it: "Hops are *fructus industriales*. That case would now probably be decided differently." And in *Frank v. Harrington*,⁵ this question was directly decided, and the court held that hops upon the vine are *personal chattels*, and may be sold as such.

SEC. 205. **Rule in Purner v. Piercy.**—In a Maryland case,⁶ the rule that crops coming under the head of *fructus naturales*, but which mature annually, are to be treated the same as crops *fructus industriales*, was adopted where a contract was entered into by which the plaintiff agreed by parol to sell to the defendant all the peaches *then growing* in the peach orchard of the plaintiff, at a certain specified sum, the defendant to gather and remove them as they matured. The defendant or his agent, at the time of the purchase, paid to the plaintiff a portion of the purchase-money, and a further portion before any of the peaches were gathered, and gathered the peaches as they matured, and removed them. In an action to recover the balance of the purchase-money, it was held that the contract was not within the statute, as a contract for the sale of an interest in land. STEWART, J., in delivering the opinion of the court, said: "Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, *whether ma-*

¹ *Scorell v. Boxall*, 1 Y. & J. 396.

⁵ *Frank v. Harrington*, 36 Barb.

² And see *Petch v. Tutin*, 15 M. & W. 115.

(N. Y.) 415.

³ 2 Bos. & P. 452.

⁶ *Purner v. Piercy*, 40 Md. 212; 17 Am. Rep. 591.

⁴ 9 M. & W. 503.

ture or immature, or whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the fourth section of the statute of frauds. Growing crops, if *fructus naturales*, are part of the soil, before severance, and an agreement therefore vesting an interest in them in the purchaser before severance, is governed by the fourth section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the seventeenth, and not by the fourth, section of the statute. Assuming these distinctions to be well founded, still what is the natural and what the artificial product remains to be determined in each case. MR. PHILLIPS, in his work on Evidence, vol. 3, p. 250, says: 'The statute does not include agreements for the sale of the produce of a given quantity of land, and which will afterward become a chattel; though some advantage may accrue to the vendee by its continuing for a time in the land.' In Taylor's Law of Evidence, 2d vol., § 952, the following propositions are submitted: '1st, a contract for the purchase of fruits of the earth, ripe, though not yet gathered, is not a contract for any interest in lands, though the vendee is to enter and gather them; 2d, a sale of any growing produce of the earth, reared annually by labor and expense, and in actual existence at the time of the contract, as, for instance, a growing crop of corn, hops, potatoes, or turnips, is not within the fourth section, though the purchaser is to harvest or dig them; 3d, an agreement respecting the sale of a growing crop of fruit, or grass, or of standing underwood, growing poles, or timber, is within the fourth section, and a written contract of sale cannot be dispensed with.'

However sound his first and second propositions, we think his third is to be taken with some qualification, and that a growing crop of peaches or other fruit, requiring periodical expense, industry, and attention, in its yield and production, may be well classed as *fructus industriales*, and not subject to the fourth section of the statute. There is nothing in the vegetable or fruit which is an interest in or concerning land, when severed from the soil, whether trees, grass, and other spontaneous growth *prima vestura*,

or grain, vegetables, or any kind of crops *fructus industriales*, the product of periodical planting and culture; they are alike mere chattels, and the severance may be in fact, as when they are cut and removed from the ground; or in law, as when they are growing, the owner in fee of the land, by a valid conveyance, sells them to another person, or where he sells the land, reserving them by express provision.

As a general rule, *if the products of the earth are sold specifically, and by the terms of the contract to be separately delivered, as chattels*, such a sale is not affected by the fourth section of the statute, as amounting to a sale of any interest in the land. When such is the character of the transaction, it matters not whether the product be trees, grass, and other spontaneous growth, or grain, vegetables, or other crops raised periodically by cultivation; and it is quite as immaterial whether the produce is fully grown or in the process of growing, at the time of making the contract.

The circumstance that the produce purchased may, or probably, or certainly will derive nourishment from the soil between the time of the contract and the time of the delivery, is not conclusive as to the operation of the statute. If the contract, when executed, is to convey to the purchaser a mere chattel, though it may be in the interim a part of the realty, it is not affected by the statute; but, if the contract is, in the interim, to confer upon the purchaser an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it is affected by the statute, and must be in writing, although the purchaser is at the last to take from the land only a chattel.

To put a reasonable construction upon the terms of the fourth section of the statute, from the evidence in this case, it is clear the contract in question is not within its meaning. It had been executed by the plaintiff, and the fruit had been gathered, and, in fact, paid for at the time of the suit. It was in proof that a part of the fruit was prematurely ripe at the time of the contract. It would be a perversion of the objects of the statute to hold as invalid the sale, in other respects legal, of the growing crop of peaches, with no intent of the parties to sell or purchase the soil, but affording a mere license, express or implied, to the purchaser to go upon the

land to gather the fruit and remove the same. Substantially the transaction takes its character of realty or personalty from the principal subject-matter of the contract and the interest of the parties, and therefore a sale of any growing produce of the earth in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered as a sale of an interest in or concerning land. Where timber or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether to be severed from the freehold by the vendor, or to be taken by the vendee, under a special license to enter for that purpose, it is still in contemplation of the parties, a sale of goods only, and not within the statute."

SEC. 206. Crops Sold with the Land. — Where, upon a lease, the tenant agrees to take the crops already growing on the land at a valuation, and to pay for the work, labor, and materials employed in making the lands ready for tillage, this is an entire contract for an interest in lands, and the growing crops cannot be treated as goods.¹

SEC. 207. Right of Out-Going Tenant. — Where it appeared that, by the custom of the county, the out-going tenant of a farm was entitled in some cases to two-thirds, in others to one-half of the crops of corn sown by him in the last year of his tenancy; that he was to cut the whole of the crops, and keep the fences in repair until the entire crop was cut and carried away, it was held that under such circumstances the out-going tenant had the possession in law of the field, until the crop was carried away.²

SEC. 208. Whether Fructus Industriales, Goods while Growing. — It appears never to have been expressly decided whether *fructus industriales* while growing are goods, wares, and merchandise within the seventeenth section of the statute. In *Evans v. Roberts*,³ both BAYLEY, J., and LITLEDALE, J., thought that they were, but BLACKBURN, J.,⁴ says that the

¹ *Earl of Falmouth v. Thomas*, 1 C. & M. 89; *Mayfield v. Wadsley*, 3 B. & C. 366; *Harvey v. Grabham*, 5 Ad. & El. 61.

² *Griffiths v. Puleston*, 13 M. & W. 358; 14 L. J. Ex. 33.

³ 5 B. & C. 829; 8 D. & R. 611.

⁴ *Blackburn on Sales*, pp. 19, 20.

proposition is "exceedingly questionable," and that no authority was given for it in *Evans v. Roberts*.¹

SEC. 209. Growing Crops not Returning Profit within the Year.—It also seems to be doubtful whether growing crops which do not produce a profit within the year in which they are sown are *fructus industriales* or *fructus naturales*. In *Graves v. Weld*,² the tenant for a term determinable upon a life sowed in the land, in the spring, first with barley, and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley straw more valuable, by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover, after more than a year had elapsed from the sowing. It was held that the tenant was not entitled to emblements of either of these two crops: first, because emblements can be obtained only in a crop of a species which ordinarily repays the labor by which it is produced, within the year in which that labor is bestowed; and secondly, because even if the plaintiff were entitled to one crop of the vegetable growing at the time of the loss of his interest, this had been already taken by him at the time of cutting the barley.³

SEC. 210. Shares in Companies, when an Interest in Lands or Goods, Wares, and Merchandise.—A question sometimes arises as to whether shares in a company possessed of real estate are to be considered as within the fourth or seventeenth sections of the statute. The question to be considered in deciding whether a share in a company is real estate or not, is, it is submitted, *has the shareholder an interest in*

¹ See further, Benjamin on Sales, 2d ed. p. 100, citing *Glover v. Coles*, 1 Bing. 6; *Owen v. Legh*, 3 B. & Ald. 470; *Mayfield v. Wadsley*, 3 B. & C. 357; *Hallen v. Runder*, 1 C. M. & R. 267.

² 5 B. & Ald. 105. See *Frank v. Harrington*, 36 Barb. (N. Y.) 415, where a sale of growing hops was held not to be within the statute.

³ And see *Latham v. Attwood*, Cro. Car. 515.

*the land itself, and is the substantial object of the company a dealing with land so that the share may result to the holder in the shape of land, or is he merely entitled to participate in the profits of the company?*¹

It is not necessary that the instrument creating the company should expressly declare that the shares are to be personal estate.² In England, shares in the following companies have been held not to be interests in land within the statute of frauds and the Mortmain Act:³ costbook mining companies,⁴ waterwork companies,⁵ dock companies,⁶ canal companies,⁷ gas companies,⁸ banking companies,⁹ foreign mining companies,¹⁰ insurance companies,¹¹ railway companies,¹² company formed for purchasing and improving land,¹³ and turnpike companies.¹⁴ In England it is held that a contract for the sale of railway shares is not a contract for the sale of "goods, wares, or merchandise" within the seventeenth section of the statute;¹⁵ nor is a contract for the

¹ *Bradley v. Holdsworth*, 3 M. & W. 422; *Watson v. Spratley*, 10 Exch. 243; *Powell v. Jessop*, 18 C. B. 336; *Hayter v. Tucker*, 4 K. & J. 243; *Morris v. Glyn*, 27 Beav. 218; *Bulmer v. Norris*, 9 C. B. (N. S.) 19; *Bennett v. Blain*, 15 C. B. (N. S.) 518; *Freeman v. Gainsford*, 34 L. J. C. P. 95; *Entwistle v. Davis*, L. R. 4 Eq. 272; *Robinson v. Ainge*, L. R. 4 C. P. 429.

² *Edwards v. Hall*, 6 D. M. G. 74; overruling *Ware v. Cumberledge*, 20 Beav. 503.

³ 9 Geo. III. c. 36.

⁴ *Watson v. Spratley*, 10 Exch. 243; *Powell v. Jessop*, 18 C. B. 336; *Walker v. Bartlett*, 18 C. B. 845; *Hayter v. Tucker*, 4 K. & J. 243; *Curling v. Flight*, 12 Jur. 423.

⁵ *Bligh v. Brent*, 2 Y. & C. 268; *Weekly v. Weekly*, cited 2 Y. & C. 281; *Ashton v. Lord Langdale*, 4 De G. & Sm. 402.

⁶ *Sparling v. Parker*, 9 Beav. 450; *Hilton v. Giraud*, 1 De G. & Sm. 183; *Walker v. Milne*, 11 Beav. 507.

⁷ *Walker v. Milne*, *ubi supra*; *Ashton v. Lord Langdale*, *ubi supra*; *Edwards v. Hall*, 6 D. M. G. 74; and see also *re Lancaster Canal Co.*, Mon. & B. 94.

⁸ *Sparling v. Parker*, *ubi supra*.

⁹ *Humble v. Mitchell*, 11 Ad. & El. 205; *Myers v. Perigal*, 11 C. B. 90; 2 D. M. G. 599; *Ashton v. Lord Langdale*, *ubi supra*; *Edwards v. Hall*, *ubi supra*.

¹⁰ *Baker v. Sutton*, 1 Keen, 234.

¹¹ *March v. Att. Gen.*, 5 Beav. 433.

¹² *Bradley v. Holdsworth*, 3 M. & W. 422; *Hibblewhite v. M'Morine*, 6 M. & W. 200; *Duncuft v. Albrecht*, 12 Sim. 189; *Tempest v. Kilner*, 3 C. B. 249; *Ashton v. Lord Langdale*, *ubi supra*; *Linley v. Taylor*, 1 Giff. 67 S. C. nom; *Taylor v. Linley*, 2 De G. F. & J. 84.

¹³ *Entwistle v. Davis*, L. R. 4 Eq. 272.

¹⁴ *Tippets v. Walker*, 4 Mass. 595. But see *Wells v. Cowles*, 2 Conn. 597, where the shares in such a company were held to be real estate.

¹⁵ *Hibblewhite v. McMorine*, 6 M. & W. 200; *Duncuft v. Albrecht*, 12 Sim. 189; *Bowlby v. Bell*, 3 C. B. 284; and see *Knight v. Barber*, 16 M. & W. 66, a case decided on the Stamp Act, 55 Geo. III. c. 184, sched. pt. 3, tit. "agreement," in which the same words are used.

sale of foreign stock,¹ or shares in a joint-stock bank,² cost-book mining company,³ or projected railway company.⁴ In

¹ *Heseltine v. Siggers*, 1 Exch. 856.

² *Humble v. Mitchell*, 11 Ad. & El. 205.

³ *Watson v. Spratley*, 10 Ex. 222.

⁴ *Tempest v. Kilner*, 3 C. B. 249.

These cases decide the question upon which the judges were divided, whether a contract for the sale of stock is within the statute: *Colt v. Netterville*, 2 P. Wms. 308, citing *Pickering v. Appleby*, Com. Rep. 354. Upon the strength of words "accept and receive" in this 17th section, it has sometimes been contended in argument that only corporeal and tangible things were the subjects of contract embraced within the meaning of that clause. Thus the counsel, in arguing the case of *Pickering v. Appleby*, Com. 354, which was an action for a sum of money for ten shares of the stock of the governor and company of the copper mines in England, sold to the defendant according to parol agreement, contended that where part of the goods cannot be delivered or accepted, it cannot be a contract within the statute, which extends only to such things, part whereof may be delivered or accepted. So, in the subsequent case of *Colt v. Netterville*, 2 P. Wms. 307, it was contended at the bar that whereas the statute enacts that no contract should be good for the sale of goods, wares, and merchandises of £10 price, unless part of the goods be accepted or earnest paid, or there was a note in writing, this showed that such goods were intended only as were capable of actual delivery; something that was corporeal, and not stock, which was incorporeal.

This reasoning, however, seemed to be answered with some effect by the counsel on the other side, who contended, that though the statute says, the contract shall be void, unless the buyer accepts part of the goods, or gives earnest, or there is some memorandum in writing; yet that it was not necessary that the thing contracted for should,

by that statute, be such as could be delivered into the other party's hands. That it was sufficient that part of the goods be accepted, or that there be earnest, or some memorandum in writing; and therefore if the goods cannot be delivered, if there be earnest or a memorandum in writing it is sufficient. And it was asked, if in the case of a contract for goods imported in a ship, the contract should be held to be not within the statute, because the goods could not be delivered till the arrival of the ship. It was further, on the same side, observed that the intention of the act was to prevent frauds and perjuries, which were equally dangerous in contracts for stock as for land, or any other thing. And that therefore the intention of the legislature seemed to be aimed at *all contracts*; and that it was the more probable that stocks were meant to be included, because traffic in them was used long before that act. According to the report in *Comyns*, the judges being divided in opinion, the case was adjourned. But, L. C. 2 P. Wms. 307, the question came afterwards before all the judges, who were equally divided upon it, six against six.

But in the case of *Massell v. Cooke*, Prec. in Chan. 533, where the plaintiff had agreed with one Green, the defendant's broker, for £5,000 South Sea Stock, at 187 per cent, to be delivered about ten days after, and on the day appointed the plaintiff attended at the transfer office all day, but the defendant did not come, and the stock having in the meantime considerably risen, the defendant refused to transfer it; the plea of the statute seemed to *MACCLESFIELD*, L. C., to be good. This last-mentioned case of *Massell v. Cooke* was probably the case alluded to in *Cruee v. Dodson*, Select. Cas., in Ch. in Lord King's time, 41 Trin. 11 G. 3, wherein the court said that it had been determined in Chancery that bargains relating to stock are within the

this country, in some of the States, by the language of the statute itself, all choses in action, which, of course, includes "stocks," are expressly within its provisions, requiring a note in writing for their sale. This is the case in New York.¹ In Indiana the word "goods" alone is used in the statute, and under it, it is held that stocks, notes, and other merely incorporeal rights;² and in New Hampshire³ and Georgia⁴ a similar doctrine prevails as to notes, treasury checks, etc., and carrying the principle to its legitimate sequence, it would embrace stocks and all other incorporeal hereditaments. Upon the other hand, in Massachusetts⁵ the statute is held to include incorporeal hereditaments, as the sale of a patent before letters granted, stocks, notes, etc.; and such also is the rule in Maine,⁶ Maryland,⁷ Vermont,⁸ and also in Connecticut.⁹ In the last case, WAITE, J., said: "In consequence of the great increase in corporations and the amount of capital invested in them, the stock of such companies has become a large and valuable portion of the personal estate

statute of frauds, and if earnest be not given, are *nuda pacta*.

In *Colt v. Netterville*, ante, the bill was for a specific performance of an agreement for transferring some York Buildings stock, stating that the defendant had agreed to transfer it to the plaintiff on a particular day therein mentioned, on the plaintiff's paying the money, and that the plaintiff agreed to pay so much per cent and to accept the transfer, and did thereupon pay to the defendant 6*d.* earnest. To which bill the statute of frauds was pleaded, denying that the defendant received or accepted the 6*d.* as earnest. The plea was held ill, was overruled on the ground that it was not material how or in what manner the defendant received it, but how the other paid it, upon the doctrine in *Pinnel's Case*, 5 Coke, 117. But LORD KING seemed to incline against construing the 17th section of the statute to extend to stock, "adverting to the case of one Wolstonholme, who was declared a bankrupt as having East India stock; but which decision was afterwards reversed by an act of parliament."

As to whether shares in a company

are "things in action" within the statute 32 & 33 Vict. c. 71, § 15, subs. 5, see *in re Jackson*, L. R. 12 Eq. 355; *in re Fox*, L. R. 17 Eq. 113.

¹ *Kessel v. Albestis*, 56 Barb. (N.Y.) 362; *People v. Beebe*, 1 id. 379; *Hagar v. King*, 38 id. 200; *Allen v. Aguirre*, 7 N. Y.; *Peabody v. Speyers*, 56 N. Y. 230; *Truox v. Slater*, 86 id. 630; *Artcher v. Zeh*, 5 Hill (N. Y.) 200.

² *Vawter v. Griffin*, 40 Ind. 593.

³ *Whittimore v. Gibbs*, 24 N. H. 484.

⁴ *Beers v. Crowell*, Dudley (Ga.) 28.

⁵ *Somerby v. Buntin*, 118 Mass. 279; *Tisdale v. Harris*, 20 Pick. (Mass.) 9; *Boardman v. Cutter*, 128 Mass. 390; *Baldwin v. Williams*, 3 Met. (Mass.) 367.

⁶ *Pray v. Mitchell*, 60 Me. 430. In *Gooch v. Holmes*, 41 Me. 523, the statute was held to apply to a sale of bank bills; see also *Riggs v. Magruder*, 2 Cr. (U. S. C. C.) 143.

⁷ *Calvin v. Williams*, 3 H. & J. (Md.) 38.

⁸ *Fay v. Wheeler*, 44 Vt. 292.

⁹ *North v. Forest*, 15 Conn. 400.

of our citizens. Contracts for the sale of such property are almost daily made, and often to a very large amount. Such contracts fall clearly within the mischiefs which the statute is intended to remedy. There is as much danger of fraud and perjury in the parol proof of such contracts as in any other. The statute is highly important and beneficial in its operation, and ought not to be narrowed by any very rigid construction;¹ and we think it no strained construction of its language to say the contract falls within the letter, as well as within the spirit of the act. In Florida the statute applies to 'personal property,' and this is held to include the stock of corporations."² The possession of shares in a company, the members of which have no direct interest in the land belonging to the company, but only a right to share in the profits, does not entitle the holder to be registered as a voter.³ But where the partnership deed declared that land which had been conveyed to two of the partners should be considered as personal estate, it was held that the partners had a right to vote, the declaration being merely voluntary and revocable.⁴

SEC. 211. *Shares in a Mine, etc.*—In *Boyce v. Green*,⁵ it was held that a sale of shares in a mine was an interest in land within the statute, BUSHE, C. J., saying: "The nature of mining implies at least a right to open the ground and keep it open, and such right to the land for a limited time as induced the court in *Crosby v. Wadsworth*,⁶ to hold a contract for the sale of growing crops to be within the statute."⁷ In *Ashton v. Lord Langdale*,⁸ mortgages of turnpike tolls, and of railway undertakings, were held to be interests in land within the Mortmain Act;⁹ and in *Toppin v. Lomas*,¹⁰

¹ *Howe v. Palmer*, 3 B. & Ald. 321.

² *Southern Life Ins. & Co. v. Cole*, 4 Fla. 359.

³ *Bulmer v. Norris*, 9 C. B. (N. S.) 19; *Acland v. Lewis*, ib. 32; *Bennett v. Blain*, 15 C. B. (N. S.) 518; *Freeman v. Gainsford*, 34 L. J. C. P. 95; *Tepper v. Nicholls*, 18 C. B. (N. S.) 121; *Wadmore v. Dear*, L. R. 7 C. P. 212.

⁴ *Baxter v. Brown*, 7 M. & Gr. 198;

see too *Rogers v. Harvey*, 5 C. B. (N. S.) 1.

⁵ *Batty*, 608.

⁶ *6 East*, 602.

⁷ And see *Vice v. Anson*, 7 B. & C. 409. But it is submitted that these cases can hardly be reconciled with those cited *ante*, p. 373, n. 1.

⁸ 4 De G. & Sm. 402.

⁹ 9 Geo. II. c. 36.

¹⁰ 16 C. B. 145.

Westminster Improvement bonds were held to confer upon the holder an interest in lands within the statute.¹

SEC. 212. Agreements for Leases or for Sale of Leases within Statute.—Agreements for leases and for the sale, assignment, or transfer of leasehold estates, being contracts for a grant or transfer of an estate or interest in land, are within the statute, and must consequently be authenticated by a signed writing.² Where the defendant agreed to obtain a transfer of the lease of a public-house, in which he himself had no interest, to the plaintiff, it was held that this was a contract within the statute.³

SEC. 213. Mixed Indivisible Contract.—Where the contract relates as well to a sale of an interest in land as to other matters, the whole forming one indivisible contract, and it is void as to the part which relates to the land, for want of writing, it will also be void as to the other matters.⁴ Thus in a Michigan case⁵ a verbal agreement was made for the transfer of a farm *and the wheat growing thereon*. The court held that as the contract for the conveyance of the farm was void for want of a writing, the contract relating to the wheat being connected therewith was also void.

SEC. 214. Agreement Amounting to Transfer of Interest in Land.—An agreement which amounts substantially to a transfer of an interest in lands, is within the statute.⁶ Where a parol agreement was made between the plaintiff and defendant, that if the plaintiff would surrender her tenancy to her landlord, and would prevail on him to accept the defendant as his tenant, in place of the plaintiff, he would pay the plaintiff £100 as soon as he should become tenant of the land, it was held that the contract was for the sale of an interest in land.⁷ A parol agreement by a lessee to quit

¹ See further, 1 Lindley on Partnership, 3d ed. 692.

² Add. on Contr. 7th ed. 145, citing Anon. Ventr. 361; Poultney v. Holmes, Str. 405.

³ Horsey v. Graham, L. R. 5 C. P. 13.

⁴ Cooke v. Tombs, Anst. 420; Mayfield v. Wadsley, 3 B. & C. 357, 361; Mechlen v. Wallace, 7 Ad. & El. 49; 2

N. & P. 224; Vaughan v. Hancock, 3 C. B. 766; Lord Falmouth v. Thomas, 1 Cr. & M. 89; Savage v. Canning, 1 Ir. C. L. 434; and see *ante*, p. 86, n. b.

⁵ Jackson v. Evans, 44 Mich. 510.

⁶ Kelly v. Webster, 12 C. B. 290; Smart v. Jones, 15 C. B. (N. S.) 717; 33 L. J. C. P. 156.

⁷ Cocking v. Ward, 1 C. B. 858; 15 L. J. C. P. 245.

possession on a certain day, and to pay all outgoings up to that time, in consideration of £150 to be paid to him by another person, who has agreed with the lessor for a new lease to him on the termination of the existing term, is within the statute;¹ and so is a similar agreement, saying that the lessee shall part with the land, and that the defendant (the intended lessee) shall take it.² Again, where there was a parol agreement for the transfer of a lease, the lessee to pay up all rent then due, and to endeavor to induce the landlord to accept the transferee as tenant, it was held that the transferee could not sue for a breach of the agreement to pay up the rent.³ Where the plaintiff, who was in the possession and occupation of premises, where he carried on the business of a milkman, agreed to yield up the possession and occupation of the premises to the defendant, who was to pay the rent and other outgoings, it was held that the agreement was for the sale of an interest in land, and must be in writing.⁴

SEC. 215. Agreement to Let Furnished Lodgings.—A contract for the taking or letting of furnished lodgings, whether by the day, week, or month, has been held to be a contract for an interest in land, if any specific rooms are let.⁵ But an agreement to take furnished lodgings in a boarding-house, it not being intended to give the right to the exclusive occupation of any particular part of the house, has been held not within the statute.⁶ In Massachusetts⁷ it has been held that a contract by the keeper of a boarding-house, to provide a man and his family for six months with board, *and with three specified rooms* as lodgings, and to light and heat the same, is not within the statute.

SEC. 216. Agreement to Furnish.—An agreement by a landlord to furnish a house previously to the entry of the intended tenant, the agreement for furnishing being made as part of the contract for the lease, is within the statute.⁸

¹ Smith v. Tombs, 3 Jur. 72.

24 L. J. C. P. 76; 3 C. L. R. 351.

² Smith v. Tombs, 3 Jur. 72.

⁵ Inman v. Stamp, 1 Stark, 12;

³ Hodgson v. Johnson, E. B. & E. 685; 5 Jur. (N. S.) 290; 28 L. J. Q. B. 88. But the doctrine of this case was questioned in Palbrook v. Lawes, L. R. 1 Q. B. D. 284.

Edge v. Strafford, 1 C. & J. 391; 1 Tyr. 295.

⁶ Wright v. Stavert, 2 E. & E. 721;

⁷ White v. Maynard, 111 Mass. 250.

6 Jur. (N. S.) 867; 29 L. J. Q. B. 161.

⁴ Smart v. Harding, 15 C. B. 652;

⁸ Mechlen v. Wallace, 7 Ad. & El.

SEC. 217. Agreement to Repair.—An agreement between a landlord and tenant, relating to repairs and alterations to be made on the property, is, when the repairs and alterations are only to be executed because of the lease, within the statute. Thus, where A being possessed of premises for the residue of a certain term of years, agreed with B to relinquish possession to him, and to suffer him to become tenant of the premises for the residue of the term, in consideration of B's paying a sum of money towards completing certain repairs on the premises, it was held that this was an agreement relating to the sale of an interest in land.¹ But where the lessee in possession verbally agreed with the lessor to pay him annually during the residue of the term, the sum of £10 per cent on the cost of new buildings, if the lessor would erect them, it was held that this agreement was not within the statute, as it was only collateral to the lease, and not a new demise.²

SEC. 218. Agreement to Build.—An agreement between occupiers of adjoining lands that one of them should build a boundary wall, the other to pay his proportionate share of the expense, is not within the statute.³ Nor is an agreement to build a house within the statute, although it implies a license to go on the land.⁴ But an agreement that if A will erect a house upon a certain lot of land belonging to B, A shall have the land, is within the statute, and cannot be enforced although A erects the house.⁵

SEC. 219. Instances of Agreements not Within the Statute.—A verbal agreement to pay for any damage done to the

49; 2 N. & P. 224; *Vaughan v. Hancock*, 3 C. B. 766; *Simmons v. Simmons*, 12 Jur. 8.

¹ *Buttermere v. Hayes*, 5 M. & W. 455; 7 Dowl. 489; and see *Vaughan v. Hancock*, 3 C. B. 766; *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89.

² *Hoby v. Roebuck*, 7 Taunt. 157; 2 Marsh. 433; and see *Donellan v. Read*, 3 B. & Ald. 899, 904; *Seago v. Deane*, 1 Moo. & P. 227; 4 Bing. 459.

³ *Stuart v. Smith*, 7 Taunt. 158.

⁴ *Wright v. Stavert*, 2 E. & E. 721.

⁵ *Smith v. Smith*, 28 N. J. L. 208. In a South Carolina case, *Jones v. McMichael*, 12 Rich. (S. C.) 176, a parol contract between A and B, whereby A agreed to erect a saw-mill on B's land and manage it at his own cost, B agreeing to deliver at the mill, at his own cost, certain timber from his land to be sawed by A, the profits of the sawing to be equally divided between them, was held to be within the statute and void.

surface in working a quarry is not within the statute.¹ Nor is an agreement that B may dig and carry away cinders from a cindertip, the property of A, B paying a certain price per ton.² Nor an agreement to use a dock for the purpose of repairing a ship.³ Nor for damage sustained by the plaintiff in consequence of a road having been made through his land; such an interest in land within the meaning of the statute as to require that a submission to arbitration to ascertain how much the defendant should pay therefor, should be in writing.⁴ Thus, an agreement not to claim damages for the flowing of lands if another will erect a dam and mill at a certain point on a stream, is not an agreement conferring an interest in land, but merely a waiver of a claim for pecuniary damages, which is valid, although by parol;⁵ and the same rule has also been adopted as to a parol

¹ *Griffith v. Jenkins*, 10 Jur. (N. S.) 207; 3 Bos. & P. N. R. 489.

² *Smart v. Jones*, 15 C. B. (N. S.) 717.

³ *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.

⁴ *Gillanders v. Lord Rossmore*, 1 Jones, Ex. R. 504; and see *Griffith v. Jenkins*, *supra*; 8 Ad. & El. 716.

⁵ *Smith v. Goulding*, 6 Cush. (Mass.) 154. See also *Johnson v. Skillman*, 29 Minn. 95, in which it was held that where one orally promised others that if they would erect a good custom mill at a certain point on their own land, he would give them the privilege of flowing his land so long as they would maintain such mill, and they relying on that promise, and partly induced by it, erected a dam and a mill accordingly, at large expense, the promise was a mere license, and was revocable even after it had been acted upon. The court said: "The parol agreement set forth in the decision of the trial court created no easement in the land of plaintiff, but took effect as a parol license only. A license creates no estate in lands. It is a mere power or authority founded on personal confidence, not assignable, and revocable at pleasure, unless subsidiary to a valid grant, to the beneficial enjoyment of which its

exercise is necessary, or unless executed under such circumstances as to warrant the interposition of equity. This is the result of the best considered cases. The doctrine of the early cases, which converted an executed license into an easement, is now generally discarded as being 'in the teeth of the statute of frauds.' The cases of *Ricker v. Kelly*, 1 Me. 117, and *Clement v. Durgin*, 5 id. 9, cited by defendants' counsel, have now little following; and the case of *Rerick v. Kern*, 14 S. & R. (Penn.) 267, also relied on, which was an action at law for damages in favor of the licensee, is followed in but few States. *Houghtaling v. Houghtaling*, 5 Barb. (N. Y.) 383; *Jamieson v. Millemann*, 3 Duer (N. Y.) 255; *Wash. Easem.* 24.

A simple reference to some of the more important cases, in support of the views herein expressed, will suffice. *Cook v. Stearns*, 11 Mass. 333; *Mumford v. Whitney*, 15 Wend. 380; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Foot v. New Haven & Northampton Co.*, 23 Conn. 214; *Bridges v. Purcell*, 1 D. & B. (N. C.) L. 492; *Hazleton v. Putnam*, 3 Pin. (Wis.) 107; *Woodward v. Seely*, 11 Ill. 157; *Wood v. Leadbitter*, 13 M. & W. 838; *Wiseman v. Lucksinger*, 84 N. Y. 31; 38

agreement to take a certain sum annually as a compensation for flooding lands,¹ although it would seem that in the latter case an easement is created, and the doctrine cannot be sustained if the agreement is treated as amounting to anything more than a license to continue the dam, revocable at the pleasure of the owner of the land. An agreement to release damages for the taking of lands under a statute for public purposes² is not within the statute, unless the statute con-

Am. Rep. 479. In cases where the license is connected with a valid grant, as of chattels or fixtures, upon the land of the licensor, susceptible of being removed, it is subsidiary to the right of property, and irrevocable to the extent necessary to protect the licensee, and save to him the right of entry — the right of possession following the right of property. *Nettleton v. Sikes*, 8 Met. (Mass.) 34; *Heath v. Randall*, 4 Cush. (Mass.) 195; *Wood Leadbitter*, *supra*. But where it is sought to couple with a license a parol grant of an interest in the realty, the attempted grant being void, the transaction remains a mere license. *Wood v. Leadbitter*, *supra*. A license is, of course, always a protection for acts done under it, and before revocation. *Pierrepont v. Barnard*, 6 N. Y. 279. In cases, however, of what are sometimes called negative easements, which are executed on the land of the licensee, a different rule prevails; as where a man has an easement of light and air upon or over an adjacent lot, he may abandon the same, and license the erection, by his neighbor, of a building which shall extinguish such right, and the license become irrevocable. *Morse v. Copeland*, 2 Gray (Mass.) 302; *Godd. Easem.* 472. Nor is it material that a mere license is or is not in writing, or upon a consideration. In *Jackson v. Babcock*, 4 John. (N. Y.) 418, there was a sealed instrument, and in *Wiseman v. Lucksinger*, 84 N. Y. 31; 38 Am. Rep. 479, there was both a writing and a consideration; but both were held licenses, and revocable. In such cases the question is one of interpretation as to the in-

tent of the parties as evidenced by the writing, and as CHANCELLOR KENT remarks, the distinction between an easement and a license is sometimes quite subtle. And so, in a suit in equity brought to confirm rights and assure an interest, as upon a part performance of a parol agreement alleged to be taken out of the statute of frauds (and otherwise void as a grant, but valid as a license), the question of interpretation of the terms of the agreement, and the intent of the parties, becomes a material one in the case. *Jackson & Sharp Co. v. Philadelphia &c. R. Co.*, 11 Am. Law Reg. (N. S.) 374," to be reported in 4 Del. Ch.

MR. GODDARD says (*Easements*, 471): "A license is also irrevocable if the licensee, acting upon the permission granted, has executed a work of a permanent character, and has incurred expense in its execution. This rule of law appears to be based on the injustice which would be inflicted upon the licensee, if after he had laid out money and executed a permanent work, the licensor were permitted to revoke his license and make him destroy his work, and so lose the money expended, or if he were allowed to treat him as a wrong-doer, and recover damages for the very act for which he gave permission."

In the latter American cases stress is laid on the statute of frauds, and the early English cases are distinguished on the ground that they were decided before the enactment of that statute.

¹ *Short v. Woodward*, 13 Gray (Mass.) 86.

² *Fuller v. Plymouth Commission-*

templates a contract between the parties, in which case the agreement must be in writing.¹ A parol promise by a municipal corporation to pay a land-owner for damages for illegally appropriating his land for the widening of a street, is not within the statute.² An agreement, for a valuable consideration, not to use a certain mill after a certain date, is held not to be within the statute; and this rule would apply to all contracts by which the owner of land agrees *not* to use it for certain specified purposes,³ where the agreement does not attempt to impose a burden upon the land, but merely to bind the owner thereof, so long as he remains the owner, or retains control over it.

SEC. 220. Parol Sales of Buildings, Fixtures, Improvements, etc. — An agreement for the sale of a building erected upon the lands of another, and which the person erecting has a right to remove, is valid, although by parol;⁴ and the same rule prevails as to any improvements made by a tenant or licensee, or fixtures put by him upon the lands of another, which he has a right to remove, although at the time the agreement is entered into they are annexed to the land, and apparently form a part thereof.⁵ In such cases the sale is treated as amounting simply to a transfer of the right of the seller to sever certain chattels from the soil, and not as transferring any interest to the vendee in the land itself.⁶ The fact that a chattel is annexed to the freehold by a person

ers, 15 Pick. (Mass.) 81; *Embury v. Connor*, 3 N. Y. 511; *Clement v. Durgin*, 5 Me. 14; *Fitch v. Seymour*, 9 Met. (Mass.) 462.

¹ *Phillips v. Thompson*, 1 John. Ch. (N. Y.) 131.

² *Coleman v. Chester*, 14 S. C. 286.

³ *Bostwick v. Leach*, 3 Day (Conn.) 476; *Leinan v. Smart*, 11 Humph. (Tenn.) 308.

⁴ *Keyser v. School District*, 35 N. H. 477; *Scoggin v. Slater*, 22 Ala. 687.

⁵ *Scoggin v. Slater*, 22 Ala. 687; *Cassell v. Collins*, 23 id. 676; *Bostwick v. Leach*, 3 Day (Conn.) 476; *Clark v. Shultz*, 4 Mo. 235; *Benedict v. Beebe*, 11 John. (N. Y.) 145. In *Beach v. Allen*, 7 Hun (N. Y.) 439, the trustees of a religious society sold to the

defendant their church building, which had been severed from the land and placed upon rollers, for the sum of \$500. It was held that the sale was not within the statute. *Lower v. Winters*, 7 Cow. (N. Y.) 263; *Howard v. Easton*, 7 John. (N. Y.) 205; *Thouvenin v. Lea*, 26 Tex. 612. Such fixtures, while annexed to the land, are not either goods, wares, or merchandise under the 17th section, nor upon the other hand do they form an interest in land within the 4th section. *Lee v. Risdon*, 7 Taunt. 188; *Primer v. Donald, Tr. & Gr.* 1; *Hallen v. Runder*, 1 C. M. & R. 266.

⁶ *Keyson v. School District*, *ante*; *Horsfall v. Hey*, 2 Excheq. 778; *Hallen v. Runder*, 1 C. M. & R. 266.

who has a right to remove it, does not destroy the character of the article so annexed, as a chattel; and in this country, whatever may be the rule in England, the rule seems to be well settled that improvements put upon land, although incorporated with it, are not necessarily to be regarded as land.¹ In a New York case,² a promise made by the owner of land to an intruder thereon, to pay him for improvements made by him thereon, — as for tillage, and certain buildings erected thereon by him, — it was held by the court that the promise was not within the statute as relating to an interest in land. “This was not,” said SPENCER, J., “a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, but related to the labor only which has been bestowed upon the land under the denomination of improvements.” In such cases, the doctrine of constructive severance applies, the same as it does where the owner of the land by a valid contract, sells a thing annexed to his land to a third person, or upon the sale of the land reserves the growing crops, or timber, or fixtures, or buildings thereon.³ In such cases, the crops, timber, or fixtures are treated as constructively severed from the land, and are treated as chattels in the hands of the person severing them, so that a parol sale thereof, answering the requirements of the statute as to the sale of goods, is valid, and sufficient to convey the title thereto.⁴ But where a chattel is annexed to lands, *without authority from the owner*, so that no right of removal exists in the person making it, it immediately becomes a part of the land; and a parol sale thereof by the person so annexing it to the land would be within the statute, and invalid upon that ground, as well as because of a total lack of title to the thing sold.⁵ There is also a constructive severance, where the thing annexed to the land has never assumed the character of realty, as *where the title to the land, and to the*

¹ Green v. Vardiman, 2 Blackf. (Ind.) 324; Scoggin v. Slater, *ante*; Forbes v. Hamilton, 2 Tyler (Vt.) 356; Ziekafosse v. Hullick, 1 Morris (Iowa) 175; Mitchell v. Bush, 7 Cow. (N. Y.) 185; Benedict v. Beebe, 11 John. (N. Y.) 145.

² Frear v. Hardenburgh, 5 John. (N. Y.) 272.

³ Warren v. Leland, 2 Barb. (N. Y.) 542; Bank of Lansingburg v. Crary, 1 Barb. (N. Y.) 542; Smith v. Bryan, 5 Md. 141; Teal v. Anty, 2 B. & B. 99.

⁴ Kingsley v. Holbrook, 45 N. H. 313; Warren v. Leland, *ante*; Smith v. Bryan, *ante*.

⁵ Frear v. Hardenburgh, *ante*.

thing annexed thereto, were originally, and have always been, distinct and vested in different persons. Thus, where land is demised to be used as a nursery garden, trees and shrubs planted therein are mere chattels,¹ as between the lessor and lessee, and the lessee may maintain an action of *de bonis exportatis* against the lessor, or any other person who wrongfully takes and converts them; and an oral agreement for their sale while growing or standing in the land, is not an agreement for the sale of an interest in or concerning land.² But as between the heir and an executor, and a grantor and grantee of the land, the rule would doubtless be otherwise if the title to the trees or shrubs was in the grantor;³ and upon principle we should say that if the nurseryman should buy the land, the trees and shrubs would at once become a part of the realty.

SEC. 221. Contracts for Work to be Done upon or for Land.

—A contract to do certain work upon the land of another, as to cut a certain number of cords of wood thereon, or certain timber, or to clear up a certain tract, is not a contract concerning an interest in land, and, if to be performed within one year, is valid, although by parol;⁴ and the same rule would apply as to a contract to erect a house, build a fence, or perform any other labor upon the land, although when completed the fruits of the labor may become a part of the realty. So, too, it has been held that an agreement to employ a person to dispose of certain lands, and to pay him a compensation dependent upon the price obtained therefor, is not

¹ *Miller v. Baker*, 1 Met. (Mass.) 27; *Wiley v. Bradley*, 60 Ind. 62.

² *Whitmarsh v. Walker*, 1 Met. (Mass.) 313. In this case a parol sale of mulberry trees growing in a nursery, and raised to be sold and transplanted, was held not to be within the 4th section of the statute. So in *Webster v. Zielly*, 52 Barb. (N. Y.) 482, a parol contract for the sale and delivery of a certain number of bushels of hop roots growing on the lands of the vendor, was held not to be a contract for the sale of an interest in land, although at the time when the

contract was made the roots were in the ground. See also *Smith v. Price*, 39 Ill. 28; *Penton v. Robert*, 2 East, 88; *Wyndham v. Way*, 4 Taunt. 316. In *Indiana*, *Heavilon v. Heavilon*, 29 Ind. 509, it has been held that a parol agreement on the sale of land that the crops growing thereon are to be reserved is valid, and that an execution of the deed is a performance of the contract by the vendor.

³ *Lee v. Risdon*, 7 Taunt. 191; *Miller v. Baker*, *ante*.

⁴ *Forbes v. Hamilton*, 2 Tyler (Vt.) 356.

within the statute;¹ and in Texas² it has been held that an agreement to locate certain land certificates and procure patents therefor in consideration of a good title to one-half of the land patented, is not within the statute; but this doctrine is doubtful, as it seems to be quite well settled that a contract to pay for labor *in land* is within the statute, and invalid as the measure of the laborer's right, unless in writing.³ This question has been quite recently considered by the House of Lords in England,⁴ and a doctrine consonant with that just stated, held. In that case, an intestate induced a woman to serve him many years as his housekeeper without wages, and to give up other prospects of establishment in life, by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her such life estate. The court held that there was no contract, and that she could not maintain an action against the heir upon a declaration stating that she was entitled to a life estate in the land. In a recent Ohio case,⁵ a parol promise to compensate a person for services, by will, *either* in land or money, was held to be within the statute. But while no recovery could be had upon the *contract* for compensation in money, yet a recovery might be had upon a *quantum meruit* therefor, and the contract could be proved, for the purpose solely of showing that the services were rendered at the request of the other party, and were not intended to be gratuitous. But although the contract *as to payment in land* is void, yet the person rendering such service may recover therefor upon a *quantum meruit*;⁶ but in order to arrive at the value of the services he will not be permitted to show the value of the land agreed to be given therefor,⁷ but is confined to the actual

¹ Fiero v. Fiero, 52 Barb. (N. Y.) 288.

² Watkins v. Gilkerson, 10 Tex. 340. See also Davis v. Walker, 4 Hayw. (Tenn.) 295.

³ Watson v. Watson, 1 Houst. (Del.) 209; Ham v. Goodrich, 37 N. H. 185; King v. Brown, 2 Hill (N. Y.) 485; Lisk v. Sherman, 25 Barb. (N. Y.) 433; Sutton v. Rowley, 44 Mich. 112.

⁴ Maddison v. Alderson, L. R. 8 App. Cas. 465.

⁵ Howard v. Brown, 37 Ohio St. 402.

⁶ Bannon v. Urton, 3 Green (Iowa) 228; Jack v. McKee, 9 Penn. St. 235; Burlingame v. Burlingame, 7 Cow. (N. Y.) 92; Watson v. Brightwell, 60 Ga. 212.

⁷ Erben v. Lorrillard, 19 N. Y. 299. In Clarke v. Davidson, 53 Wis. 317, A went into possession of a farm under a parol agreement to purchase; it was agreed between A and the ad-

value of his services in view of all the circumstances.¹ In a Massachusetts case,² it was held that if a person agrees to work for another and take his pay in land, while the contract is within the statute and therefore not enforceable, yet if the person for whom the service is rendered is ready and willing to perform it by conveying the land, the employee is bound to accept performance, and cannot recover for his services on an account annexed. A parol agreement entered into between a father and son, or between the owner of land and any third person, that if he will carry on a certain farm and support such land-owner and his family during his life, he may have the use of the farm, is valid;³ and in Indiana it is held that a parol agreement between a land-owner and another, that if the latter will support such land-owner during his life he will convey his land to him, or devise it to him by will, is not within the statute.⁴ Thus, in the latter case, in an action for the partition of certain lands, one of the defendants answered, claiming title thereto, and setting up a verbal contract between himself and the former owner of the lands, who had died intestate, by which said defendant was to board and care for such intestate during her life, and in consideration therefor said intestate was to convey said lands to the defendant, or devise the same to him by will; it was also alleged that the defendant had performed his part of such contract, and that said intestate had put him into possession of the lands under the same, and it was held that such contract was not within the statute of frauds. But it is not believed that at law⁵ such contracts have any valid-

ministrator, from whom he purchased, that, in case A failed to get title to the farm, he should be paid a certain sum per day for the work of himself and team thereon, and certain prices per bushel for seed used thereon. He did not acquire title. It was held that the agreement of purchase and that for payment for A's labor, etc., were so connected as considerations for each other as to constitute one indivisible contract, which was void because not in writing; and that while A might, however, recover on a *quantum meruit* the fair value of his labor, etc., over and above that of the crops grown

upon the farm and used by him, and the use of the buildings, pasturage, etc., yet the recovery in the case having been based upon the void agreement, the court would not assume that the amount recovered would have been the same on a *quantum meruit*.

¹ See Wood's Law of Master and Servant, 123.

² Riley v. Williams, 123 Mass. 506.

³ McCormick v. Drummert, 9 Neb. 384.

⁴ Mauck v. Melton, 64 Ind. 414.

⁵ In Johns v. Johns, 67 Ind. 440, the owner of land agreed verbally

ity; but in equity, where the contract has been fully performed by the third person, the court would under certain circumstances direct a specific performance by the executors of the land-owner, by a conveyance of the land. But an agreement made by the grantee of lands, in consideration of the grant, that he will support the grantor during the balance of his life, is not a contract relating to an interest in lands, and is valid, although by parol.¹ Such a contract merely relates to the mode in which payment for the lands shall be made, and does not require any writing to give it validity.

SEC. 222. Contract to Pay Taxes on Land. Mortgages. Collateral Agreement, Instances of, etc.—A parol agreement by the vendee of land to pay the taxes then or thereafter to be assessed thereon, is not a contract relating to an interest in land, and is not within the statute;² nor, indeed, *is any special agreement to pay the price of land, made either at the time when the conveyance is made, or afterwards,*³ or to do any merely collateral act, in consideration of such conveyance, which does not operate as a conveyance of an estate or interest in land. Thus, an agreement to pay an outstanding mortgage thereon,⁴ or to pay the indebtedness of the grantor to a certain person,⁵ or to pay the expenses of investigating the title to the land,⁶ or not to use the premises for the prosecution of a certain trade or business,⁷ have all been held not to be within the statute. But so far as the validity of a

with his sons, then living with him, that if they would support him and his wife, he would convey to them. They did so, the family continuing to reside together. No conveyance was ever made, and the father died intestate. It was held that the verbal contract was not taken out of the statute by performance on their part.

¹ Lyman v. Lyman, 133 Mass. 414; Bassford v. Pearson, 9 Allen (Mass.) 387; Nutting v. Dickinson, 8 id. 541.

² Brackett v. Evans, 1 Cush. (Mass.) 79; Carr v. Dooley, 119 Mass. 294; Preble v. Baldwin, 6 Cush. (Mass.) 549.

³ Nutting v. Dickinson, 8 Allen (Mass.) 540; Bassford v. Pearson, 9 id. 387; Whitbeck v. Whitbeck, 9

Cow. (N. Y.) 206; McCabe v. Fitzpatrick, 2 Leg. Gaz. 138; Miller v. Roberts, 18 Tex. 16; Gerahtney v. Wheeler, 26 Ind. 415; Daggett v. Patterson, 18 Tex. 158; Ford v. Finney, 35 Ga. 258; Evans v. Hardman, 15 Tex. 480; Graves v. Graves, 45 N. H. 323; Natchez v. Vandervelde, 31 Miss. 706; Stark v. Wilson, 3 Bibb. (Ky.) 476.

⁴ Ante, p. ; Ely v. McKnight, 30 How. Pr. (N. Y.) 97.

⁵ Morgan v. Overman Silver Mining Co., 37 Cal. 534.

⁶ Jenks v. White, 6 Excheq. 873.

⁷ Bostwick v. Leach, 3 Day (Conn.) 476; Fleming v. Ramsay, 46 Penn. St. 252; Linan v. Smart, 11 Humph. (Tenn.) 308.

parol agreement not to use the premises for certain purposes is concerned, it seems that no permanent restraint upon the use of the premises can be thus imposed; and it has been held that an agreement not to build upon the premises within a certain distance upon the street, is within the statute,¹ as also is an agreement by the vendor to open a street adjacent to his land,² or any agreement which imposes a permanent burden upon the estate.

SEC. 223. Agreement to Pay Additional Price, etc. — Where lands are sold by the acre and conveyed by metes and bounds, and described as containing a certain number of acres of land, a parol agreement to discount *pro rata* for each acre or part of an acre which the premises shall fall short of the number of acres which it is described as containing in the deed, is not a contract relating to an interest in land, but merely relates to the price thereof, and is not within the statute,³ because in such a case

¹ *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Rice v. Roberts*, 24 Wis. 461.

² *Richter v. Irwin*, 28 Ind. 26.

³ *Seward v. Mitchell*, 1 Cold. (Tenn.) 87. In Connecticut this question has been decided both ways. *Mott v. Hurd*, 1 Root (Conn.) 73, holding in conformity with the text; and *Bradley v. Blodgett*, Kirby 22, the contrary. See also *Gillett v. Burr*, 1 Root (Conn.) 74; *Graves v. Dyer*, 37 Vt. 369; *Green v. Vardiman*, 2 Blackf. (Ind.) 324; and *Frazer v. Child*, 4 E. D. S. (N. Y. C. P.) 153, in the two last of which cases the doctrine of *Mott v. Hurd*, *ante*, is treated as authoritative. In *Green v. Vardiman*, *ante*, A and B jointly purchased a land-office certificate, which was assigned to A alone. They agreed upon a division of the land by which A was to receive a few more acres than B, and was to allow a certain sum for the excess, and each entered upon and held the portion allotted him; and it was held that the agreement was not within the statute. In *Fraser v. Child*, *ante*, A procured money of B, and conveyed certain land to him, upon the understanding

that if, upon a sale of the land B was not reimbursed for the loan, B would make up the deficiency; and it was held that the contract was not within the statute. In *Garrett v. Malone*, 8 Rich. (S. C.) L. 335, the plaintiff conveyed to the defendant a tract of land as containing 110 acres, at \$8 per acre; and it was verbally agreed between them that the land should be surveyed, and if it turned out that it contained less than the number of acres named, the plaintiff should refuse *pro rata*; and if it contained more, the defendant should pay for the excess at the rate named. The lot contained more than 110 acres; and in an action to recover for such excess, the court held that the contract was not within the statute, and that the plaintiff's promise was a good consideration for the defendant. In *Dyer v. Graves*, *ante*, such an agreement is held to be within the statute. In *Schrivver v. Eckenrode*, 94 Penn. St. 456, S purchased from the assignee of E, for the benefit of creditors, a farm which E, by parol, guaranteed to contain a certain number of acres. S paid to the assignor the full amount

the grantor is legally bound to make good the deficiency in an action at law,¹ and his promise being merely to do what he was before legally or equitably bound to do, is predicated upon a good consideration, and does not relate to an interest in land; and this applies as well to an agreement on the part of the grantee to pay for any excess of land over the quantity contracted for. In a case previously cited,² the defendant sold the plaintiff a tract of land described in the deed by metes and bounds, and as containing five hundred and twenty-one acres. After the deed was made the parties, differing as to the quantity of land embraced in the tract, entered into a parol agreement that it should be surveyed, and if there were *more* than five hundred and twenty-one acres, the vendee should pay for the excess, and if less, the vendor should pay for the deficiency; and it was held that the agreement did not relate to the sale of an interest in land, and was binding upon the parties. In some of the States, *where land is sold by the acre*, and there is no agreement relative thereto, equity will give relief upon the ground of mistake, either where the quantity falls short of or exceeds the quantity intended to be conveyed.³ But no liability exists, either at law or in equity, where the sale is in gross;⁴ consequently in the latter instance, while a promise to make up the deficiency, or pay for the excess of lands conveyed, would not be void because within the statute, yet it would be of no validity because not supported by a consideration. A parol agreement to pay an increased price for land upon a certain contingency, as, if coal is found in it, is held to be within the statute.⁵ So is a contract to reconvey and divide

of the purchase-money, and received a deed of the farm which conveyed a less number of acres. In suit by S against E on his parol guaranty, it was held that he could recover, the statute having no application to such a case.

¹ *Cleaveland v. Rogers*, 1 A. K. Mar. (Ky.) 193; *Bell v. Thompson*, 34 Ala. 633; *Kelley v. Allen*, 34 id. 193.

² *Seward v. Mitchell*, 1 Coldw. (Tenn.) 87.

³ *Hendricks v. Mosby*, 3 Yerg. (Tenn.) 74; *Nichols v. Cooper*, 2 W.

Va. 347; *Cravens v. Kiser*, 4 Ind. 512; *Keyton v. Crawford*, 5 Leigh. (Va.) 39; *Metcalf v. Putnam*, 9 Allen (Mass.) 100.

⁴ *Zeringue v. Williams*, 15 La. An. 76; *Dalton v. Rust*, 22 Tex. 133; *Clark v. Carpenter*, 19 N. J. Eq. 328. But see *Grundy v. Grundy*, 12 B. Mon. (Ky.) 269, where it was held that equity would relieve where the deficiency is great, although the land was not sold by the acre.

⁵ *Heth v. Woolridge*, 6 Rand (Va.) 605.

the increase of price, if the grantor can find a purchase at an increased price within a year.¹ But in North Carolina,² where a debtor conveyed lands to his creditor under a parol agreement that the latter should resell the land, and after reimbursing himself, pay over the balance to the debtor, was held not to be within the statute.

SEC. 224. **Contract to Sell Lands.** — A contract to sell lands for another, for a certain sum or upon commission, is not within the statute;³ but while it has been held in Tennessee⁴ that a parol contract between the owner of a land-warrant and a locator, that the latter *shall have a portion of the land for locating the warrant*, is not within the statute,⁵ yet the only ground upon which this doctrine can be sustained is that the parties thereto become partners in the land, and that the land was given, not as compensation for the services of the locator, but as his share of the joint venture, and, that an agreement to pay a person *in lands* for his services in selling other land is within the statute as much as any other contract for services to be so compensated.⁶ In a California case,⁷ the defendant orally agreed with the plaintiff to give him a certain portion of the purchase-money, *and also a certain piece of land*, for his services in effecting a sale of the defendant's land. The court held that the portion of the contract relating to the land to be given to the plaintiff being within the statute, the whole contract was void, and that no action could be maintained for the money.⁸

¹ Ballard v. Bond, 32 Vt. 355. See S. P. Dyer v. Graves, 37 id. 369.

² Massey v. Holland, 3 Ired. (N.C.) L. 137.

³ Lesley v. Rosson, 39 Miss. 368; Watson v. Brightwell, 60 Ga. 212.

⁴ Davis v. Walker, 4 Hayw. (Tenn.) 295.

⁵ See also Miller v. Roberts, 18 Tex. 16, where it was held that an agreement between A and B that if B would remove A and his family from Tennessee to Texas, B should have one-half of all the land which A should acquire by such immigration and settlement, was not within the statute.

⁶ An agreement to *procure* a conveyance of lands is held, in Iowa, not to be within the statute. Bannon v. Bean, 9 Iowa, 395. In Vermont a contract by the vendee of lands to reconvey and divide the increase of price if the vendor can find a purchaser at an increased price within a year, is held to be within the statute.

⁷ Fuller v. Reed, 38 Cal. 99.

⁸ Holding that a contract *partly* within the statute is invalid *in toto*. See Hobbs v. Wetherwax, 38 How. Pr. (N. Y.) 385.

SEC. 225. **Land-Warrants, Possessory Rights, etc.**—The sale of an unlocated land-warrant or land-certificate is not within the statute, and may be made by parol;¹ and the same has also been held as to a parol assignment of a title bond,² and to the parol transfer of a certificate of the entry of a certain tract of land,³ or of a judgment constituting a lien on land.⁴ But a “possessory right,” or a right acquired by actual occupancy, is an interest in land, and although the party has no legal or equitable title beyond that acquired by being in possession, as a “squatter’s right” is an interest in land and cannot be sold by parol,⁵ so is a right to dig and carry away ore from the mine of another,⁶ as coals,⁷ or a mining claim,⁸ or any possessory right in lands.⁹ This is upon the ground that *possession* in the case of real estate, as in respect to chattels, is *prima facie* evidence of title, and as is stated in a case previously cited,¹⁰ “no title is complete without it.” Under this rule it is held in Connecticut¹¹ that a verbal agreement made at the delivery of a deed, that the grantee shall not take possession nor record his deed until he has paid the first instalment of the purchase-money, is an agreement relating to an interest in land, and within the statute; and the same rule prevails in those States where by law the mortgagee may enter before condition broken, as to a verbal agreement on his part *not* to enter until there has been a breach of the condition,¹² unless, from the language used, an agreement that the mortgagor shall retain possession until breach of the condition is fairly implied, in which case such verbal agreement is only auxil-

¹ Cox v. Bray, 28 Tex. 247.

² Bullion v. Campbell, 27 Tex. 653.

³ Reed v. McGrew, 5 Ohio, 275.

⁴ Winberry v. Koonce, 83 N. C. 351. But the interest acquired by an execution purchaser cannot be sold verbally. Whiting v. Butler, 29 Mich. 122.

⁵ Hayes v. Skidmore, 27 Ohio St. 331.

⁶ Riddle v. Brown, 20 Ala. 412.

⁷ Lear v. Chateau, 23 Ill. 39.

⁸ Copper &c. Co. v. Spencer, 25 Cal. 18.

⁹ Howard v. Easton, 7 John. (N. Y.) 205; Lower v. Winters, 7 Cow. (N. Y.) 263; Onderdonk v. Lord, Hill & D.

Supp. (N. Y.) 129; Rice v. Roberts, 24 Wis. 461; Sutton v. Sears, 10 Ind. 223; Whittemore v. Gibbs, 24 N. H. 484; Smart v. Harding, 15 C. B. 652; Miranville v. Silverthorne, 1 Grant’s Cas. (Penn.) 410.

¹⁰ Howard v. Easton, *ante*.

¹¹ Gilbert v. Bulkley, 5 Conn. 262.

¹² Norton v. Webb, 35 Me. 218; Colman v. Packard, 16 Mass. 39. But the latter case was overruled by Wales v. Mellen, 1 Gray (Mass.) 512, upon the ground that this rule does not apply where there is an *implied* agreement that the mortgagor shall retain possession until breach of the condition.

iary to that implied, and gives the latter no additional force.¹ In an English case² there is a *dictum* to the effect that a mere agreement to relinquish possession might not amount to a contract for an interest in land; but as the question did not arise in that case, and as the expression of PARKE, B., did not amount even to an expression of an opinion that such a rule would be adopted if the question was before the court, it cannot be regarded as lending any authority to a doctrine contrary to that expressed *supra*.³ Where the title has once passed by the execution and delivery of a valid deed, it is held in some of the States that the title cannot be reconveyed to the grantor by parol, nor, although the deed has never been recorded, by a destruction or cancellation of the deed.⁴ But the rule is otherwise where the deed is held in escrow, and the condition upon which it was to be delivered to the grantee has not been performed.⁵ But in some of the

¹ Wales v. Mellen, *ante*.

² Buttermere v. Hayes, 5 M. & W. 465.

³ Smart v. Harding, *ante*; Smith v. Lambs, 3 Jur. 72.

⁴ Gilbert v. Bulkley, *ante*; Batsford v. Morehouse, 4 Conn. 550; Coe v. Turner, 5 id. 86; Hine v. Robbins, 8 id. 347; Washington v. Ogden, 1 Black. (U. S.) 450; Raynor v. Wilson, 6 Hill (N. Y.) 469; Kearsing v. Killian, 18 Cal. 491; Girgins v. Van Gorger, 10 Mich. 523; Morgan v. Elam, 4 Yerg. (Tenn.) 375; Chessman v. Whittemore, 23 Pick. (Mass.) 231; Parker v. Kane, 22 How. (U. S.) 1; Cravener v. Bowser, 4 Penn. St. 257; Holmes v. Trout, 7 Pet. (U. S.) 171; Rogers v. Rogers, 53 Wis. 36; Taliafero v. Ratten, 34 Ark. 503; Jeffers v. Jeffers, 35 Ohio St. 119; Schutt v. Large, 6 Barb. (N. Y.) 373. In Orth v. Jennings, 8 Blackf. (Ind.) 420, A sold and conveyed a tract of land to B. Afterwards A purchased back the land from B, paid him for the same, and took possession; B, at the same time, delivering up to A, to be cancelled, the deed which had been executed to him by A, and which had not been recorded. No conveyance was executed by B to A. It was held

that the legal title to the land remained in B. It was held also that judgment rendered against A, after said deed was delivered up to him to be cancelled, was not a lien on the land. Schaffer v. Fithian, 17 Ind. 463; Hinchcliff v. Hinman, 18 Wis. 130; Bogie v. Bogie, 35 id. 659; Parker v. Kane, 4 id. 1; Wilke v. Wilke, 28 id. 296; Hilmar v. Christian, 29 id. 104. The tearing off of the names of the grantors in a deed, *with the mutual consent of all the parties*, will not operate to revest the title, although done under the supposition that such will be the effect. Steel v. Steel, 4 Allen (Mass.) 417. Nor does the cancellation of a deed by consent of parties divest the grantee of an estate once vested. Thus, title to lands vested in a married woman by an unrecorded deed cannot be divested by her parol consent that such deed may be cancelled, and a conveyance made by her grantor to her husband. Wilson v. Hill, 13 N. J. Eq. 143.

⁵ Shep. Touch. 59; Bushnell v. Passmore, 6 Mod. 217; Jackson v. Sheldon, 21 Me. 569; White v. Bailey, 14 Conn. 271; Shirley v. Ayres, 14 Ohio, 307; Hinman v. Booth, 21 Wend. (N. Y.) 267; Coe v. Turner, 5 Conn.

States it is held that *where a deed has not been recorded, the grantee by delivering up the deed to the grantor and cancelling it, revests the estate in him,*¹ where the transaction is fair, and the intent of the parties to revest the estate is clear, and the redelivery and destruction of the deed takes place *before the grantee has entered into possession under the deed*, as thereby his inchoate title is destroyed, and the grantor is left in possession under his former title.² But where the grantee has entered into possession under the deed, the title cannot be revested in the grantor by a mere redelivery and cancellation of the deed to him,³ nor when the rights of third parties have intervened,⁴ or a mortgage given for the purchase-money is outstanding.⁵ Under the rule that an equitable interest in land cannot be conveyed by parol, it is held that an interest in an executory contract for the purchase of a specific piece of land can only be made in writing.⁶ But where a person merely has a refusal of a certain tract of land, an agreement to find a purchaser for it has been held valid although not in writing.⁷

92; *Ruggles v. Lawson*, 13 John. (N. Y.) 285; *Russell v. Rowland*, 6 Wend. (N. Y.) 666.

¹ *Mallory v. Stodder*, 6 Ala. 801; *Holbrook v. Tirrell*, 9 Pick. (Mass.) 105; *Foulks v. Burns*, 2 N. J. Eq. 250; *Nason v. Grant*, 21 Me. 160; *Patterson v. Yeaton*, 47 id. 314; *Dodge v. Dodge*, 33 N. H. 487; *Sherburne v. Fuller*, 5 Mass. 133; *Trull v. Skinner*, 17 Pick. (Mass.) 213; *Lamson v. Ward*, 1 N. H. 9; *Farrar v. Farrar*, 4 id. 191.

² *Lamson v. Ward*, 1 N. H. 9. Where the grantee enters into the actual occupation and improvement of the premises under his deed, but does not record it, the title cannot be revested in the grantor, by the delivery back of the deed, for one purpose, and yet remain in the grantee for another; and if the grantee consents to the delivery back of such unrecorded deed to the grantor, for the purpose of having security given by mortgage for a portion of the consideration money remaining unpaid, no authority is thereby given to the grantor to make an absolute conveyance of the estate. *Hall v. McDuff*, 24 Me. 311.

³ *Chessman v. Whittemore*, 23 Pick. (Mass.) 231; *Steel v. Steel*, 4 Allen (Mass.) 417; *Howe v. Wilder*, 11 Gray (Mass.) 267; *Garver v. McNulty*, 39 Penn. St. 473; *Lawrence v. Stratton*, 6 Cush. (Mass.) 103; *Mallory v. Stodder*, 6 Ala. 801; *Morgan v. Elam*, 4 Yerg. (Tenn.) 375. But see *Cone v. Dudley*, 10 Mass. 403, *contra*.

⁴ *Hall v. McDuff*, 24 Me. 311; *Nason v. Grant*, 20 id. 160. *Trull v. Skinner*, *ante*; *Marshall v. Fisk*, 6 Mass. 24; and in any event a man may show his incapacity to vacate his deed. *Doe v. Dignowitty*, 12 Miss. 57.

⁵ *Patterson v. Yeaton*, 47 Me. 308.

⁶ *Smith v. Burnham*, 3 Sum. (U. S.) 435; *Whiting v. Butler*, 29 Mich. 122; *Hughes v. Moore*, 7 Cranch (U. S.) 176; *Richards v. Richards*, 9 Gray (Mass.) 313; *Simms v. Killian*, 12 Ired. (N. C.) 252; *Toppin v. Lomas*, 16 C. B. 145; *Grover v. Buck*, 34 Mich. 519; *Daniels v. Bailey*, 42 Wis. 566.

⁷ *Hosford v. Carter*, 10 Abb. Pr. (N. Y.) 452.

SEC. 226. Instances of Contracts which are Within the Statute.—An agreement to establish the title to land,¹ or to release a covenant running with the land,² or an agreement to execute an agreement to sell at some future time,³ or a parol agreement to purchase land⁴ are all within the statute. But, unless expressly made so by statute, such contracts are not void, but only voidable, and unless the party against whom it is sought to be enforced sees fit to object upon that ground, the court will not refuse to enforce it simply because it is verbal.⁵ A contract to abate a tenant's rent is within the statute.⁶ So is an agreement that an arbitration shall determine as to a lease to be granted,⁷ and an agreement by a beneficed clergyman to permit the profits of his living to be received by a trustee for the benefit of creditors.⁸

SEC. 227. Equitable Interests.—An agreement to convey an equity of redemption will not be binding unless in writing, for the equity of redemption is considered to be an interest in land.⁹ "It must be admitted," said ROLFE, B.,¹⁰ "that no agreement to convey an equity of redemption would be binding, unless in writing, because a court of equity treats the equity of redemption as the land itself—at all events, as an interest in land." This rule has been extended to contracts

¹ *Bryan v. Johnson*, 7 Mo. 106; *Duvall v. Peach*, 1 Gill. (Md.) 172.

² *Bliss v. Thompson*, 4 Mass. 488.

³ *Gould v. Mansfield*, 103 Mass. 408; *Sands v. Thompson*, 43 Ind. 18; *Yates v. Martin*, 1 Chand. (Wis.) 118; *Ledford v. Farrell*, 12 Ired. (N. C.) 285; *Lawrence v. Chase*, 54 Me. 196; *Trammell v. Trammell*, 11 Rich. (S. C.) L. 471; *White v. Coombs*, 27 Md. 489. Or a parol agreement to convey. *Taintor v. Brockway*, 1 Root (Conn.) 59; *MacKubbin v. Clarkson*, 5 Minn. 247; *Thompson v. Elliott*, 28 Ind. 55.

⁴ *Doe v. Cochran*, 2 Ill. 209; *Minus v. Morse*, 15 Ohio, 568; *Sims v. Hutchins*, 16 Miss. 328.

⁵ *Nelson v. Forgey*, 4 J. J. Mar. (Ky.) 569; *Doe v. Cochran*, *ante*. In Pennsylvania parol executory contracts for the sale of land, are not void. *Abell v. Douglass*, 4 Den. (N. Y.) 305.

⁶ *O'Connor v. Spaight*, 1 Sch. & Lef. 306.

⁷ *Walters v. Morgan*, 2 Cox, 369.

⁸ *Alchin v. Hopkins*, 4 M. & Sc. 615; 1 Bing. (N. C.) 99.

⁹ *Massey v. Johnson*, 1 Ex. 255; *Toppin v. Lomas*, 16 C. B. 145; *Burnet v. Dougherty*, 32 Penn. St. 371; *Richards v. Richards*, 9 Gray (Mass.) 313; *Hogg v. Wilkins*, 1 Grant's Cas. (Penn.) 67; *Holmes v. Holmes*, 86 N. C. 205; *Rawdon v. Dodge*, 40 Mich. 697; *Cowles v. Marble*, 37 Mich. 158; *Scott v. McFarland*, 13 Mass. 309; *Marble v. Marble*, 5 N. H. 374; *Kelley v. Stanberry*, 13 Ohio, 408; *Van Kenren v. McLaughlin*, 19 N. J. Eq. 187; *Clark v. Condit*, 18 id. 358; *Odell v. Montrose*, 68 N. Y. 499; *Agate v. Gignough*, 1 Rob. (N. Y.) 278; *Hughes v. Moore*, 7 Cr. (U. S.) 176. But *contra*, see *Danforth v. Lowry*, 3 Hayw. (Tenn.) 61.

¹⁰ *Massey v. Johnson*, 1 Exchq. 253.

for the sale of executory agreements for the sale of land, *because it is a contract for the sale of an equitable interest in land.*¹

SEC. 228. Agreement to make Mutual Wills devising Real Estate.—A devise at common law is considered in the nature of a conveyance by way of appointment² of particular lands to a particular devisee, and in this respect differs from the civil law, by which a will is an institution of the heir. A will, devising lands, transfers the title and passes the property of lands or goods as effectually as a deed,³ and a person taking lands under a devise is treated as coming under the legal definition of one who takes by purchase;⁴ consequently a parol agreement between two parties that each will make a will of his or her real estate and personal chattels in favor of the other, and that neither shall alter such will, is within the fourth section of the statute of frauds, and the fact that the wills were executed by both parties in conformity with such agreement, but one of them afterwards made another will, and died, the survivor, however, not changing his will, is not such a part performance as takes the agreement out of the statute so as to warrant a specific performance in equity.⁵

SEC. 229. Agreements for the Exchange or Partition of Lands.—An agreement by parol for the exchange of lands is within the statute.⁶ But where the exchange is carried into effect by a mutual change of possession, and the parties continue in such possession for a long time, making changes and improvements thereon, a court of equity would hold it to be binding upon the parties; and in Pennsylvania under such circumstances it is treated as valid at law, the custom in that State being for courts of law to administer equity through

¹ STORY, J., in *Smith v. Burnham*, 3 Sum. (U. S. C. C.) 435; *Whitney v. Butter*, 29 Mich. 122; *Grover v. Buck*, 34 id. 519; *Simms v. Killian*, 12 Ired. (N. C.) 252; *Daniels v. Bailey*, 43 Wis. 566; *Richards v. Richards*, 9 Gray (Mass.) 313; *Tappin v. Lomas*, 16 C. B. 145.

² *Harwood v. Goodright*, Cowp. 87.

³ *Shepherd's Touch*, 402.

⁴ *Watkins on Descents*, 155.

⁵ *Gould v. Mansfield*, 103 Mass. 408; *Hander v. Hander*, 2 Sandf. Ch. (N. Y.) 17; *Caton v. Caton*, L. R. 1 Ch. 137.

⁶ *Lane v. Shackford*, 5 N. H. 130; *Newell v. Newell*, 13 Vt. 24; *Maydwell v. Carroll*, 3 H. & J. (Md.) 361; *Clark v. Graham*, 6 Wheat. (U. S.) 577; *Lindsley v. Coates*, 1 Ohio, 243; *Stark v. Cannady*, 3 Litt. (Ky.) 399.

the forms of law.¹ Thus in the case first cited in the preceding note,² the parties by parol mutually agreed to exchange lands, and in pursuance thereof each party entered into possession, and occupied undisturbed nineteen years, when the plaintiff brought ejectment for the lands so occupied by the defendant. The court held that such exchange, accompanied by such a long-continued and exclusive change of possession, operated to transfer the title, and was not within the statute. "It is true," said AGNEW, J., "there is no difference between a parol sale and an exchange in regard to the requisites to take it out of the statutes of frauds and perjuries. A clear, explicit, and unambiguous contract, and a taking of possession under and in pursuance of the contract, are as much requisites of a parol exchange as of a sale. But there is a marked difference in the evidence which establishes the possession. A sale is confined to a subject coming from a single side. It has no relation to, or dependence on, any other subject. The evidence of possession taken of it is therefore confined to the single subject, and if not taken in a reasonable time, or so as to make it doubtful whether it is attributable to the contract, the parol sale is not taken out of the statute. But an exchange necessarily has a subject on each side which stands related to the other. One is the representative of the other, so much so that the law implies a contract of warranty by the act of exchanging. If, therefore, the evidence shows a clear, unequivocal, and complete taking possession of one of the subjects of an exchange, by the party owning the other subject, it strengthens the evidence of a possession taken by the opposite party of the corresponding subject. Evidence of possession that might seem weak and inconclusive in the case of a parol sale, is thus made clear and convincing in the case of an exchange." It must be remembered, however, that the doctrine expressed in this case is peculiar to Pennsylvania and the equitable powers of its courts, and that in the other States, while such a contract under similar circumstances would doubtless be held binding in a court of equity, it would not be treated as valid in a court of law, unless the occupancy had continued for the

¹ *Moss v. Culver*, 64 Penn. St. 614; *Reynolds v. Hewett*, 27 Penn. St. 176.
Miles v. Miles, 8 W. & S. (Penn.) 135; ² *Moss v. Culver*, *ante*.

period requisite to acquire title by adverse possession.¹ In a New York case,² B and H verbally agreed to exchange real estate, B to pay H \$500 as the difference in value. B gave a check for that amount in payment, receiving therefor a receipt signed by H. In an action on the check, which was lost, there was parol proof that it specified the lands, the price of each piece, and the amount of the mortgages to be executed, but it did not appear that the terms of credit were specified. B refused to enter into the written contract, and stopped payment of the check. It was held that the burden was upon B to show a failure of consideration; that the receipt and check, taken together, showed a good consideration for the check, and a sufficient memorandum so that the contract was valid under the statute of frauds, and enforceable in equity against H. At the common law, partitions of land could be made by *joint-tenants* only by deed, and by tenants in common only by livery, without deed, and by coparceners by parol only, without deed or livery,³ but by the statute of frauds such partition cannot in any of these cases be effected without writing.⁴ But in several of the States it

¹ *Stark v. Cannady*, 3 Litt. (Ky.) 399; *Roberts on Frauds*, 285.

² *Raubitschek v. Blank*, 80 N. Y. 478.

³ *Roberts on Frauds*, 283; Litt. 250; *Whaley v. Dawson*, 2 Sch. & L. 367; *Johnson v. Wilson*, Willes, 248; *Ireland v. Rattle*, 1 Atk. 541.

⁴ *Porter v. Hill*, 9 Mass. 34; 4 Greenl. Cruise, 77; *Perkins v. Pitts*, 11 Mass. 125. There are some cases in which a different view has been adopted, and it has been said that a joint-tenancy may be severed like a tenancy in common. *Haughbaugh v. Honald*, 1 Tread. (S. C.) 90. But this appears to be mere *dictum*, and certainly exhibits a misconception of the law by the court. Joint-tenants and tenants in common were not compellable among themselves to make partition until the 31 H. 8, c. 10, and 32 H. 8, c. 32, gave a remedy for enforcing it; but parceners were always at common law subject to a coercive partition by the writ *de partitione facienda*; to which BLACKSTONE,

2 vol. 324, assigns the reason for the validity of a partition at common law, though made by word of mouth alone. But the reason given by HAWKINS, in his Abridgment of Coke Litt. 250, seems to be more satisfactory, "that partitions between parceners were much favored and privileged, because their undivided estate was created and cast on them merely by act of law." Partitions, therefore, between parceners, might at law be made by parol; and what more particularly marked this favor of the law towards them, rent, estovers, and such like incorporeal things, might, upon such partition, be reserved or granted for equality of division without deed or writing, notwithstanding they *lay in grant only*, which was a privilege without a parallel in the law. But then such reservation or grant ought to be out of the lands descended, and not out of other lands, and the rent so reserved or granted was distrainable of common right though it was not a rent-service.

is held that verbal partitions between tenants in common are valid at law, at least for some purposes, as in New York,¹ Illinois,² Mississippi,³ Texas,⁴ Indiana,⁵ Pennsylvania,⁶ and

Joint-tenants, by reason of the particular nature of their estate, which is held by them in perfect unity, each being seized in the language of the law *per my et per tout*, cannot *enfeoff* each other of their respective parts of the land, for each already holds all the land subject to the interest of his companion, and the conveyance by livery of seizin cannot apply to one who is already in possession; neither can they *surrender* to each other, even though he is *only tenant for life* who attempts to make the surrender, and he who attempts to take the surrender, be *tenant in fee simple* of his part. Though it is true that if there are two joint-tenants, and one of them have the particular estate, and the other the fee simple, as where the estate is limited to two, and the heirs of one of them, and he that has the estate for life, aliens his part to a stranger, the alienee may surrender to the other joint-tenant; or if there are three joint-tenants for life, and the fee simple is limited to the heirs of one of them, and one of the joint-tenants for life releases to the other, and he to whom this release is made surrenders to him who has the fee simple, this is a good surrender for a third part. Vid. Perk. §§ 586, 587. The proper medium of mutual translation of each other's parts is a release, the reason of which easily occurs by adverting to the nature of their estate. But, on the other hand, as tenants in common have several and distinct freeholds, they may *enfeoff* each other, but cannot *release* to each other, for a release supposes the party to have the thing in demand, Co. Litt. 193, 200, *b.*, and the estates having come to them by distinct liveries, must pass to each other by distinct liveries. But if one joint-tenant grants, bargains, and sells, or gives, grants, and confirms his estate to his companion, either of these may operate in law as a release. 1

Ven. 78; 1 Sid. 452. And if there are three joint-tenants, and one of them releases to one of the other two, in such cases there is no need of any limitation of the estate, for the release is good without it. Shep. Touch. 324. At common law, therefore, one tenant in common might convey to his companion by parol with livery of seizin, but not so a joint-tenant.

It seems, therefore, to be an inadvertence upon BLACKSTONE's part when he says, that in the case of joint-tenants and tenants in common, the conveyance must have been perfected by livery of seizin; for which he cites the text of Littleton, § 250, and Co. Litt. 169. The words of LORD COKE are: "*A partition by joint-tenants is not good without deed, but tenants in common may make partition by parol, and if they execute the same in severalty by livery, this is good and sufficient in law; and therefore when the books say that joint-tenants may make partition without deed, it must be intended of tenants in common, and executed by livery.*" It seems now, however, to be clear that the statute has made it necessary, *both with respect to tenants in common and coparceners, that a partition of their lands must be effected by writing, and that among joint-tenants a deed is necessary as it stood at the common law.* Roberts on Frauds, 284.

¹ Wood v. Fleet, 36 N. Y. 499; Jackson v. Bradt, 2 Cai. (N. Y.) 169; Ryass v. Wheeler, 25 Wend. (N. Y.) 434; Jackson v. Harder, 11 John. (N. Y.) 202; Jackson v. Vosburgh, 9 id. 270.

² Grimes v. Butts, 65 Ill. 347; Shepard v. Rinks, 78 id. 188.

³ Natchez v. Vanderudde, 31 Miss. 706; Piper v. Buckner, 51 id. 848.

⁴ Stuart v. Baker, 17 Tex. 417; Dement v. Williams, 44 id. 158.

⁵ Moore v. Kerr, 46 Ind. 468.

⁶ Long's Appeal, 77 Penn. St. 151.

Wisconsin,¹ but even in these States the partition must be followed by possession, and in most of them by such acts of occupation as would be sufficient to secure a decree for specific performance in equity. In Maine,² North Carolina,³ New Jersey,⁴ Massachusetts,⁵ New Hampshire,⁶ and South Carolina,⁷ such partitions are held to be invalid at law unless followed by an adverse possession for the requisite statutory period, although, even where the possession is for a less period, the parties may acquire an equitable right which will be enforced in equity.⁸ In Missouri it is held that a parol partition between tenants in common is good as between the parties, but that only the *equitable* title passes, and that this does not ripen into a legal title except when followed by adverse possession for the requisite period.⁹ In California¹⁰ it is held that a parol partition of lands of such a character that possession cannot follow, is void, and upon the general question practically the same rule exists as in Missouri,¹¹ and such also is the rule in Alabama.¹² Thus, in the case last cited it was held that where A and B make an oral partition of lands, the legal title to which is in B, and take possession accordingly, A has no defence in an action brought by B to recover the land, unless his possession has been for such a length of time as to acquire a title by adverse possession, but that he has an *equitable* right which is not bound by a judgment recovered by B. It has been held that a partition of an equitable estate may be made

¹ Buzzell v. Gallagher, 28 Wis. 678.

² Duncan v. Sylvester, 16 Me. 388; John v. Sabbatis, 69 Me. 473; Chener v. Dole, 39 id. 162.

³ McPherson v. Seguire, 3 Dev. (N. C.) L. 153; Medlin v. Steele, 75 N. C. 154.

⁴ Woodhull v. Longstreet, 18 N. J. L. 405; Watson v. Keely, 16 id. 517; Lloyd v. Conover, 25 id. 47; Richman v. Baldwin, 20 id. 395.

⁵ Porter v. Hill, 9 Mass. 34; Porter v. Perkins, 5 id. 233.

⁶ Ballou v. Hale, 47 N. H. 347.

⁷ Goodhue v. Barnwell, Rice (S. C.) Eq. 198.

⁸ Woodhull v. Longstreet, *ante*; Townsend v. Dawson, 32 Vt. 183;

Marcy v. Marcy, 6 Met. (Mass.) 360; Dow v. Brown, 5 Cush. (Mass.) 289; Moore v. Kerr, 46 Ind. 468; Duncan v. Sylvester, 16 Me. 388; Hazen v. Barnett, 50 Mo. 506; Pringle v. Sturgeon, Litt. (Ky.) Sel. Cas. 112; Moore v. Kerr, 46 Ind. 468; Polhemus v. Hodson, 19 N. J. Eq. 63.

⁹ Hazen v. Barnett, 50 Mo. 506. In *Bourgeoise v. Blank*, 8 Mo. App. 484, it was held that a parol partition followed by long-continued possession will not be set aside.

¹⁰ *Lantermann v. Williams*, 55 Cal. 60.

¹¹ *Gates v. Salmon*, 46 Cal. 361.

¹² *Yarborough v. Avant*, 66 Ala. 526.

by parol;¹ but this doctrine is opposed to that which holds that an equitable interest is within the statute, and is untenable, except in those States where courts of law either by statute or custom administer equity, and then only in those cases where the partition has been followed by such acts as would warrant a decree for a specific performance of the contract. Indeed, where a parol partition has been made in any case, and the parties have entered into possession under it, and made extensive improvements, or done other acts which equity regards as sufficient to compel a specific performance, such partitions will be held good in equity.² In the case of the proprietors of townships, or of common and undivided land, holding by grant from the sovereign, it is held that they may make partition *by vote* merely;³ but this doctrine is exceptional, and can only be supported upon the ground of public necessity, and a custom, a departure from which would work great mischief in unsettling and overturning the title to lands in that section of country where this species of grants existed.

SEC. 230. Disputed Boundaries.—The settlement of disputed boundaries by adjoining owners, by parol, followed by the erection and maintenance of fences in accordance therewith, or an actual occupancy by the adjoining owners up to the line as agreed upon, *during the period requisite to acquire title by possession*, will be operative to confer an indefeasible title;⁴ but at law, in the absence of fraud, it is held in some of the States that such an agreement, though followed by long-continued occupancy under it, but short of

¹ *Maul v. Rider*, 51 Penn. St. 377; *Daw v. Jewell*, 18 N. H. 340.

² *Rhine v. Robinson*, 27 Penn. St. 30; *Bussell v. Gallagher*, 28 Wis. 678; *Weed v. Terry*, 2 Doug. (Mich.) 344; *Young v. Frost*, 1 Md. 377; *Goodhue v. Barnwell*, Rice (S. C.) Eq. 198; *Cummins v. Nutt*, Wright (Ohio) 713; *Sweeney v. Miller*, 34 Me. 388; *McMahon v. McMahon*, 18 Penn. St. 376; *Rhodes v. Frick*, 6 Watts (Penn.) 315; *Ebert v. Wood*, 1 Binn. (Penn.) 216; *Calhoun v. Hays*, 8 W. & S. (Penn.) 127; *Galbreath v. Galbreath*, 5 Watts (Penn.) 146.

³ *Codman v. Winslow*, 10 Mass. 146; *Springfield v. Miller*, 12 id. 415; *Folger v. Mitchell*, 3 Pick. (Mass.) 396; *Coburn v. Elmwood*, 4 N. H. 99; *Stiles v. Curtis*, 4 Day (Conn.) 328; *Corbett v. Norcross*, 35 N. H. 99; *Abbott v. Mills*, 3 Vt. 521; *Thorndike v. Barrett*, 3 Me. 380; *Cary v. Whitney*, 48 id. 526.

⁴ *Jones v. Smith*, 64 N. Y. 180; *Boyd v. Graves*, 4 Wheat. (U. S.) 513; *Davis v. Judge*, 46 Vt. 655; *Wakefield v. Ross*, 5 Mass. 16; *Moody v. Nichols*, 16 Me. 23.

the statutory period, has no validity, and although good as a license to protect the parties from liability in trespass, it is no defence in an action of ejectment.¹ But the rule is otherwise where the line is settled by referees under a rule of court,² or under an award of arbitrators when the submission is in writing.³ But in some of the States it is held that a parol agreement fixing a dividing line, which is in dispute, and ascertaining its position, with possession immediately following, is conclusive upon the parties, and cannot be controverted upon the ground that it is within the statute of frauds,⁴ because in such cases no title is conveyed, but the parties merely fix upon the true limits of their grant, and from that time hold up to such agreed line, under their deeds,⁵ and a line so established cannot be disturbed except upon the ground of fraud or mistake.⁶ But in order to give effect to such an agreement *the line must be in dispute*,⁷ and if it is a mere attempt to set up a new line in place of the original, which is not in dispute, it will have no validity unless in writing.⁸ The agreement must also be between the *owners of the land at the time*, and an agreement in that respect made by one who at the time was only an occupant is not binding upon him, although he subsequently becomes owner.⁹

¹ Raynor v. Timerson, 51 Barb. (N. Y.) 517; Reed v. Farr, 35 N. Y. 113; Proprietors &c. v. Prescott, 4 Allen (Mass.) 22; Talman v. Sparhawk, 5 Met. (Mass.) 469; Brewer v. Boston &c. R. R. Co., 5 Met. (Mass.) 478; Warner v. Fountain, 28 Wis. 405; Dupont v. Starring, 42 Mich. 492. In such cases, however, it is held that the division established is good as a license until revoked. Dewey v. Bardwell, 9 Wend. (N. Y.) 65; Sellick v. Adams, 15 John. (N. Y.) 197; Palmer v. Anderson, 63 N. C. 365; Davis v. Townsend, 10 Barb. (N. Y.) 333; Whitney v. Holmes, 15 Mass. 152.

² Goodridge v. Dustin, 5 Met. (Mass.) 363.

³ Davis v. Henry, 121 Mass. 150.

⁴ Grey v. Berry, 9 N. H. 473; Orr v. Hadley, 36 id. 575; Cutler v. Colli-son, 72 Ill. 113; Baba v. Richmond,

25 Ohio St. 115; Blair v. Smith, 16 Mo. 273; Turner v. Baker, 64 id. 218; Lindsay v. Springer, 4 Harr. (Del.) 547; McNamara v. Seaton, 82 Ill. 498.

⁵ Hagey v. Detweiler, 35 Penn. St. 409.

⁶ Bailey v. Jones, 14 Ga. 384; Houston v. Sneed, 15 Tex. 307; Coon v. Smith, 29 N. Y. 392; Colby v. Norton, 19 Me. 412; Gray v. Convillon, 12 La. An. 730; Avery v. Baum, Wright (Ohio) 576.

⁷ Nichols v. Lyth, 4 Yerg. (Tenn.) 456; Wilson v. Hudson, 8 id. 398; Houston v. Matthews, 1 id. 116; Boyd v. Graves, 4 Wheat. (U. S.) 513; Vassburgh v. Teator, 32 N. Y. 561.

⁸ Miller v. McGlann, 63 Ga. 435.

⁹ Crowell v. Maugh, 17 Ill. 419; Lewellen v. Overton, 9 Humph. (Tenn.) 76.

SEC. 231. Dower, Right of, Interest in Lands.—A widow's right of dower is an interest in land, within the meaning of the statute, which cannot be waived, discharged, or released by parol.¹ Thus an agreement by a widow not to claim dower upon the happening of a certain contingency,² or of a person to procure the release of a widow's dower, is within the statute;³ but it is held that a mere assignment of dower may be made by parol, as the estate is conferred upon the widow by the act of the law.⁴ Thus in the case last cited, an agreement by parol between a widow and the heirs as to the division between them of the rents and profits of a mine, was held to be valid, as it should be regarded as an assignment of dower.

SEC. 232. Pews in Churches.—Pews in churches, being regarded as real estate, can only be sold by a contract in writing;⁵ and in the case first cited in the last note it was held that an assignment of a certificate of ownership in the manner provided by the by-laws of the society, if not sufficient under the statute of frauds, will not protect the assignee against the attaching creditors of the assignor.

SEC. 233. Partnership in Lands.—A partnership constituted without writing is as valid as one constituted by writing;⁶ and when the partnership is proved to exist, it may be shown by parol evidence that its property consists of lands,⁷ and that it was established for the purpose of buying and selling lands for speculation.⁸

¹ *Wright v. De Graff*, 14 Mich. 164; *Gordon v. Gordon*, 56 N. H. 170; *Hall v. Hall*, 2 McCord (S. C.) Eq. 269; *Shotwell v. Sedam*, 3 Ohio, 5; *White v. White*, 16 N. J. L. 202; *Finney v. Finney*, 1 Wils. 34; *Keeler v. Tatnall*, 23 N. J. L. 62.

² *Wright v. De Graff*, *ante*.

³ *Martin v. Wharton*, 38 Ala. 637.

⁴ *Lenfer v. Henke*, 73 Ill. 405; 24 Am. Rep. 263.

⁵ *Barnard v. Whipple*, 29 Vt. 401; *Viele v. Osgood*, 8 Barb. (N. Y.) 130.

⁶ *Essex v. Essex*, 20 Beav. 442.

⁷ *Forster v. Hale*, 5 Ves. 309; *Dale v. Hamilton*, 5 Hare, 369; *affd.* 2 Ph. 266; but see *Caddick v. Skidmore*, 2

De G. & J. 52; and 1 Lindley on Partnership, 3d ed. 90.

⁸ *Dale v. Hamilton*, *ante*; *Essex v. Essex*, *ante*; *Gibbons v. Bell*, 45 Tex. 417; *Chester v. Dickinson*, 54 N. Y. 1; *Morrill v. Colehour*, 82 Ill. 618; *Henderson v. Hudson*, 1 Munf. (Va.) 510; but see *Walker v. Herring*, 21 Gratt. (Va.) 678, *contra*. *Dudley v. Littlefield*, 21 Me. 418; *Claggett v. Kilbourne*, *ante*; *Tibbetts v. Tibbetts*, 6 McLean (U. S.) 80; *Ludlow v. Cooper*, 4 Ohio St. 1; *Kramer v. Arthurs*, 7 Penn. St. 165. In *Personette v. Pryme*, 34 N. J. Eq. 26, two owners of land agreed by parol that the same should be considered

SEC. 234. **Agreement merely Collateral.** — *An agreement that is merely collateral to an intended transfer of an interest in land* is not within the statute.¹ Thus, where the defendant, on a negotiation for a mortgage, promised to pay the plaintiff (the intended mortgagee) his costs of investigating the title, in case the defendant changed his views, or the title proved to be bad, it was held that the contract did not relate to an interest in land.² So where the plaintiff agreed to hire of the defendant some grass-land on the terms of a lease to be signed at some future time, entered upon the land and found it overrun with rabbits, and on the lease being presented to him for signature, refused to sign it, unless the rabbits were destroyed, and the plaintiff verbally promised to destroy them, it was held that the parol agreement was collateral to the written lease, and was valid.³

Where a contract consists of two collateral agreements, one only of which relates to an interest in land, then, if that part of the contract has been executed, the fact of the whole

and conducted as partnership property, each contributing equally to the support of a widow, whose support was a charge on the land, and to the expenses and taxes; that an account should be kept of the proceeds derived from the sale of the produce, and from the sale of any sand therefrom; that one owner might live on the land, and any advancements for her support should be charged against her, and at the death of either a final account should be taken. On a bill for such an account, filed by the administrator of one owner, after the widow's death, it was held that the agreement was not within the statute. *Evans v. Green*, 23 Miss. 294; *Bunnell v. Tainter*, 4 Conn. 568; *Bruce v. Hastings*, 41 Vt. 380; *Brown v. Morris*, 83 N. C. 251; *Trowbridge v. Wetherbee*, 11 Allen (Mass.) 361.

¹ *Wetherbee v. Potter*, 99 Mass. 454; *Essex v. Essex*, 20 Beav. 442; *Jeffreys v. Small*, 1 Vern. 217; *Boyers v. Elliott*, 7 Humph. (Tenn.) 204; *Wells v. Stratton*, 1 Tenn. Ch. 328; *Dyer v. Clark*, 5 Met. (Mass.) 562; *Howard v. Priest*, 5 id. 582; *Burnside*

v. Merrick, 4 id. 437; *Fall River Whaling Co. v. Borden*, 10 Cush. (Mass.) 458; *Claggett v. Kilbourne*, 1 Black (U. S.) 348; *Waugh v. Mitchell*, 1 Dev. & B. (N. C.) Eq. 510; *McAllister v. Montgomery*, 3 Hayw. (Tenn.) 94; *Moderwell v. Mullison*, 21 Penn. St. 257; *Ludlow v. Cooper*, 4 Ohio St. 1; *Coles v. Coles*, 15 John. (N. Y.) 159; *Galbraith v. Gedge*, 16 B. Mon. (Ky.) 631; *Henderson v. Hudson*, 1 Munf. (Va.) 510; *Hauff v. Howard*, 3 Jones (N. C.) Eq. 44; *Jones v. McMichael*, 12 Rich. (S. C.) L. 176; *Fairchild v. Fairchild*, 64 N. Y. 471; *Crawshay v. Maule*, 1 Swanst. 495; *Smith v. Tarlton*, 2 Barb. Ch. (N. Y.) 336; *Traphagen v. Burt*, 67 N. Y. 80; *Black v. Black*, 15 Ga. 449; *Shanks v. Klien*, 104 (U. S.) 18; *Wiegander v. Copeland*, 7 Sawyer (U. S. C. C.) 442.

² *Jenks v. White*, 6 Exch. 873; 21 L. J. Ex. 265.

³ *Morgan v. Griffith*, L. R. 6 Exch. 70; and see *Angell v. Duke*, L. R. 10 Q. B. 174; *Erskine v. Adeane*, L. R. 8 Ch. 756.

contract not having been in writing will not preclude an action on the other part, founded on a promise to be performed after such execution. But one contract founded upon one consideration cannot be bisected, so as to make a new contract and a new consideration out of one-half.¹ In *Mayfield v. Wadsley*,² the occupier of a farm quitted it in March, and was succeeded in possession by B. A had sown forty acres with wheat, and it appeared that at a meeting between A and B in February in the same year, A asked B if he would take the forty acres of wheat at £200, telling him that if he did not he should not have the farm. B said that he would take it; and a person present then valued the dead stock, and, having so done, asked to whom he was to value it; B said that it was to be valued to him, and then promised to pay A for the wheat and the dead stock on a given day, and paid a sum of money on account. B afterwards had possession of the farm, the growing wheat, and the dead stock. It was held that the contract for the dead stock was distinct from any contract for the sale of the wheat and the possession of the farm, and therefore that A was entitled to recover to that amount.

SEC. 235. Actions in Respect of Void Contracts.—*Where a void contract directly concerning an interest in land has been executed, an action will lie upon a special promise to be performed after such execution.*³ Where a lessee agreed with his lessor that if she would accept another tenant in his place (he being restrained from assigning the lease without her consent) he would pay her £40 out of £100 which he was to receive for the good will, and consent was given, and he received the £100, but refused to pay over the £40, on the ground that there was no written agreement; it was held that the lessor might recover the £40 in an action for money had and received.⁴ Again, where the plaintiff had verbally

¹ *Hodgson v. Johnson*, E. B. & E. 689; 28 L. J. Q. B. 88, *per* LORD CAMPBELL.

² 3 B. & C. 357.

³ *Ryan v. Tomlinson*, 39 Cal. 639; *Stone v. Dennison*, 13 Pick. (Mass.) 1; *Mushat v. Brevard*, 4 Dev. (N. C.) 73; *Beal v. Brown*, 13 Allen (Mass.) 114;

Crane v. Gough, 4 Md. 316; *McCue v. Smith*, 9 Minn. 252; *Andrews v. Jones*, 10 Ala. 400; *Watrous v. Chalker*, 7 Conn. 224; *Craig v. Van Pelt*, 3 J. J. Mar. (Ky) 489; *Shaw v. Woodcock*, 7 B. & C. 73; *Paul v. Gunn*, 4 Bing. (N. C.) 445.

⁴ *Griffith v. Young*, 12 East, 513.

agreed with J S for the purchase of houses, and the defendant agreed to give the plaintiff £40 for his bargain, and the conveyance was afterwards made by J S to the defendant's wife at her request; it was held that the defendant was liable to pay the £40.¹

The plaintiff may, *after he has performed his part of the contract, sue upon an account stated, if after such performance the defendant has admitted that he is indebted to him in the amount of the consideration.*² If an agent enters into a contract for purchase, and pays the purchase-money, and procures a conveyance, his principal cannot, in answer to an action for money paid to his use, object that the contract was not in writing as required by the statute.³ This rule is well illustrated in a New York case⁴ in which the plaintiff's

¹ *Seaman v. Price*, 10 Moo. 34; 2 Bing. 437; Ry. & Moo. 195; and see *Cocking v. Ward*, 1 C. B. 868; 15 L. J. C. P. 245, overruling *Price v. Leyburn*, Gow. N. P. R. 109; *Kelly v. Webster*, 12 C. B. 283; *Green v. Saddington*, 7 E. & B. 503; *Sanderson v. Graves*, L. R. 10 Ex. 234.

² *Cocking v. Ward*, 1 C. B. 858; *Kelly v. Webster*, 12 C. B. 283; *Smart v. Harding*, 3 C. L. R. 351; 15 C. B. 652; 24 L. J. C. P. 76. In *Lavery v. Turley*, 6 H. & N. 239, to an order for goods sold, the defendant pleaded that he was possessed of a public, and it was agreed that, in consideration that the defendant would give up possession thereof the plaintiff would pay him £100, and discharge the defendant from the debt. That plaintiff quit the house and paid the defendant the £100. The agreement was not in writing. It was held that the agreement having been executed was receivable as evidence to sustain the plea. *POLLOCK, C. B.*, said: "The objection is that the agreement is one which, by the statute of frauds, is required to be in writing; and that would be so if it were sought to enforce it as an agreement. But it is pleaded as a fact that the defendant performed the agreement, and the plaintiff accepted such performance in satisfaction. The objection that the agreement was not in writing is

got rid of. The 4th section of the statute of frauds does not exclude unwritten proof in the case of executed contracts. A familiar instance is that of letting land for a period longer than three years, where, if the premises have been occupied, evidence may be given of the terms of the holding." *Angell v. Duke*, L. R. 10 Q. B. 174; *Green v. Saddington*, 7 Cl. & B. 503; *Souch v. Strawbridge*, 2 C. B. 814; *Price v. Leyburn*, Gow. 109; *Leago v. Deane*, 4 Bing. 459; *Remington v. Palmer*, 62 N. Y. 31; *Wetherbee v. Potter*, 99 Mass. 360; *Jewel v. Ricker*, 68 Me. 377; *Worden v. Sharp*, 56 Ill. 104; *Allen v. Aquire*, 7 N. Y. 543; *Eastman v. Anderson*, 119 Mass. 526; *Bosford v. Pearson*, 9 Allen (Mass.) 387; *Nutting v. Dickinson*, 8 id. 540; *Whitbeck v. Whitbeck*, 9 Cow. (N. Y.) 266; *Preble v. Baldwin*, 6 Cush. (Mass.) 549; *Page v. Monks*, 5 Gray (Mass.) 492; *Brackett v. Evans*, 1 Cush. (Mass.) 79; and see *Knowles v. Michel*, 13 East, 249; *Highmore v. Primrose*, 5 M. & Sel. 65.

³ *Peacock v. Harris*, 10 East, 104; *Pinchon v. Shilcott*, 3 C. & P. 236; *Dynes v. O'Neil*, *Crawf. & D. Abr.* 329; *Wilson v. Marshall*, 2 Ir. R. Ch. 356; *Buck v. Hurst*, L. R. 1 C. P. 297; *Savage v. Canning*, 1 Irish, C. L. 434.

⁴ *Van Valkenburgh v. Croffut*, 15 Hun (N. Y.) 145.

father, the plaintiff being then only eleven years old, entered into a contract with the defendant that the plaintiff should live with him until he was twenty-one years old. The plaintiff was to work for the defendant, and was to be clothed by him, and sent to school. The defendant also was to take a calf belonging to the plaintiff, and when the latter attained his majority, was to deliver him a cow, in lieu of the calf. There was also evidence of a conflicting character that the defendant was also to pay the plaintiff when he became of age, fifty, one hundred, or two hundred dollars, or nothing. When the plaintiff arrived at the age of twenty-one, the defendant gave him the cow, but refused to give him any money. The plaintiff thereupon brought an action against the defendant on a *quantum meruit*, for the value of his services. The court held that *the plaintiff having fully performed the contract on his part*, could not repudiate it upon the ground that it was void under the statute of frauds, *and maintain an action for the value of his services, but was restricted to his remedy upon, and the compensation fixed by, the contract*. In speaking of the effect of performance by the plaintiff and the defendant's recognition of his contract liability, LARNED, P. J., said: "The contract is no longer liable to any objection under the statute of frauds. The oral contract was void because not to be performed within a year. But the party who contracted to render the service has in fact fully rendered them under the contract, *and the other party has fully accepted them*. The contract, then, has been actually treated by the parties as valid, until all has been done by the plaintiff which he was bound to do, *and this has been done with the consent of the defendant*. He is then liable to pay for the services rendered, according to his agreement. The effect of the statute is not to make a new contract between the parties,¹ but, *when the contract has been fully performed upon one side, and its performance is accepted upon the other, the original contract is re-adopted.*² But *when there has been a full performance upon one side, and a refusal to perform upon the other, or performance by the other party has become impossible, no remedy can be had upon the contract*, but the party must bring an action upon a *quantum meruit* in the case of services, or for money had and received in the

¹ Galvin v. Prentice, 45 N. Y. 162.

² Thomas v. Dickinson, 12 N. Y. 364.

case of expenditures, or must seek his remedy according to the nature of his claim¹ for the value of his performance independent of the contract. Thus in the case last cited the plaintiff brought an action to recover for certain services rendered to the defendant under parol agreement that if the plaintiff would render the services, the defendant would give him a lease of certain premises for the term of twenty-one years, but after the services were rendered, the defendant refused to perform, and the court held that the plaintiff, for the purpose of showing the value of his services, could not show the value of the lease, upon the ground that where, in an action to recover for a complete or partial performance by the purchaser, upon a contract for the purchase of land or other property within the statute of frauds, he is not entitled to recover the value of the land or property contracted for, but only for the actual value of the services rendered or property given towards the performance of the contract.² Where a person is let into possession of land or other property under a contract to purchase, in an action to recover for expenditures which he has made under the contract, his recovery is limited to the amount of expenditures less the profits he has derived from the use of the property.³ In other words, he is restricted in his recovery to his actual loss,⁴ and the value of the land is not an element to be considered.⁵ Thus, the plaintiff purchased a certain field of growing grass of the defendant for the sum of twenty-five dollars, which he paid to him, and afterwards entered upon the land and mowed and carried away a part of the grass, but while he was mowing the remainder of the grass, the defendant interfered and prevented him from continuing to cut or harvest it, and the plaintiff brought an action for the money paid by him for the grass; upon the trial the defendant offered evidence of the value of the grass cut and taken away by the plaintiff, which was re-

¹ *Erben v. Lorillard*, 19 N. Y. 302.

² *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *Bartlett v. Wheeler*, 44 Barb. (N. Y.) 165; *Jones v. Hay*, 52 Barb. (N. Y.) 165.

³ *Shreve v. Grimes*, 4 Litt. (Ky.) 220; *Rucker v. Abell*, 8 B. Mon. (Ky.) 566; *Richards v. Allen*, 17 Me. 296;

Dix v. Marcy, 116 Mass. 416; *Lockwood v. Barnes*, 3 Hill (N. Y.) 128.

⁴ *Moore v. Small*, 19 Penn. St. 461; *Wilson v. Clark*, 1 W. & S. (Penn.) 554; *Ellet v. Paxon*, 2 W. & S. (Penn.) 418.

⁵ *Herzog v. Herzog*, 34 Penn. St. 418; *Bash v. Bash*, 9 id. 360; *Malain v. Ammon*, 1 Grant (Penn.) 123.

jected, but upon appeal the court held that the evidence should have been received. "The plaintiff," said DWIGHT, J., "had received a portion of the property. *He cannot maintain his action to recover the whole of the purchase-price without making restitution or compensating the defendant for the benefit which he has had.*"¹

A person who has entered into a parol contract for the purchase of lands, and who expends money in investigating the title, cannot recover money so spent.² But he may recover the deposit and auction-duty as money paid upon a consideration that has failed.³ Money paid, labor done, or expenses incurred in the part performance of a contract of a stipulation thereof within the statute of frauds which the other party refuses or is unable to perform, may if made in pursuance of a stipulation of the contract be recovered at law, in a proper action upon the ground of a failure of the consideration.⁴ The rule is, that if one pays money, renders services, or delivers property in part or complete performance of a contract which is invalid under the statute of frauds, he may recover the money so paid, or the value of his services, or the property, delivered in an action upon an implied assumpsit, if the other party has refused, or from any cause become unable to perform, the plaintiff being ready and willing to do so.⁵ Thus, in *Wood v. Shultis*,⁶ the plaintiff sold the de-

¹ *Watkins v. Rush*, 2 Lans. (N. Y.) 235; *Abbott v. Draper*, 4 Dev. (N. Y.) 51; *Dix v. Marcy*, 116 Mass. 416. See also *Rosenpaugh v. Vredenburg*, 16 Hun (N. Y.) 60, statement of which is given *post*, p. 429.

² *Pawle v. Gunn*, 4 Bing. (N. C.) 445.

³ *Gosbell v. Archer*, 2 Ad. & El. 500; *Cook v. Daggett*, 2 Allen (Mass.) 439. The rule is that no recovery can be had for expenditures made without any express stipulation that they should be made, but which were made rather for the plaintiff's own benefit, and in reliance upon, and the expectation that the defendant would convey the lands to him. *Farnam v. Davis*, 32 N. H. 362; *Harden v. Hays*, 9 Penn. St. 151; *Miller v. Tobie*, 41

id. 84; *Gillett v. Maynard*, 5 John. (N. Y.) 85; *Welsh v. Welsh*, 5 Ohio, 425; *Shreve v. Grimes*, 4 Litt. (Ky.) 220; *Kemble v. Dresser*, 1 Met. (Mass.) 271; *Wells v. Bannister*, 4 Mass. 514.

⁴ *Dowling v. McKinney*, 124 Mass. 478; *Williams v. Bemis*, 108 id. 91; *Seymour v. Burnett*, 14 Mass. 266; *Kidder v. Hunt*, 1 Pick. (Mass.) 331; *Sherburne v. Fuller*, 5 Mass. 133; *Cook v. Daggett*, 2 Allen (Mass.) 439; *Thompson v. Gould*, 20 Pick. (Mass.) 134; *Barrickman v. Kuykendall*, 6 Blackf. (Ind.) 21; *Goar v. Lockridge*, 9 Ind. 92; *White v. Wieland*, 109 Mass. 291; *Palbrook v. Lawes*, 1 Q. B. D. 284; *Gray v. Hill*, Ry. & M. 421; *Smith v. Smith*, 25 N. J. L. 208.

⁵ *Day v. New York Cent. R. R. Co.*, 51 N. Y. 590; *Baldwin v. Palmer*,

⁶ *Wood v. Shultis*, 4 Hun (N. Y.) 309.

fendant forty-five trees standing upon his land by a verbal sale, in payment for which the defendant agreed to dig a ditch upon his own land to carry off the water from the plaintiff's land. The defendant cut and carried away the trees, but refused to dig the ditch. In an action to recover for the value of the trees the defendant insisted that, inasmuch as the contract was within the statute of frauds, no recovery could be had, but the court held that the plaintiff was entitled to recover the value of the trees, the law implying a promise to pay the value of property so received. GILBERT, J., said: "The timber was the consideration for the defendant's part of the contract. He failed to perform the contract and repudiated it altogether. The law affords no sanction to such a mode of appropriating the property of another, but, on the contrary, implies from such circumstances a promise to pay for it. If the contract had not only been void, but illegal, the plaintiff, on that account would have had no remedy, but being invalid only by reason of its not being in writing, the plaintiff has a clear remedy." In another New York case¹ this rule was applied. In that case the plaintiff and one Simmons worked a blue stone quarry belonging to the defendant, under a verbal agreement with him that, as long as there was any blue stone in a certain direction they should be allowed to quarry it, paying him a certain royalty or rent therefor. The lower end of the quarry filled with water, and the plaintiffs were obliged, in order to get out the stone, to dig a ditch, and they also uncovered a portion of the stone at an expense altogether of about five hun-

10 N. Y. 232; *King v. Brown*, 2 Hill (N. Y.) 485; *Lisk v. Sherman*, 25 Barb. (N. Y.) 433; *Erben v. Lorillard*, 19 N. Y. 299; *Harris v. Frink*, 49 id. 24; *Galvin v. Prentice*, 45 id. 162; *Baker v. Scott*, 2 T. & C. (N. Y.) 606; *Bosford v. Pearson*, 9 Allen (Mass.) 387; *Parker v. Tainter*, 123 Mass. 185; *Moody v. Smith*, 70 N. Y. 598; *Eaton v. Eaton*, 35 N. J. L. 290; *Keeler v. Tatnell*, 23 id. 62; *Rutan v. Hinchman*, 30 id. 255; *Kidder v. Hunt*, 1 Pick. (Mass.) 328; *Seymour v. Bennett*, 14 Mass. 266; *Rosenpaugh v. Vredenburg*, 16 Hun (N. Y.) 60; *Kneeland v. Fuller*, 51 Me. 518; *Greer v. Greer*, 18 id. 16; *Julison v. Jandon*, 69 id. 373; *Lucy v. Bundy*, 9 N. H. 298; *Gray v. Gray*, 2 J. J. Mar. (Ky.) 21; *Davenport v. Gentry*, 9 B. Mon. (Ky.) 927; *Humble v. Hamilton*, 3 Dana (Ky.) 501; *Wood v. Shultis*, 4 Hun (N. Y.) 309; *Burlingame v. Burlingame*, 7 Cow. (N. Y.) 92; *Sims v. McEwen*, 27 Ala. 184; *Shute v. Dorr*, 5 Wend. (N. Y.) 204; *King v. Welcome*, 5 Gray (Mass.) 41; *Souch v. Strawbridge*, 2 C. B. 808; *Knowlman v. Bluett*, L. R. 9 Exch. 307.

¹ *Rosenpaugh v. Vredenburg*, 16 Hun (N. Y.) 60.

dred dollars to drain the quarry, and after this had been done, the defendant repudiated the contract and notified them to quit the quarry. The court held that the defendant was liable for the amount of the services rendered and expenses so incurred by them. "It is conceded," said BOARDMAN, J., "that the contract under which plaintiff worked in the defendant's quarry was void by the statute of frauds. So far, however, as such contract had been executed by and between the parties, the terms of the contract would determine their respective rights, and the court will not disturb them in relation thereto. The defendant having taken advantage of the invalidity of the contract to discharge the plaintiff, and forbid his performance of further labor under it, becomes liable to plaintiff on a *quantum meruit* for services rendered and not paid for. To the extent that the contract was performed and plaintiff's services paid for, he may retain such pay or profits.¹ But services rendered and not paid for constitute a basis for damages. One who renders services under a contract void by the statute of frauds may recover the value of such services, if he has been ready to perform the contract, and the other party has refused.² In this case the plaintiff cannot recover damages so far as his services were compensated by the stone taken out under the contract. But for services not thus compensated, he is entitled to recover their value. The measure of damages is the value of the services, and not the value of the stone in the quarry, or of the void contract.³

The action was tried upon the law as here stated, and we think the rule of damages adopted by the court justified the rulings upon the admission of evidence on that subject. The defendant could not deduct the plaintiff's profits already realized from the value of services thereafter rendered. In regard to the ditch dug to drain the quarry, it is not clear that the jury allowed the plaintiff anything for digging it. But we think he was plainly entitled to make that proof, and to recover some portion of that expense; *such proportion as the stone to be taken out bore to that already removed*. There

¹ Harris v. Frink, 49 N. Y. 24.

² King v. Brown, *ante*; Erben v.

³ King v. Brown, 2 Hill (N. Y.) 485; Lorillard, 19 N. Y. 299, 302, 304; Galvin v. Prentice, 45 N. Y. 162; Day v. N. Y. C. R. R. Co., 51 N. Y. v. N. Y. C. R. R. Co., 51 id. 583. 590.

is no reason why the whole expense of the ditch should be charged to plaintiff, and the defendant have all its benefits for future works. The plaintiff was allowed to recover for so much of the top removed as was over the stone, which he was not allowed to get out, and which the defendant can now get out without the expense of uncovering. It is evident, therefore, that upon any just rule of damages, the plaintiff recovered no more than a fair compensation for the services rendered and benefits bestowed upon defendant." So where the landlord promised a tenant a lease of the premises, in consideration of which the tenant made repairs upon the building, the landlord having refused to perform, and the contract being within the statute, it was held that the tenant was entitled to recover the cost of the repairs;¹ and where buildings are erected upon premises by a person to whom the owner or lessee has promised a lease, but which the latter refuses to give, it has been held that the former is entitled to recover the cost of the buildings notwithstanding the agreement to give the lease is within the statute.² But no such recovery can be had if the other party is ready and willing to perform.³ Thus if a person enters into the pos-

¹ *White v. Wieland*, 109 Mass. 291.

² *Parker v. Tainter*, 123 Mass. 185. But where the expense is incurred in making repairs or improvements under a promise of a lease or conveyance by a *lessee*, no recovery can be had at law therefor from the *owner* of the land, although he told the lessee he might make such an agreement, and the entry and improvements were made with the knowledge of the owner. *Stone v. Crocker*, 19 Pick. (Mass.) 292.

³ *Hawley v. Moody*, 24 Vt. 603; *Shaw v. Shaw*, 6 id. 69. In *Adams v. Smilie*, 50 Vt. 1, the defendant sold and delivered to the plaintiff ninety stoves for which the plaintiff paid him \$1,000 cash, and executed and tendered him a deed of certain land which the defendant had agreed to take in payment for the balance, but which he refused to accept, claiming that this part of the agreement was within the statute of frauds and not

binding upon him; upon the faith of the defendant's agreement the plaintiff had done various things towards clearing the land from incumbrances. On a bill for specific performance it was held that there was such a part performance as to take the case out of the statute, and that the defendant was estopped from asserting the legal effect of general provisions of a written contract, that the stoves should be paid for on delivery. *Galvin v. Prentice*, 45 N. Y. 162; *Lockwood v. Barnes*, 3 Hill (N. Y.) 128. In *Green v. N. C. R. R. Co.*, 77 N. C. 95, the plaintiff and defendant entered into a verbal contract by which the plaintiff agreed that the defendant might cut from his land a certain quantity of wood, *in payment for which, the defendant was to convey to the plaintiff a certain tract of land*. The defendant entered under this contract and cut the wood in question, and the plaintiff brought an action to recover the

session of land under a parol contract to purchase, and after having made improvements thereon, or paid a part of the purchase-money, *he voluntarily abandons the contract, without calling upon the other party to perform, and the other party is in such a situation to the property that he can, and is ready and willing to perform, he cannot recover either for the cost of the improvement, or the purchase-money which he has paid.*¹ In an early New York case² there was an oral contract for the purchase of land, and after the purchaser had made some payments in goods, under the contract he sued the vendee

value thereof, claiming that he was not bound to accept the land, as the contract was within the statute of frauds. But the court held that the plaintiff could not recover in assumpsit for the wood cut and taken by the defendant, *but was bound by the terms of the original contract, the defendant being ready to perform it.* In *Galway v. Shields*, 66 Mo. 313, a similar doctrine was held, and where the plaintiff sold and delivered goods to the defendant under a verbal agreement that the price thereof should be paid in specified land, to be conveyed by the buyer to the plaintiff, and the buyer had offered to convey the land, and was ready and willing to do so, it was held that the plaintiff could not repudiate this part of the contract on the ground that it was within the statute, and sue for the price of the goods in money. See also, to the same effect, *Miller v. Tobie*, 41 N. H. 84; *Donaldson v. Waters*, 30 Ala. 175; *Mitchell v. McNab*, 1 Brad. (Ill.) 297; *Sims v. Hutchins*, 16 Miss. 328; *Abbott v. Draper*, 4 Den. (N. Y.) 51; *Plummer v. Breckman*, 55 Me. 105. In *Allis v. Read*, 45 N. Y. 142, at the time of making a verbal agreement for the sale of goods, no payment of purchase-money or delivery of goods, sufficient to take the case out of the statute of frauds, took place; but at a subsequent time, when, under the agreement, a payment became due, the parties again met, and made a further contract, varying in some respects their original

agreement, and, in pursuance of this agreement, the purchaser delivered to the sellers a promissory note to be collected and applied by them on the purchase-price of the goods, and also consigned to them merchandise, which they were to sell, the proceeds to be applied to the same purpose. It was held that the minds of the parties met upon all the terms and conditions of this latter agreement, and by the purchaser's transfer of the note and consignment of merchandise, it became, under the statute, a binding contract. That it adopted the terms, in part, of the original void contract did not affect its validity. *Barrickman v. Kuykendall*, 6 Blackf. (Ind.) 21; *Richards v. Allen*, 17 Me. 296; *Bedinger v. Whittemore*, 2 J. J. Mar. (Ky.) 552; *Collier v. Coates*, 17 Barb. (N. Y.) 471; *Green v. Green*, 9 Cow. (N. Y.) 46; *Dowdle v. Camp*, 12 John. (N. Y.) 451. But in Michigan a contrary doctrine is held, and money advanced on a verbal contract for the purchase of land may be recovered back at any time before conveyance, at the option of the party advancing it. *Scott v. Bush*, 26 Mich. 418; 13 Am. Rep. 311; *Grimes v. Van Vechten*, 20 id. 410; *Hall v. Soule*, 11 id. 494; and see to the same effect *Collins v. Thayer*, 74 Ill. 138; and *Harriston v. Jordan*, 42 Miss. 380.

¹ *Day v. Wilson*, 83 Ind. 463; 43 Am. Rep. 76.

² *Abbott v. Draper*, 4 Den. (N. Y.) 51.

for the value of the goods, but the court held that, as long as the vendor was ready to perform the contract on his part, *the vendee could not recall the payments which he had made under the agreement.* In a Massachusetts case,¹ DEWEY, J., in an able opinion gave expression to the rule, as follows: "The provisions of the statute are not so broad as to entitle a party, who has entered into a verbal contract, by which he is to receive a conveyance of land, and towards payment for which he has made advances in money, to set aside such a contract as a nullity, and reclaim the money so advanced, *the other party being in no way in fault,* but being both able and ready to make the conveyance in the manner stipulated by the oral agreement. The principle is well settled that no such right exists in the case just supposed, to reclaim the money, upon the ground that the contract is within the statute of frauds."² The rule is, that no recovery can be had for money paid, services rendered, or improvements put upon land, until the other party is put in default,³ either by a refusal to convey, or because he is unable to do so.⁴ "The law is," says CATON, J., in the Illinois case last cited,⁵ "that one who advances money in part payment of a parol purchase of land, cannot recover till he has offered to fulfil the parol agreement, and the other party has repudiated it by refusing to perform. *If he repudiates it himself without the default of the other party,* he must lose what he has paid." This is said to be put upon the ground that a contract within the statute is not absolutely void, but is voidable only, and is binding upon both parties and may be enforced either at law or in equity, unless the statute is interposed as a defence.⁶ From what has been said, however, it must not for a moment be supposed that part performance of a contract within the statute of frauds, at law, deprives the other party of the defence of the statute, or gives it validity, or that the rules stated or cases cited *supra* sustain any such doctrine, for such

¹ Coughlin v. Knowles, 7 Met. (Mass.) 57.

² Sims v. Hutchins, 16 Miss. 328; Lane v. Shackford, 5 N. H. 130; Abbott v. Draper, 4 Den. (N. Y.) 51; Shaw v. Shaw, 6 Vt. 69; Gammon v. Butler, 48 Me. 344; Cobb v. Hall, 29 Vt. 510.

³ Crabtree v. Welles, 19 Ill. 55; Rhodes v. Starr, 7 Ala. 346, Meredith v. Naish, 3 Stew. (Ala.) 207.

⁴ Barrickman v. Kuykendall, *ante*.

⁵ Crabtree v. Welles, *ante*.

⁶ Philbrook v. Belknap, 6 Vt. 383; Shaw v. Shaw, 6 id. 69; Crabtree v. Welles, *ante*.

is not the law.¹ The only effect of part performance of such a contract, according to the rules stated, is to leave it optional with the other party to perform it or not, and to require of the person who has performed as a condition precedent to his right to recover for such performance, that he should put the other party in default, either by requesting him to perform or showing that it had become impossible for him to do so. *If the other party refuses to perform*, or if it is impossible for him to do so, the person who has performed does not thereby become entitled to a remedy upon the contract, but only *for what he has paid or done towards performance of the contract*. This rule is illustrated by a New York case.² In that case the defendant received one dollar under an agreement to invest it in sheep and double them every four years until the plaintiff became of age, and then to deliver them to him. He made the investment according to the agreement, but upon the plaintiff becoming of age refused to deliver the sheep to him. The plaintiff brought an action to recover the value of the sheep. The court held that no recovery could be had upon the contract, as it was within the statute of frauds, because not to be performed in one year, but that the plaintiff's recovery was limited to the money received by the defendant for investment. The distinction between the rule in this case and those previously referred to is, that in this case, although the agreement had been performed so upon the plaintiff's part, yet the defendant elected not to perform, but to avail himself of the defence of the statute, while in those cases the defendant was ready and willing to perform, and waived the privilege of the statute. It may be said that *part performance of a contract within the statute of frauds may render it valid and binding so far as that extends, but it can have no such effect upon the stipulation of the contract still remaining executory*.³ Where property has been delivered to the defendant in performance of such a contract, he

¹ Hebbard v. Whitney, 13 Vt. 21; 93; Campbell v. Campbell, 11 N. J. Norton v. Preston, 15 Me. 14; Patton Eq. 268.

v. McClure, 1 M. & Y. (Tenn.) 333; ² Weir v. Hall, 2 Lans. (N. Y.) Kidder v. Hunt, 1 Pick. (Mass.) 328; 278.

Baldwin v. Palmer, 10 N. Y. 232; ³ Bartlett v. Wheeler, 44 Barb. (N. Adams v. Townsend, 1 Met. (Mass.) Y.) 162; Lockwood v. Barnes, 3 Hill (N. Y.) 128; Broadwell v. Getman, 2 (N. Y.) 221; Box v. Stanford, 21 Miss. Den. (N. Y.) 87.

cannot, upon refusing to perform, return the property to the other party, and escape liability for its value in money, in an action for goods sold;¹ but it seems that the party delivering property in part performance of such a contract, which the other party refuses to perform, may at his election recover its value, or in proper proceedings, the property itself.² Where services have been rendered under such a contract, they may be recovered for upon a *quantum meruit*.³ At equity, even where the part performance is not sufficient to warrant a decree for specific performance, if the party entering under a verbal contract has made improvements which increase the value of the land, the court will compel the other party to make proper remuneration therefor.⁴ In all cases where a person has gone into the possession of land under a verbal contract, which the other party refuses to perform, before he can maintain an action for the purchase-money paid by him, or improvements put by him upon the land, he must surrender the possession;⁵ and such also is the rule where he has given a note or other obligation for the purchase-money of the land, before he can be permitted to defend against the note upon the ground of a failure of the consideration, because the payee refuses to convey, he must show that he is not deriving any advantage or benefit from the contract.⁶

SEC. 236. Lien for Repayment of Purchase-Money. — *If the vendor of land cannot make a title thereto, and the vendee has paid the whole or only a part of the purchase-money, it is held that he has a lien upon the lands not only for the money paid by him, but also for the cost of improvements put by him thereon,*⁷ even though he has taken a distinct security

¹ Hawley v. Moody, 24 Vt. 693.

² See note 3, *ante*, p. 431.

³ King v. Welcome, 5 Gray (Mass.) 41; Williams v. Bemis, 108 Mass. 91.

⁴ Findley v. Wilson, 3 Litt. (Ky.) 390; Bellamy v. Ragsdale, 14 B. Mon. (Ky.) 364; Thompson v. Mason, 4 Bibb. (Ky.) 195; Vaughan v. Cravens, 1 Head (Tenn.) 108.

⁵ Cope v. Williams, 4 Ala. 362; Ott v. Garland, 7 Mo. 28; Abbott v.

Draper, *ante*; Johnson v. Hanson, 6 Ala. 351.

⁶ Gillespie v. Battle, 15 Ala. 276; Curnutt v. Roberts, 11 B. Mon. (Ky.) 42.

⁷ Rusker v. Abell, 8 B. Mon. (Ky.) 566; McCampbell v. McCampbell, 5 Litt. (Ky.) 92. But *quere*, does this lien exist where he refuses to convey, although able to do so? It would seem that the rule would extend to such cases, but the point does not seem to be covered by the cases.

therefor.¹ But in Tennessee it is held that no such lien exists, and that a court of equity has no authority to direct a sale of the land to reimburse the vendee for the purchase-money, etc., advanced by him.²

SEC. 237. Liability on Implied Contract.—If the purchaser of a growing crop, or of growing trees, under a parol contract, void by reason of the statute, takes away the crop, or fells and carries away the trees, although he cannot be made liable under the original contract, he will become liable on a new implied contract for goods sold.³ Where the plaintiff repaired certain leasehold premises held by the defendant under a covenant to repair, on a parol promise by the defendant to assign him his lease, it was held that the defendant, upon refusal to assign, was liable, on an implied assumpsit, to pay the plaintiff for such repairs.⁴ The statute does not apply to implied contracts or covenants. Thus if A conveys to B certain realty by a deed poll in which specified rents are reserved for periods of time described, and B enters under the deed, by his entry he contracts to pay the rents as reserved, and the contract being an implication of law, is not within the statute. The contract to pay the rent reserved is not an express but an implied contract, or a contract raised by law from the nature of the transaction, and such contracts are not within the statute.⁵ In *Goodwin v. Gilbert*, *ante*, the

¹ *Sugden's Vendors and Purchasers*, 857; *Turner v. Mariatt*, L. R. 3 Eq. 744.

² *McNew v. Toby*, 6 Humph. (Tenn.) 27.

³ *Mayfield v. Wadsley*, 3 B. & C. 357; *Poulter v. Killingbeck*, 1 B. & P. 397; *Bragg v. Cole*, 6 Moo. 114; *Teall v. Auty*, 4 Moo. 547; *Knowles v. Michel*, 13 East, 249; *Earl of Falmouth v. Thomas*, 1 C. & M. 109.

⁴ *Gray v. Hill*, Ry. & Moo. 420.

⁵ *Goodwin v. Gilbert*, 9 Mass. 510; *Fletcher v. McFarlane*, 12 id. 43; *Felch v. Taylor*, 13 Pick. 133; *Sage v. Wilcox*, 6 Conn. 81; *Allen v. Pryor*, 3 A. K. Marsh. 305. In *Bolton v. Tomlin*, 2 H. & W. 367, the defendant's testator agreed by parol with the plaintiff's steward to hire some land

of the plaintiff from year to year, upon special terms mentioned in some printed rules, and to commence occupation at a future day; the plaintiff's attorney then signed a memorandum of the hiring at the back of the printed rules. It was held that, *after the tenancy had actually commenced* the terms of the agreement might be shown by reference to the printed rules and memorandum, although as a mere agreement for a lease it was void under the statute, and that a *parol* lease for a period admitted by the statute might be as special in its terms as a written. "It seems absurd to say," said LORD DENMAN, "that a parol lease shall be good, and that it cannot contain any special stipulations or agreements. . . . It has

doctrine is broadly laid down that where land is conveyed by deed poll and the grantee enters under the deed, certain duties being reserved to be performed, as no action lies against the grantee on the deed, the grantor may maintain *assumpsit* for the non-performance of the duties reserved, and the promise being raised by the law is not within the statute of frauds. In a Massachusetts case,¹ SHAW, C. J., in delivering the opinion of the court, instances the case of rent reserved in a lease by deed poll as a signal and familiar illustration of the doctrine. Occupation under the lease is not indispensable to the recovery, if the lease has been accepted.² The court say, it is enough that they accepted the conveyance which gave them the right of immediate and exclusive occupation. The law would imply from such acceptance a promise to comply with the terms of the lease, and such a promise is not within the statute of frauds.³

SEC. 238. **Mortgages.**—A mortgage of land is within the statute, and so is an agreement to execute a mortgage.⁴ A mortgage that has been satisfied, or otherwise become defunct, or indeed any defunct agreement relating to the purchase or sale of land cannot be reinstated by parol,⁵ nor can a mortgage be extended by parol to cover other indebtedness than that named therein,⁶ or to embrace other lands than those conveyed therein.⁷ Not only is a parol mortgage within the statute, but so also is an agreement to execute a mortgage,⁸ or indeed any agreement by which rights in real estate are qualified or enlarged,⁹ as an agreement to convert a mortgage into a conditional sale,¹⁰ or a defeasance into an absolute conveyance.¹¹ But while an agreement to foreclose a mort-

always been assumed that a parol lease may be as special in its terms as a written one, and we are of the opinion that such is the case."

¹ Pike v. Brown, 7 Cush. (Mass.) 133.

² Kabley v. Worcester Gas Light Co., 102 Mass. 392.

³ Providence Christian Union v. Elliott, R. I. Sup. Ct. 1833.

⁴ Marquat v. Marquat, 7 How. Pr. (N. Y.) 417.

⁵ Davis v. Parish, Litt. Sel. Cas. (Ky.) 153.

⁶ Curle v. Eddy, 24 Mo. 117; Stoddard v. Hart, 23 N. Y. 556; Williams v. Hill, 19 How. (U. S.) 246.

⁷ Castro v. Illies, 13 Tex. 229.

⁸ Clabaugh v. Byerly, 7 Gill. (Md.) 334.

⁹ Irwin v. Hubbard, 49 Ind. 350; McEwan v. Ortman, 34 Mich. 325.

¹⁰ Woods v. Wallace, 22 Penn. St. 171.

¹¹ Boyd v. Stone, 11 Mass. 342.

gage is held to be within the statute,¹ yet an agreement to extend the time of payment thereon is not, nor,² except in those States where a mortgage is treated strictly as a conveyance of the land, rather than as a mere incident of the debt, is a verbal release of a mortgage within the statute.³

¹ *Cox v. Peeble*, 2 Bro. C. C. 334.

² *Griffin v. Coffey*, 9 B. Mon. (Ky.) 452; *Hamilton v. Terry*, 11 C. B. 954.

³ *Leavitt v. Pratt*, 53 Me. 147; *Phillips v. Leavitt*, 54 id. 405; *Haven v. Adams*, 4 Allen (Mass.) 80. In *Hunt v. Maynard*, 6 Pick. (Mass.) 489, it was held that a court of equity would not prevent a mortgagee from proceeding at law to recover possession, because of a parol agreement made by him with the assignee of the mortgagor that the assignee should hold the property discharged from the mortgage. See also *Parker v. Barker*, 2 Met. 423, where it was held that where a mortgagee entered into a parol agreement with the creditors of the mortgagor to relinquish his claim to the land mortgaged if they would accept another mortgage upon the same land and give him time for payment, was within the statute; and that, although the creditors acted upon the faith of such agreement, and took the mortgage, etc., the mortgagee did not lose his rights under his mortgage, and that the creditors acquired no right against the first mortgage. In *Richards v. Sims*, Bernard, 90, the mortgagor went to the house of the mortgagee with the box of writings, wherein the mortgage and bond were, and offered them to the mortgagee, but the mortgagee put the deeds back, saying, "Take back your writings; I freely forgive you the debt"; and then speaking to the mortgagor's mother, who was present, said: "I always told you I would be kind to your son; now you see I am as good as my word." The LORD CHANCELLOR, upon this evidence, observed, that the rule on this head was the same, both at law and in equity, and that his opinion was that it might be admitted. That the statute, indeed, had laid down a very

strict but proper rule relating to real estates, viz., that no interest for any longer than three years should pass in them without writing, nor any trust in them for a longer time, unless the trust arose by operation of the law. That where a mortgage was made of an estate, it was only considered as a security for money due; the land there was the accident attending upon the money; and when the debt was discharged, the interest in the land followed, of course. In ejectment, where a title was made under a mortgage, if evidence was given that the debt was satisfied, this was considered as defeating the estate which the mortgagee had in the land; and in such cases, especially where the mortgage was ancient, the court would presume that the money was paid at the day, and would direct the jury to give their verdict accordingly, unless it clearly appeared that the money could not be paid at the day. No writing was in these cases necessary, which showed that, even at law, the debt was considered as the principal, and the land only as the incident. Equity goes farther, and in all cases holds that when the debt appears to be satisfied, there arises a trust by operation of law for the benefit of the mortgagor; that the case is within the exception in the statute of frauds as to trusts arising by operation of law, and, in this sort of cases, the court receives any kind of evidence of payment; therefore, if a mortgage is made by one partner to another, and the mortgagor agrees with the mortgagee that he shall take a certain part of the profits of the partnership in discharge of the mortgage, that of itself would discharge it. Here was a mortgage made, and a bond at the same time entered into for the performance of covenants. Suppose an obligee deliv-

The discharge of a mortgage may be proved by parol both at law and in equity.¹ A parol agreement that if the mortgagor will make no defence to the foreclosure of a mortgage, that his equity of redemption shall not thereby be barred, is not within the statute, but it will only be treated as effective, when the evidence is clear and conclusive. Thus in a case in the United States Supreme Court,² A mortgaged land to B, and B foreclosed the same

ered up a bond, with intent to discharge a debt, the debt would be certainly discharged; and, if the bond was discharged in the present case, the debt would be discharged with it. Accordingly, his lordship directed an issue to inquire whether these expressions were used or not, the evidence as to this point being doubtful.

When it was said by the CHANCELLOR, in the above case, that the rule was the same both at law and in equity, we must suppose him to advert to the presumption of the reconveyance or surrender of the interest at law, and the annexation of the trust in equity, as the media, by which the interest in the land is made to follow the debt in those respective judicatures; and when his lordship is made to say that equity goes farther, he must be understood to mean that in all cases, and consequently in some where, from certain repelling circumstances, the presumption at law could not arise to produce the effect of a reconveyance of the legal estate, the courts of equity would compel the formal transfer of the interest at law, and in the meantime clothe it with a trust for the party entitled. And it seems that we must so understand LORD MANSFIELD, when, in speaking on the same subject, his lordship observes: "*That whatever will give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it; it will be liable to debts; it will go to executors; it will pass by will not made and executed with the solemnities required by the statute of frauds.*" The assignment of the debt,

or forgiving it, will draw the land after it as a consequence; nay, it will do it, though the debt were only forgiven by parol, for the right to the land would follow, notwithstanding the statute of frauds." *Martin v. Mowlin*, 2 Burr. 978.

If the mortgage debt is assigned for valuable consideration, the benefit of all the securities, including the interest in the land, will pass from the assignor to the assignee in equity. The assignment is a contract in the view of the courts of equity, which, being grounded on a consideration of value, these courts will carry into full effect. And if such debt is assigned, by *parol*, by the mortgagee, all the securities for the debt become beneficially vested in the assignee, so that in this manner the *interest in land* may be *consequently* transferred, and a contract concerning it be effectuated *without writing*, notwithstanding the 1st, 3d, and 4th sections of the statute of frauds, and, not withstanding courts of equity, are as much bound by the statute as courts of law. *Green v. Hart*, 1 John. (N. Y.) 580; *Johnson v. Hart*, 3 Johns. Cas. (N. Y.) 322; *Brownson v. Crosby*, 2 Day (Conn.) 425; *Austin v. Burbank*, 2 Day (Conn.) 474; *Roberts on Frauds*, 273.

¹ *Howard v. Gresham*, 27 Ga. 347; *Wentz v. Durhaven*, 1 S. & R. (Penn.) 312; *Hemenway v. Bassett*, 13 Gray (Mass.) 378; *Ackla v. Ackla*, 6 Penn. St. 288; *Richards v. Sims*, Bern, 90; *McDaniels v. Lapham*, 21 Vt. 222; *Baker v. Wimpee*, 22 Ga. 69.

² *Howland v. Blake*, 97 U. S. 624.

by a decree of court, and the land was afterwards conveyed to C. Eight years after B's death, A filed a bill against C, alleging an oral agreement whereby A agreed to make no defence to the suit for foreclosure, and B agreed that the equity of redemption should not thereby be barred; that C took with full knowledge of the agreement, and also agreed that when he, C, was reimbursed out of the rents and profits of the land, he would convey it to A. It was held: 1st. That in order to make out his alleged agreement with B, the burden was upon A to produce evidence of such weight and character as would justify a court in reforming a written instrument which, upon the ground of mistake, did not set forth the intention of the parties thereto. 2d. That such evidence not having been produced to show the alleged agreement, *and A's continuing interest in the land*, his oral agreement with C was void under the statute of frauds. A question sometimes arises as to whether property covered by a mortgage is real estate or personalty. Thus, a mortgage of growing grass by the owner of the land does not work a constructive severance of the grass, until the mortgage has become absolute; therefore, up to that period, at least, it is treated as a mortgage of realty,¹ and the same rule prevails as to trees and growing timber. But where the title of the land is in one and that of the grass or growing timber is in another, it is treated as severed, and as personal property, and may be sold or mortgaged by parol,² or in any event may be mortgaged as personal property, and the same rule applies as to fixtures.³

SEC. 239. Parol Gift of Mortgage.—A mortgage will not pass under a parol gift either of the debt or the security, for the reason that, in order to give effect to a gift, there must be an actual delivery, of which the security is incapable. MR. ROBERTS, in his excellent treatise on the statute of frauds, says: "As a mere gift must be effectuated or proved by de-

¹ *Bank of Lansingburgh v. Crary*, 1 Barb. (N. Y.) 542; *Smith v. Jenks*, 1 Den. (N. Y.) 586. See also, upon this question, *Pierce v. Goddard*, 22 Pick. (Mass.) 559; *Eastman v. Foster*, 8 Met. (Mass.) 19, as to buildings.

² *Claffin v. Carpenter*, 4 Met. (Mass.)

580; *Douglass v. Shumery*, 13 Gray (Mass.) 498.

³ *Thompson v. Pettitt*, 10 Q. B. 101. In New Hampshire, by statute, personal property and crops are subject to mortgage.

livery, the question seems to be simply this, Is a mortgage a thing capable of being delivered? . . . A mortgage is composed of two things, the debt and the security. The debt is a chose in action, and as such, is incapable of delivery, being an incorporeal existence; and the statute seems very plainly and emphatically to preclude any primary or direct transfer of the interest in land, which, as has been endeavored to be shown, can only pass in equity as consequential to the debt, which assignment takes place in the nature of a contract in equity, where it is supported by a valuable consideration. But the delivery of the mortgage deed, by way of gift, can only transfer the debt as an accessory, regarding the *mortgage* as the principal; but the truth being that the *debt* is the principal, and the mortgage of the land the accessory, we cannot suppose the debt to follow the gift or delivery of the mortgage deed, without reversing the maxim of law and logic *accessorium sequitur principale*.”¹ But if a *bond* accompanied the mortgage, its delivery might be good to perfect the gift, it being for many purposes considered as goods.²

SEC. 240. Equitable Mortgage by Deposit of Title-deeds.—Notwithstanding the statute of frauds, it has long been settled that a deposit of title-deeds by the owner of an estate, *either for the purpose of securing a debt already due, or a sum of money advanced at the time the deposit is made*, operates as a mortgage, and gives the mortgagee not only the right of keeping the deeds until repayment of the money due, but also an interest in the land itself to which the deeds relate, sufficient to enable him to maintain an action for a sale. The leading case on this branch of the law is *Russel v. Russel*.³ There, a lease having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee filed a bill for a sale of the estate. The assignees contended that the claim was against the law of the land, for that it would be charging land without writing, which is against the fourth clause of the statute of frauds. LORD LOUGHBOROUGH, L. C., said that it was a delivery of the title to the plaintiff

¹ Roberts on Frauds, 279.

³ 1 Bro. C. C. 269.

² Snelgrow v. Bailey, 3 Atk. 214.

for a valuable consideration, and that the court had nothing to do but to supply the legal formalities; and ASHURST, L. C., that it was open to explanation upon what terms the lease was delivered. An issue was directed to try *whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt*, and the jury found that it was. In a marginal note the reporter adds that he was informed that the cause came on afterwards before LORD THURLOW on the equity reserved, when his lordship ordered that the lease should be sold and the plaintiff paid his money.

The doctrine of equitable mortgage by deposit of title-deeds was much disapproved of by LORD ELDON;¹ but the case of *Russel v. Russel*² has been uniformly followed, and considered to be of binding authority.³

In *Lacon v. Allen*,⁴ KINDERSLEY, V.C., said: "Now, since the case of *Russel v. Russel*, this is well established, that supposing A, owing money to B, deposits the title-deeds of his estates with B for the purpose of a security, even without any writing, it is a good equitable mortgage; it gives B a lien; and notwithstanding the expressions of regret of LORD ELDON that the law should be so, even in his time we find him saying he could not disturb it; since that time it has been acted upon over and over again. That doctrine cannot now, then, be disturbed."⁵ In this country the doctrine that an equitable mortgage may arise from a deposit of title-deeds, etc., does not generally prevail, although it is recognized in New York,⁶ Rhode Island,⁷ Wisconsin,⁸ Maine,⁹ South Carolina,¹⁰ and in Mississippi,¹¹ for such a length of time only as a lease of land may be made by parol. In Vermont¹² the question has not been definitely settled. In Pennsylv-

¹ See *ex parte Coming*, 9 Ves. 117; *ex parte Haigh*, 11 Ves. 403; *ex parte Hooper*, 1 Mer. 9; *ex parte Whitbread*, 1 Rose, 299.

² 1 Bro. C. C. 269.

³ See cases above cited and *ex parte Wetherell*, 11 Ves. 401; *ex parte Mountfort*, 14 Ves. 606; *ex parte Kensington*, 2 V. & B. 79; 2 Rose, 138.

⁴ 3 Drew. 582.

⁵ And see *National Bank of Australasia v. Cherry*, L. R. 3 P. C. C. 299; *Carey v. Rawson*, 8 Mass. 159;

Rockwell v. Hobby, 2 Sandf. Ch. (N. Y.) 9; *Mandeville v. Welch*, 5 Wheat. (U. S.) 277.

⁶ *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 9.

⁷ *Hackett v. Reynolds*, 4 R. I. 512.

⁸ *Jarvis v. Dutcher*, 16 Wis. 307.

⁹ *Hall v. McDuff*, 24 Me. 311.

¹⁰ *Welsh v. Usher*, 2 Hill (S. C.) Eq. 166.

¹¹ *Gothard v. Flynn*, 25 Miss. 58.

¹² *Bicknell v. Bicknell*, 31 Vt. 498.

vania, where the deposit is accompanied by a certificate under seal, describing the property and the particular debt for the security of which the deposit is made, with a farther agreement to convey the land if the debt is not paid within a reasonable time, it is held to amount to a mortgage,¹ but the English doctrine relative to the creation of an equitable mortgage by a deposit of the title-deed, is rejected,² and such also is the case in North Carolina,³ Ohio,⁴ Tennessee,⁵ and Kentucky.⁶

SEC. 241. Special Agreement not Necessary. — *The mere fact of deeds being deposited with the intention to create a security is sufficient; it is not necessary that there should have been a special agreement to mortgage, the deposit creates a presumption that such was the intention of the parties,*⁷ at least as against strangers, in cases where the possession of the title-deeds can be accounted for in no other manner except from their having been deposited by way of equitable mortgage, or the holder being otherwise a stranger to the title and to the deeds.⁸ In *Ex parte Moss, Re Davies*,⁹ an equitable mortgagee, by deposit of shares in a public company, without a written memorandum, was held to be entitled to his costs on evidence of a custom not to give a written memorandum.

SEC. 242. What Interest Passes. — The deposit of title-deeds *prima facie* creates an equitable mortgage upon the whole property comprised in them.¹⁰ The deposit is only entitled to the depositor's interest in the property, and therefore an equitable mortgagee from a vendee who has not paid the purchase-money, can only sell the depositor's interest

¹ Luck's Appeal, 44 Penn. St. 579. But equity will not enforce the return of deeds so deposited. *Sidney v. Stevenson*, 11 Phila. (Penn.) 178.

² *Shitz v. Dieffenbach*, 3 Penn. St. 233; *Bowery v. Oyster*, 3 Penn. 239.

³ *Harper v. Spainhour*, 64 N. C. 629.

⁴ *Probasco v. Johnson*, 2 Dis. (Ohio) 96.

⁵ *Meador v. Meador*, 3 Heisk. (Tenn.) 562.

⁶ *Vanmeter v. McFaddin*, 8 B. Mon. (Ky.) 435.

⁷ *Featherstone v. Fenwick*, 1 Bro. C. C. 269, n.; *Hurford v. Carpenter*, ib.; *Richards v. Borrett*, 3 Esp. 102; *ex parte Kensington*, 2 V. & B. 83; 2 Rose, 138; *Hankey v. Vernon*, 2 Cox, 12; *ex parte Mountfort*, 14 Ves. 606; *ex parte Wright*, 19 Ves. 258.

⁸ *Bozon v. Williams*, 3 Y. & J. 150; *Rockwell v. Hobby*, 2 Sandf. Ch. (N. Y.) 9.

⁹ 3 De G. & Sm. 599.

¹⁰ *Ashton v. Dalton*, 2 Coll. 565.

unless the vendee consents.¹ The charge will extend to an interest accruing after the date of the deposit; as by the discharge of an incumbrance,² or by a partition.³

Where the unexpired term in a lease and the good will of a business established in it, were sold in a creditor's suit, with the consent of a person with whom the lease had been deposited as a security, and brought a price less than the amount of his debt, it was held that the equitable mortgagee was entitled to the whole of the purchase-money, whether arising from the value of the good will, or from the value of the lease independently of the good will.⁴

SEC. 243. Explanation of Extent of Charge.—The intention to give a general charge upon all the property comprised in the deeds deposited, may be explained when the memorandum is defective, by other written memoranda of the agreement.⁵

SEC. 244. Deposit of Copies of Court Rolls, etc.—An equitable mortgage may be created by the deposit of a copy of court rolls,⁶ or by the deposit of a contract for a sale of land.⁷

SEC. 245. Deposit of Shares in Joint-Stock Company.—In the case of shares in a company, the instrument creating the company usually contains provisions for the transfer of the shares in a particular form. But notwithstanding such provisions, and the provisions in various statutes that no notice of any trust, express, implied, or constructive, shall be entered on the register, it is now settled that an equitable mortgage may be created by the deposit of share certificates in a joint-stock company, such as an insurance,⁸ mining,⁹

¹ *Ex parte Wright, re Watts*, 3 M. & A. 49; and see *ex parte Smith, re Hildyard*, 2 M. D. & De G. 587.

² *Ex parte Bisdée, re Baker*, 1 M. D. & De G. 333.

³ *Ex parte Farley, re New*, 1 M. D. and De G. 683.

⁴ *Chissum v. Dewes*, 5 Russ. 29.

⁵ *Ex parte Glyn, re Medley*, 1 M. D. & De G. 29; *ex parte Loyd, re Ogden*, 1 M. & A. 494; 3 D. & C. 765.

⁶ *Winter v. Lord Anson*, 3 Russ. 493; *Tylee v. Webb*, 6 Beav. 552;

Pryce v. Bury, 2 Drew. 11; *ex parte Warner, re Cooke*, 19 Ves. 202; 1 Rose, 286; *Whitbread v. Jordan*, 1 Y. & C. Exch. Ca. 303.

⁷ *The Unity Joint Stock Mutual Banking Association v. King*, 25 Beav. 72.

⁸ *Ex parte Masterman, in re Litt*. 2 M. & A. 209; *ex parte Littledale, re Pearse*, 6 D. M. G. 714.

⁹ *Ex parte Richardson, in re Richardson*, M. & C. 43.

merchant shipping,¹ railway,² or dock company.³ The object of the prohibition is simply that the title of the shareholders in the books of the company shall be kept wholly unincumbered and unaffected by any notice of equitable dealings.⁴ But as the shares are still in the case of traders, in the possession, order, and disposition of the mortgagor, notice of the deposit must be given by the mortgagee to the company, in order to take the property out of the order and disposition of the mortgagor; otherwise the shares will, in case of his bankruptcy, pass to his assignees.⁵

SEC. 246. Policy of Insurance.—An equitable mortgage may also be created by the deposit of a policy of insurance.⁶ Formerly it was necessary to give the company notice of the deposit, in order to take the policy out of the reputed ownership and disposition of the debt or in case he became bankrupt or insolvent.⁷ But in England, since the bankruptcy act,⁸ this is not necessary, as policies of insurance are choses in action, and not within the doctrine of reputed ownership.⁹

SEC. 247. Deeds Relating to Property Abroad.—Where, by the law of a foreign country, no lien or equitable mortgage is created by the deposit of deeds, the mortgage will, if the parties are resident in this country, be enforced to this extent, that, if the property comes into the hands of assignees, they will be compelled to pay the debt out of the proceeds

¹ *Ex parte Pooley, in re Atkinson*, 2 M. D. & De G. 505.

² *Ex parte Harrison, re Medley*, 3 M. & A. 506; *ex parte Dobson, re Boulton*, 2 M. D. & De G. 685.

³ *Ex parte Littledale, re Pearse*, 6 D. M. G. 714.

⁴ *Ex parte Stewart, in re Shelley*, 11 Jur. (N. S.) 25; 34 L. J. Bkcy. 6; 13 W. R. 356; and see *Binney v. Ince Hall Coal Co.*, 35 L. J. Ch. 363; overruling a doubt raised in *ex parte Boulton, in re Sketchley*, 1 De G. & J. 163, as to whether an equitable mortgage valid against assignees in bankruptcy of the mortgagor could be made of railway shares, having regard to the Companies Clauses Consolidation Act, 1845, § 20.

⁵ *Ex parte Lancaster Canal Co., in re Dilworth*, 1 D. & C. 411; *ex parte Boulton, in re Sketchley*, 1 De G. & J. 163; *ex parte Stevens, in re Stevens*, 4 D. & C. 117; *ex parte Pooley, in re Atkinson*, 2 M. D. & De G. 505; *Union Bank of Manchester, in re Jackson*, L. R. 12 Eq. 354.

⁶ *Ferris v. Mullins*, 2 Sm. & Giff. 378.

⁷ *Ex parte Boulton, re Sketchley*, 1 De G. & J. 163; 3 Jur. (N. S.) 425.

⁸ 32 & 33 Vict. c. 71, § 15, sub § 5.

⁹ *Edwards v. Martin*, L. R. 1 Eq. 121; *Green v. Ingram*, L. R. 2 C. P. 525; *re Webb's Policy*, L. R. 2 Eq. 456; *in re Russell's Policy Trusts*, L. R. 15 Eq. 26; *Alletson v. Chichester*, L. R. 10 C. P. 328.

of the sale of the property.¹ Where an agreement to deposit deeds of a house in Shanghai was begun in Prussia, but concluded in England, and the deposit was made in England, it was held that the contract must be governed by English law and that the deposites had a good security on the house.²

A deposit of a "minute" of a lease of a house and land, and an agreement to pledge chattels in Scotland, does not require to be registered under the Bills of Sales Act.³ Where according to the law in a colony, a deposit of title-deeds would not amount to a mortgage, but the parties contract without reference to any particular law, and the general law of the colony is English, an equitable mortgage may be created by the deposit of title-deeds.⁴

SEC. 248. Whether Mortgagor Bound to Execute Legal Mortgage.—By the deposit the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance, or assurance, as may be necessary to vest his interest in the mortgagee. He does not contract that he will make a perfect title, but he does bind himself to do all that is necessary to have the effect of vesting in the mortgagee such interest as he, the mortgagor, has.⁵ But the mortgagor will not in every instance be entitled to compel the mortgagee to execute a formal mortgage; the course of dealing between the parties may show that it was never intended that there should be anything more than a deposit of the deeds. Thus where title-deeds were deposited by the defendant with the plaintiff as an indemnity against contingent payments, but there was no agreement to execute a formal mortgage, and before the plaintiff had made any payment, he filed a bill to have a formal mortgage executed; it was held that he was not entitled thereto, but only to a memorandum signed by the defendant, specifying the terms of the deposit.⁶

SEC. 249. Adverse Possession.—Some doubt has been thrown upon LORD ELDON'S dictum in *Ex parte Coming*,⁷

¹ *Ex parte Pollard, in re Courtney*, Mon. & C. 239.

² *Ex parte Holthausen, re Scheibler*, L. R. 9 Ch. 722.

³ 17 & 18 Vict. c. 36; *Coote v. Jecks*, L. R. 12 Eq. 597.

⁴ *Varden Seth Sam v. Luckpathy Royjee Lallah*, 9 Moo. Ind. App. 303.

⁵ *Pryce v. Bury*, 2 Drew. 42, per KINDERSLEY, V. C.

⁶ *Sporle v. Whayman*, 20 Beav. 607.

⁷ 9 Ves. 115.

that the fact of the adverse possession of the deeds in the person claiming a lien, was a fact that entitled the court to give an interest.¹ In the case of *Chapman v. Chapman*,² the bill which was filed in 1846 alleged that in 1827 the plaintiff had lent to the testator, Robert Chapman, the sum of £1,900 upon his bond and the deposit of the title-deeds of a freehold estate, that the testator died in 1831, and that interest on the debt had been paid by the testator and his executors down to 1843. The only evidence given by the plaintiff was the bond and the production of the title-deeds; but no evidence whatever was given of the circumstances under which the deeds had come into the plaintiff's possession; and the equitable deposit was not admitted by the parties entitled to the estate. It was held that no equitable mortgage had been constituted, and that there was not sufficient ground for an inquiry before the master. But in *Smith v. Constant*,³ the defence to a claim, seeking the usual order in the case of an equitable mortgage, was, that no money had ever been advanced, but that the deeds were placed in the plaintiff's hands with a view to a future loan; KNIGHT BRUCE, V.C., however, thought that the retention of the deeds was consistent with probability if an advance had been made, but utterly inconsistent if it had not.⁴

SEC. 250. Subsequent Advances.—An equitable mortgage by deposit of title-deeds will cover subsequent advances by the same person upon evidence that they were made upon the existing security, and it is not necessary that there should be a return and fresh deposit of the deeds in order to take a case out of the statute.⁵ And a deposit of deeds as a secur-

¹ *Norris v. Wilkinson*, 12 Ves. 197, per SIR W. GRANT, "to connect a debt of long standing with the possession of the debtor's deeds, the creditor must proceed upon a distinct allegation, supported by proper evidence, that they were delivered to him by way of security." 1 Fisher on Mortgages, 2d ed., p. 32.

² 13 Beav. 308.

³ 4 De G. & Sm. 213.

⁴ And see *Burgess v. Moxon*, 2 Jur. (N. S.) 1059; *Maugham v. Ridley*, 8 L. T. (N. S.) 309, where WOOD, V.C.,

pointed out that in *Chapman v. Chapman*, the plaintiff, in the then state of the law, could not have been allowed to give evidence as the plaintiff in the cause; and the judgment of LORD CAIRNS in the recent case of *Shaw v. Foster*, L. R. 5 H. L. 337.

⁵ *Ex parte Langston*, 17 Ves. 227; *ex parte Hearn*, re Hamlyn Buck, 165; *ex parte Nettleship*, re Burkhill, 2 M. D. & De G. 124; *Ede v. Knowles*, 2 Y. & C. C. C. 172; *Baynard v. Woolley*, 20 Beav. 586; *Maugham v. Ridley*, 8 L. T. (N. S.) 309.

ity for any advance which "may" be made, will extend to past as well as future advances.¹ The evidence must be clear that the advance was made upon security of the deposit.²

In *Ex parte Kensington*,³ LORD ELDON said, that where the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; and the distinction appeared to him to be too thin, that you should not have the benefit of such an agreement, unless you added to the terms of that agreement the fact that the deeds were put back into the hands of the owner, and a redelivery of them required, on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of the cases.

Where money was advanced at £6 per cent on a promissory note and a deposit of title-deeds of freehold property as a collateral security, and afterwards it was agreed by parol that a legal mortgage should be executed by the borrower to secure the amount advanced with interest at £5 per cent, but no mortgage was executed, it was held that the parol agreement was sufficient to change the contract to a legal one, and that a return and fresh deposit of the title-deeds was not necessary to take the second contract out of the statute of frauds, TURNER, L. J., saying: "The deeds being in the hands of the plaintiff, and there being a parol agreement to give him a legal mortgage, I think the case falls within the principle of *Ex parte Kensington*,⁴ and that the plaintiff is entitled to a decree."⁵

SEC. 251. **Sub-Mortgage.**—To create an equitable sub-mortgage by redeposit of deeds originally deposited by way of equitable mortgage, it is not necessary that the written memorandum accompanying the first transaction should be deposited upon the second.⁶ Where a debtor deposited his title-deeds with his creditor until such time as his account

¹ *Ex parte Farley, re New*, 1 M. D. & De G. 683; *ex parte Smith, re Hildyard*, 2 M. D. & De G. 587; *Whitworth v. Gaugain*, 3 Hare, 416.

² *Ex parte Whitbread*, 19 Ves. 209; *James v. Bydder*, 4 Beav. 600.

³ 2 V. & B. 84; 2 Rose, 138.

⁴ 2 V. & B. 79; 2 Rose, 138.

⁵ *James v. Rice*, 5 D. M. G. 461, overruling *S. C. Kay*, 231; and see *National Bank of Australasia v. Cherry*, L. R. 3 P. C. 304.

⁶ *Ex parte Smith, re Hildyard*, 2 M. D. & De G. 587.

should not exceed £100, at which time they were to be restored to him, and died indebted to the creditor in £274, it was held that the creditor's lien extended to the whole £274.¹

SEC. 252. Legal Mortgage not Security for Subsequent Advances. — A legal mortgage will not be considered as a security for subsequent advances, made on the strength of a parol agreement. The mortgagee is not entitled to say that he holds the conveyance as a deposit; because the contract under which he holds is a contract for conveyance only, and not for deposit.² But where a trader executed a mortgage of real estate, with a borrowing clause, and deposited the title-deeds with the mortgagee, and subsequently accepted a bill drawn by third parties, and being unable to pay the bill when at maturity, wrote to the drawer to say that it should be paid out of the produce of the mortgaged premises, and that he would not take his title-deeds out of the mortgagee's hands until the bill was paid, and the mortgagees communicated to the drawers their consent to this arrangement, it was held that the drawers were entitled to an equitable mortgage.³

SEC. 253. Rectification of Accompanying Instrument. — Where an instrument accompanying the deeds has been, by mistake, so prepared as to be illegal, it may be reformed, so as to give effect to the equitable deposit. Thus, where the plaintiff had lent the defendant a sum of money on his bond and an equitable deposit, and the bond on the face of it was usurious, and the plaintiff (who had failed on this ground in an action at law) came into equity showing that the bond had been erroneously prepared, and that in fact, the contract was not usurious, and praying that the instrument might be reformed and effect given to his equitable deposit, the court, being satisfied of the error, held that the plaintiff was entitled to the relief he asked.⁴

SEC. 254. Whether a Deposit of Deeds for Purpose of Preparing a Legal Mortgage Creates an Equitable Mortgage. — Some

¹ Ashton v. Dalton, 2 Coll. 565.

³ Re Henry, ex parte Crossfield, 3

² Ex parte Hooper, re Hewett, 1 Ir. Eq. 67.

Mer. 7; and see Shepherd v. Titley, 2 Atk. 348.

⁴ Hodgkinson v. Wyatt, 9 Beav. 566.

doubt has been raised as to whether the deposit of title-deeds for the purpose of preparing a legal mortgage creates an equitable mortgage.¹ But the later authorities have decided that under these circumstances, a valid equitable mortgage is created. In *Edge v. Worthington*,² A offered to give the plaintiff a legal mortgage, and sent the title-deeds to C, the plaintiff's solicitor. The mortgage was prepared and executed, but it was alleged that before the execution, A had committed an act of bankruptcy. SIR LLOYD KENYON, M.R., held that there was a valid equitable mortgage from the time of the deposit.

In *Ex parte Bruce*,³ where a petition for a sale was resisted on the ground that the deeds had been delivered to him, not as the security, but in order that a legal mortgage might be prepared, LORD ELDON said: "The principle of equitable mortgage is, that the deposit of the deeds is evidence of the agreement; but if they are deposited for the express purpose of preparing the security of a legal mortgage, is not that stronger than an implied intention?" and in *Ex parte Wright*,⁴ his lordship said that the deposit of title-deeds until a mortgage is evidence of an agreement for a mortgage, and that an equitable title to a mortgage is in equity as good as a legal title. Again, in *Hockley v. Bantock*,⁵ LORD GIFFORD held that an agreement to give a legal mortgage, together with the delivery of the title-deeds, for the purpose of having a legal mortgage prepared, constituted an equitable mortgage.⁶

SEC. 255. Presumption of Mortgage may be Rebutted by Evidence.—Though a deposit of deeds without any express agreement will create an equitable mortgage, yet, if the circumstances under which they are left raise an inference that such was not the purpose of the party delivering them, the

¹ See *Brander v. Boles*, Prec. Ch. 275; *Brizeck v. Manners*, 9 Mod. 284; *ex parte Bulteel*, 2 Cox, 243; *Norris v. Wilkinson*, 12 Ves. 192; *R. v. Benson*, cited 6 Price, 467; *ex parte Pearse & Prothero*, 1 Buck. 525; *ex parte Hooper*, 1 Mer. 7; 19 Ves. 477; *Pain v. Smith*, 2 My. & K. 417.

² 1 Cox, 211.

³ 1 Rose, 374.

⁴ 19 Ves. 258.

⁵ 1 Russ. 141.

⁶ See also *Keys v. Williams*, 3 Y. & C. Exch. 62; *James v. Rice*, 5 De G. M. & G. 461; *Fenwick v. Potts*, 8 ib. 506; *Lloyd v. Attwood*, 3 De G. & J. 614; *Bulfin v. Dunne*, 11 Ir. Ch. 198.

deposit will not have this effect.¹ Thus where A, who was indebted to certain bankers for advances made on sugars, afterwards applied to them with the lease in question, requesting them to advance money on it, which they declined to do, but he left it with them without making any declaration of his reasons for so doing, it was held that the bankers had no lien upon the lease for their debt.²

Again, the possession of a client's deeds by a solicitor is so usual and so much in the ordinary course of transactions, that where a person purchases an estate, and is informed that the deeds are in the hands of the solicitors of the owner of the estate, there is nothing in that circumstance which renders it necessary for him to inquire under what circumstances the solicitor holds the deeds.³

Where one Oakley by deed mortgaged freeholds to Phillips, and at the same time the title-deeds, not only of the freeholds, but of leaseholds belonging to Oakley, were delivered to Phillips, it was held, in the absence of proof to the contrary, that Phillips had no lien on the leaseholds for the money advanced.⁴

SEC. 256. Parol Evidence not Admissible to Contradict Memorandum.—Parol evidence is not admissible to contradict a memorandum or statement in writing of the circumstances under which a deposit has been made.⁵ But parol evidence is admissible to extend the lien evidenced by a written memorandum,⁶ or to show that the depositor is a trustee for another.⁷ In England it is held that a memorandum in writing accompanying a deposit of title-deed, it seems, requires an

¹ Byth. Prec. 3d ed. 111; and see *ex parte* Langston, 17 Ves. 227; *Edge v. Worthington*, 1 Cox, 211; *Ede v. Knowles*, 2 Y. & C. C. C. 172; and where the mortgagee fails at the hearing to produce satisfactory evidence of the deposit, he will not be entitled to an inquiry upon the subject. *Holden v. Hearn*, 1 Beav. 445.

² *Lucas v. Dorrien*, 1 Moo. 29; 7 Taunt. 278.

³ *Bozon v. Williams*, 3 Y. & J. 150. As to the solicitor holding the deeds as trustee for another person, see

Lloyd v. Attwood, 3 De G. & J. 651; 5 Jur. (N. S.) 1322.

⁴ *Wardle v. Oakley*, 36 Beav. 27.

⁵ *Ex parte* Coombe, 17 Ves. 369; *ex parte* Borrodaile, *re* Rucker, 2 M. & A. 398; *Baynard v. Woolley*, 20 Beav. 583, where the document was attempted to be contradicted by the answer.

⁶ *Ex parte* Kensington, 2 V. & B. 79; 2 Rose, 138; *ex parte* Nettleship, 2 M. D. & De G. 124.

⁷ *Ex parte* Whitbread, 19 Ves. 209; 1 Rose, 209.

ad valorem stamp.¹ But the fact of the memorandum being inadmissible as an agreement unstamped, does not prevent parol evidence, otherwise admissible, being given to prove the mortgage.²

SEC. 257. Sale in Bankruptcy.—The common order for sale was refused in bankruptcy where there was no memorandum, the deeds having been deposited twelve years previously, and the bankrupt being dead.³ But where, on the petition of an equitable mortgagee with a memorandum of deposit for the usual order for a sale, it appeared that the space of time between the alleged deposit and the issuing of the fiat was very short, an inquiry as to the nature of the transaction was ordered.⁴

SEC. 258. Parol Agreement to Deposit Deeds does not Constitute Equitable Mortgage.—A parol agreement to deposit title-deeds as a security for a sum advanced does not constitute an equitable mortgage. Thus, where money was advanced on the deposit of a lease, and a further sum was advanced to enable the lessee to obtain a renewal, upon a parol agreement to deposit the renewed lease when obtained, and the lessee became bankrupt before the lease was given up by the lessor's solicitor, it was held that there was no equitable deposit.⁵ There must be some actual deposit, and therefore an order on a third party to deposit a lease when executed is not sufficient.⁶

SEC. 259. Delivery to Wife of Depositor.—A delivery of deeds to the wife of the depositor to be held between him and the creditor, was decided in *Ex parte Coming*,⁷ not to be a deposit so as to create a lien, the possession of the wife being in law the possession of the husband. "No case," said his lordship, "has gone the length, though I do not see the reason that, if the deposit is in the hands of a person who could fairly be called a third person, abstracted from both,

¹ *Wise v. Charlton*, 4 Ad. & El. 786; 6 N. & M. 364.

² *Hiern v. Mill*, 13 Ves. 114.

³ *Ex parte Jones, re Oliver*, 3 M. & A. 152, 327.

⁴ *Ex parte Clouter, re Lindon*, 7 Jur. 135.

⁵ *Ex parte Coombe*, 4 Madd. 249; *ex parte Halifax, re Ridge*, 2 M. D. & De G. 544.

⁶ *Ex parte Perry, re Collins*, 3 M. D. & De G. 252.

⁷ 9 Ves. 115.

that can be considered a deposit for the creditor, provided that is proved to be the intention. But it is very delicate, when the deposit remains in the hands of the mortgagee himself; and I doubt much whether a mere memorandum, kept in his own possession, and not parted with to the man in whose favor it is expressed, would take it out of the statute. It is very nearly the same where the deeds are put into the hands of the wife of the mortgagor, to keep them as between her husband and the creditor."

SEC. 260. Deeds Remaining in Possession of Debtor.—An equitable mortgage may be created although the deeds remain in the possession of the debtor, when there is a written memorandum or agreement showing an intention to deposit the deeds or to charge the property comprised in them.¹ Thus, an agreement to deposit a lease when granted, and which is granted, creates an equitable mortgage, unless the *bona fides* of the agreements is questioned.² In *Ferris v. Mullins*,³ the secretary of a banking company had a credit account with the bank to the extent of £3,000, secured by a memorandum specifying certain securities deposited by way of equitable mortgage. On his dying a debtor to the bank in £4,000, there was found in his office in the banking-house the securities mentioned in the memorandum, with others tied up in a bundle, and indorsed and labelled as securities. There was evidence that he had stated that the bank was secured in £5,000; it was held that the bank was equitable mortgagee of all the securities.

Where freehold title-deeds were intended to be deposited with an equitable mortgagee, together with deeds relating to leasehold property, and were accordingly specified in the memorandum, it was held that the freehold property was included in the mortgage.⁴ But where the deeds remain in the possession of the debtor, an equitable mortgage will not be created by the fact of a memorandum attached to them de-

¹ *Ex parte Smith, re Hildyard*, 2 M. D. & De G. 587; *ex parte Sheffield Union Banking Co., re Carter*, 13 L. T. (N. S.) 477.

² *Ex parte Orrett, re Pye*, 3 M. & A. 153.

³ 2 Sm. & G. 378; 18 Jur. 718.

⁴ *Ex parte Leathes, re Leathes*, 3 D. & C. 112; and see *ex parte Edwards, re Moore*, 1 Dea. 611; *ex parte Heathcote, re Ogbourne*, 2 M. D. & De G. 711; *Daw v. Terrell*, 33 Beav. 218; *Eyre v. McDowell*, 9 H. L. C. 619.

claring that they are appropriated to a particular debt, that not being an assignment.¹

SEC. 261. Deposit with Firm.—Where deeds have been deposited with a firm, it is necessary, in order that, if any new partners are admitted into the firm, they may have the benefit of the security, that the memorandum accompanying the deposit (if any) should state that such was the intention of the parties when the deposit was made, or that it should be clearly proved by parol evidence.² But the dealings with the new firm may be such as to recognize their right to the security to cover the original advance as well as subsequent advances by the new firm.³ “The leaving the deeds in the custody of each successive firm is equivalent to a re-deposit.”⁴

SEC. 262. Whether all the Title-Deeds Should be Deposited.—It was at one time considered doubtful whether it was not necessary that all the deeds relating to the property should be deposited.⁵ But it seems now to be clear that a deposit of part of the deeds only is enough to create a valid equitable mortgage, there being evidence that the object was to create a security upon the whole.⁶ In *Lacon v. Allen*,⁷ SIR R. T. KINDERSLEY, V. C., said: “The question is, is it necessary that every title-deed should be deposited? Suppose the owner has lost an important deed, could he not deposit the rest? In each case we must judge whether the instruments deposited are material parts of the title; and if they are, it is not necessary to say there are other deeds material, if there is sufficient evidence to show that the deposit was made for the purpose of creating a mortgage.”

SEC. 263. Good Title Need not be Shown.—To constitute a good equitable mortgage it is not necessary that the deeds deposited should show a good title in the depositor. Thus,

¹ *Adams v. Claxton*, 6 Ves. 230.

² *Ex parte Kensington*, 2 V. & B. 79, 83; 2 Rose, 138.

³ *Ex parte Oakes*, re Worters, 2 M. D. & De G. 234; *ex parte Smith*, re Gye, ib. 314; *ex parte Lloyd*, re Ablett, 1 Gl. & J. 389; *ex parte Alexander*, re Till, ib. 409.

⁴ Fisher on Mortgages, 2d ed. 36.

⁵ *Ex parte Wetherell*, 11 Ves. 401;

ex parte Pearce, Buck, 525.

⁶ *Ex parte Arkwright*, re Daintry, 3 M. D. & De G. 129, sc. nom.; *ex parte Pott*, 7 Jur. 159; *ex parte Chippendale*, 1 Deac. 67; 2 Mont. & A. 299; *Whitbread v. Jordan*, 1 Y. & C. Exch. Ca. 303.

⁷ 3 Drew. 582.

where the debtor deposited the title-deeds of his estate, and omitted the conveyance to himself, which he subsequently deposited with his bankers, it was held that the first deposittee had priority over the bankers.¹

But it seems to be doubtful whether an equitable mortgage will be created by the deposit of an attested copy of a deed, even when the depositor cannot deposit the original, as in the case of a partnership.²

SEC. 264. Part of Deeds Deposited with One Creditor and Part with Another.—Where part of the deeds are deposited with one person, and subsequently the other part with another, if the equities between the incumbrancers are equal, the first mortgagee will have priority.³ In the recent case of *Dixon v. Mucklestone*,⁴ the owner in fee of a farm deposited deeds of conveyance of the farm dated 1774, by way of security for money then due, writing at the same time a letter which stated that the deeds were the title-deeds of the farm, and were to be a security. He afterwards deposited the subsequent title-deeds of the farm, the earliest being dated 1787, with bankers by way of security for money due to them; the title was investigated by the bankers, and they had no notice of the prior charge. It was held that the letter created an equitable charge on the farm, and that under the circumstances credit must be taken to have been given by the owner of the prior charge to the statement made by the mortgagor, that the deposited deeds were the whole of the title-deeds, and that the owner of the prior charge had therefore not been guilty of negligence, so as to deprive herself of her priority.

SEC. 265. Deeds relating to Part of an Estate.—Where deeds are deposited which relate only to a portion of an estate, the deposittee will only have a charge on the lands included in the deeds deposited, even though he has been led to believe from the depositor's statement that the whole of the property was comprised. If this were not so, any deed

¹ *Roberts v. Croft*, 24 Beav. 223; affd. 2 De G. & J. 1.

² *Ex parte Broadbent, re Borron*, 1 M. & A. 635; 4 D. & C. 3.

³ *Roberts v. Croft*, 24 Beav. 223; 2 De G. & J. 1.

⁴ L. R. 8 Ch. 155; see also *Ratcliffe v. Barnard*, 19 W. R. 340; 40 L. J. Ch. 147; 24 L. T. (N. S.) 215.

might be deposited, with an allegation that it should be held as a deposit to charge any lands which were the property of the depositor.¹ But the court will, under another head of equity, compel the depositor to make good his words.²

SEC. 266. Memorandum Referring to Different Deeds than those Deposited. — Where certain deeds are deposited with a creditor as security for a loan with a memorandum of charge, and the deeds do not answer the description in the memorandum, the creditor has a valid lien upon the deeds so deposited for the amount of his advances. Thus, where certain title-deeds were found among the effects of a deceased person, with a memorandum of charge, and the deeds were not the same as those described in the memorandum, and there was no evidence that others were deposited, the court held that there was a good lien for the amount of the loan, upon the property comprised in the deeds so found.³ But where deeds are deposited relating to *two* different properties with a memorandum pledging only one of them as a security, the lien will only apply to the estate described in the memorandum.⁴

SEC. 267. Direction to Third Person to Hand Over Deeds. — *An equitable mortgage may be created by a direction to hand over deeds belonging to the depositor to another person.* Thus, where A being entitled to three estates, the title-deeds of one of which were held by his bankers as a security, deposited the title-deeds of the other two with B as a security for a debt, and he gave him an order upon his bankers (*written* by himself, but not signed) to deliver over the deeds of the third estate, when their lien had been satisfied, it was held that this gave B a valid equitable mortgage on the property covered by the deeds deposited with the bankers, subject to their prior lien.⁵

SEC. 268. Sales of Lands by Auction. Judicial Sales. Sheriff's Sales, etc. — Sales of lands by auction are within the statute,⁶ and so are sales in bankruptcy,⁷ and by sheriffs

¹ Jones v. Williams, 24 Beav. 47.

² Roberts v. Croft, 24 Beav. 230; Ratcliffe v. Barnard, 40 L. J. Ch. 147.

³ Ex parte Powell, 6 Jur. 490.

⁴ Wylde v. Radford, 9 Jur. (N. S.) 1169.

⁵ Dow v. Terrell, 33 Beav. 218.

⁶ Buckmaster v. Harrop, 7 Ves. 341; Higginson v. Clowes, 15 id. 521; Blagden v. Brodbear, 15 id. 472.

⁷ Carroll v. Powell, 48 Ala. 298; Tate v. Greenlee, 4 Dev. (N. C.) 149; King v. Gunnion, 4 Penn. St. 171; Emley v. Drumm, 36 id. 123; Wolfe

and constables,¹ although in some of the cases cited they are held not to be affected by the statute, upon the ground that they are *quasi* judicial sales. Sales by loan officers are held to be within the statute,² and such also is the case as to all sales at auction, except in the case of judicial sales; and in order to be operative, a memorandum of the sale sufficient in all respects must be made.³ But sales under an order of court are not, for the object of the statute being to prevent frauds and perjuries, any agreement in which there is no danger of either is considered as out of the statute,⁴ but in some of the cases it is held that the *purchaser* must sign.⁵

It was at one time thought that by reason of their publicity, sales of land or goods at auction did not come within the statute; but, whatever may formerly have been the rule, it is now well settled that such sales not only come within the letter, but also within the spirit of the statute.⁶ And no exceptions are made in this respect, except in favor of what *are strictly judicial sales*. That is, *sales made under an order or decree of a court of chancery*, or subject to its confirmation and control.⁷ The first case in which this question arose was *Attorney General v. Day, ante*, in which LORD HARDWICKE held that the statute had no application to chancery sales, or, as he calls them, *judicial sales*, and this doctrine has

v. Sharp, 10 Rich. (S. C.) L. 60; *Ingram v. Dowdle*, 8 Ired. (N. C.) 455; *Brent v. Green*, 6 Leigh. (Va.) 16; *Warfield v. Dorsey*, 39 Md. 299; *Ruckle v. Barbour*, 48 Ind. 274; *Thomas v. Trustees*, 3 A. K. Mar. (Ky.) 298; *Gratz v. Catlin*, 2 John. (N. Y.) 248; *Catlin v. Gratz*, 8 id. 520.

¹ *Emley v. Drumm, ante*; *Nicholl v. Ridley*, 6 Yerg. (Tenn.) 63.

² *Jackson v. Bull*, 1 John. Cas. (N. Y.) 81.

³ *Ex parte Cutts*, 3 Dea. 267.

⁴ *Atty. Genl. v. Day*, 1 Ves. Sr. 218; *Lord v. Lord*, 1 Sim. 503; *Blagden v. Brodbear, ante*; *Sutton v. Moore*, 25 Penn. St. 468; *Watson v. Violet*, 2 Duer. (Ky.) 33; *Halleck v. Guy*, 9 Cal. 181; *Hutton v. Williams*, 35 Ala. 503; *Smith v. Arnold*, 5 Mas. (U. S. C. C.) 420; *Armstrong v. Vroman*,

11 Minn. 220. A sale under foreclosure proceedings is not within the statute. *Willets v. Van Alst*, 26 How. Pr. (N. Y.) 325. But see *Hutton v. Williams, ante*, where it is held that a judicial sale is not taken out of the statute until after confirmation.

⁵ *Leroux v. Brown*, 12 C. B. 801; *Williams v. Wheeler*, 8 id. 299. See Chap. on "Memorandum or Note in Writing."

⁶ Sir WM. GRANT in *Blagden v. Bradhear*, 12 Ves. 466; *Attorney General v. Day*, 1 Ves. Sr. 218; *Trice v. Pratt*, 1 D. & B. (N. C.) Eq. 626; *Smith v. Arnold*, 5 Mass. (U. S. C. C.) 474.

⁷ *Attorney General v. Day, ante*; *Kauffman v. Walker*, 9 Md. 240; *Warfield v. Dorsey*, 39 Md. 299.

remained unquestioned, except that, in an early New York case¹ in which CHANCELLOR KENT criticised the ruling of LORD HARDWICKE as being too broad, but his remarks were mere *dicta*, and the question before him was in reference to a *sheriff's* sale, which was clearly within the statute, while LORD HARDWICKE was disposing of a chancery sale, where the statute did not apply, being a *judicial sale*, that is, a sale made by the court, or under its direction, and upon the terms and rules provided by a decree or order²; and which it has the power to enforce by order, attachment, or other summary process; and CHANCELLOR KENT himself in a later case,³ in which it was sought to coerce a pur-

¹ *Simmonds v. Cottin*, 2 Cai. (N. Y.) 61.

² *Jenkins v. Hogg*, 2 Const. (S. C.) 835; *Brent v. Green*, 6 Leigh (Va.) 16; *Barney v. Patterson*, 6 H. & J. (Md.) 182; *Harrison v. Harrison*, 1 Md. Ch. 331; *Kauffman v. Walker*, 9 Md. 240; *Andrews v. Scotten*, 2 Bland's Ch. (Md.) 29; *Anderson v. Faulke*, 2 H. & G. (Md.) 346.

³ *Brasher v. Cortland*, 2 John. Ch. (N. Y.) 505. See, also, in *Warfield v. Dorsey*, 39 Md. 299; 17 Am. Rep. 562, the appellee was the assignee of two mortgages, each of which contained a power of sale, as provided by statute, and under the provision of the statute and in all respects complying therewith, he advertised the property for sale at public auction, and it was bid in by the appellant, and four days afterwards filed his report of the sale in the Circuit Court, for Howard County. Some time afterwards the appellant files exceptions to the ratification of the sale, not questioning its fairness, but relying specifically upon the statute of frauds. The exceptions were overruled, and the sale ratified. STEWART, J., saying: "If there was any irregularity or unfairness about the sale reported in this case, to the prejudice of the appellant, he had the right and ample opportunity to have shown it. This has not been done, but he relies upon the statute of frauds, 29th Ch. II, ch. 3, as a sufficient defence for

his non-compliance with the terms of sale; and the question now involved is, whether that statute, requiring a memorandum in writing as to certain sales of land, applies to a chancery sale; or sale under mortgage, as provided by the 64th article of the code. The learned judge of the Circuit Court, in delivering his opinion, has shown much and commendable research, and furnished a conclusive argument as to the inapplicability of the statute to sales of this description.

Chancery sales are neither within the letter of the statute nor embraced by its policy. In regard to such sales, its provisions are not obligatory upon the court, nor is there any reason why they should be implied upon any principles of analogy. Such sales are conducted under the decrees or orders of the court, which prescribes the terms, and are always guarded by its superintendence, and, therefore, cannot be considered within the mischief intended to be provided against by that celebrated statute. Every intendment will be made to support them. The court acts for all the parties through its officer, the trustee, and they look to it for protection against the consequences of his acts or omissions. *Kauffman v. Walker*, 9 Md. 240. Whether the sale is made by a trustee, according to our practice, or by a master, as in England, we have been referred to no case, where the sale, if made under the authority

chaser of lands under a sale by a master in chancery, by attachment, to perform his contract, said: "I do not mean at present to lay down any general rule on the subject of coercing a purchaser by attachment; but I ought not to hesitate under the circumstances of this case, *and I have no doubt the court may in its discretion do it in every case where the previous conditions of the sale have not given the purchaser an alternative.* Here it has become necessary, in order to give due effect to the authority and process of the court, and to prevent them from being treated with contempt." In a case involving this question,¹ JUDGE STORY said: "No doubt is

of the court, has been set aside upon the ground that the sale was not evidenced by a memorandum in writing, as provided by the statute. On the contrary, the authorities are all the other way, so far as we have discovered. CHANCELLOR BLAND, in *Andrews v. Scotton*, 2 Bland's Ch. (Md.) 29, has very fully discussed the subject as to the authority and practice of the court in regard to sales made in pursuance of its decrees or orders, and his rulings have been affirmed by this court in *Anderson v. Foulke*, 2 H. & G. (Md.) 346. Throughout the extent of his opinion, which displays laborious research, and which is incorporated at length in the report of that case, there is no allusion by the chancellor or the Court of Appeals to the statute of frauds, as affecting sales made by the court, or under its direction. In such case it is well settled the court is in truth the vendor, and not the trustee, who is its mere agent, and there is no sale until its approval. The public auction of the property is a part of the proceeding constituting the sale; and the bidders make themselves parties, and, as such, have the right to interfere in the proceedings; their bids are propositions, and when accepted by the trustee acting for the court, and when the property is struck off accordingly, they have no power, at their pleasure, to retract them, and thus baffle and defeat the sale. If they fail to comply with all or any of the terms proposed and accepted, the court has

the power to compel compliance by attachment or other suitable process, according to the nature of the case. Code, art. 16, § 131. The provisions were intended to clothe the court with adequate authority, if there was any doubt of its existence before, to compel compliance with the terms prescribed by its decree or order for the sale of the property. In the case of *Richardson v. Jones*, 3 G. & J. 164, before the enactment of the code, these powers of the court were fully recognized. It was distinctly held by this court that, where a sale is made under a decree or order in chancery, and no bond or security is given for the payment of the purchase-money, it was the practice, sanctioned by this court in *Anderson v. Foulke*, 2 H. & G. 346, to compel the purchaser to compel his purchase by an order on him, in a summary way, to pay or bring the money into court; and that from necessity, arising from the peculiar character of the transaction. Before the ratification the trustee cannot sue, because the sale is not complete and binding—the contract is not perfect—nor can he sue at law after the ratification, because it becomes thereby a sale by the court—a contract with the court, and the whole reasoning of the court is utterly inconsistent with any theory, that the contract of sale was affected by the statute of frauds."

¹ *Wood v. Mann*, 3 Sum. (U. S. C. C.) 310.

now entertained that a court of equity may, by attachment, compel a purchaser, at a sale by the master, to complete his purchase by paying in the purchase-money. It stands upon the plainest principle of the court, that he who makes himself a party to the proceedings of the court, and undertakes to do a particular act, under the decretal orders of the court, may be compelled to perform what he has undertaken. It is a mere incident to the due exercise of the principal jurisdiction, and indispensable to the enforcement of the orders of the court upon persons who have submitted themselves to its jurisdiction; a sale might otherwise become a mere mockery, and give entire immunity to purchasers to speculate upon the chances of the sale. The notion is utterly groundless, that no person but a direct party to the suit can be made subject to the orders or process of the court." In a later case¹ before the same court, under the Rhode Island Statute of Frauds, the same doctrine is reiterated by STORY, J., who said: "In sales directed by the Court of Chancery, the whole business is transacted by a public officer under the guidance and superintendence of the court itself; the sale is not final until a report is made to the court and approved. Either party may object to the report, and the purchaser himself, who becomes a party to the sale, may appear before the court, and if any mistake has occurred, may have it corrected. He becomes a party in interest, and may represent and defend his own interests; and if he acquiesces in the report, he is deemed to adopt it, and is bound by the decree of the court confirming the sale. He may be compelled, by the process of the court, to comply with the terms of the contract. So that the whole proceedings are under the direction of the court; and the case does not fall within the mischiefs supposed by the statute." But in this case the question was whether an administrator's sale was to be regarded as a *judicial sale*, and therefore not within the statute, and it was held that such sales are not *judicial* sales, and are within the

¹ Smith v. Arnold, 5 Mas. (U. S. C. C.) 420. See, also, Jenkins v. Hogg, 2 Treadw. (S. C.) 821; Boykin v. Smith, 3 Munf. (Va.) 102; Armstrong v. Vroman, 11 Minn. 220; Trice v. Pratt, 1 D. & B. (N. C.) Eq. 626; Hutton v. Williams, 35 Ala. 503; Brent v. Green, *ante*; Watson v. Violet, 2 Duv. (Ky.) 332; Fulton v. Moore, 25 Penn. St. 468; Halleck v. Guy, 9 Cal. 181.

statute. "In the case of an administrator," said STORY, J., "the *authority to sell* is indeed granted by a court of law. *But the court when it has once authorized the administrator to sell, is functus officio.* The proceedings of the administrator never come before the court for examination or confirmation. They are mere matters *in pais* over which the court has no control. The administrator is merely accountable to the court of Probate for the proceeds acquired by the sale, in the same manner as for any other assets. But whether he has acted regularly or irregularly in the sale, is not matter into which there is any inquiry by the court granting the license, or by the court of Probate having jurisdiction over the administrator of the estate. *So that the present case is not a judicial sale in any just sense*, but it is execution of a ministerial power. *The sale is not the act of the court, but of the administrator.*" But if the statute made it obligatory upon the administrator to make a report of the sale to the court, and the court had authority to confirm it or not, the rule would be otherwise.¹ Other sales at auction, as we have seen, whether by individuals, town officers or sheriffs, constables or marshals, under executions, or other legal process, are, as before stated, held to be within the statute² unless by statute they are made judicial sales.

¹ See *Warfield v. Dorsey*, *ante*, where a sale under a power in a mortgage, under the provisions of the statute, was held to be a *judicial sale*, the seller being required to file a report of the sale, and the court having the power to confirm or reject it.

² *Barney v. Patterson*, *ante*; *Simmonds v. Cottin*, *ante*; *King v. Gunni-*

son, 4 Penn. St. 171; *Wolf v. Sharp*, 10 Rich. (S. C.) L. 60; *Carroll v. Powell*, 48 Ala. 298; *Emley v. Drum*, 36 Penn. St. 123; *Warfield v. Dorsey*, *ante*; *Tate v. Greenlee*, 4 Dev. (N. C.) 149; *Ruckle v. Barbour*, 48 Ind. 274; *Ingram v. Dowdle*, 8 Ired. (N. C.) 455.

SECTION VI.

“No action shall be brought whereby to charge any person upon any agreement, that is not to be performed within the space of one year from the making thereof.”

CHAPTER VII.

CONTRACT NOT PERFORMABLE IN A YEAR.

SECTION.

- 269. Contract must be One Not to be Completed within the Year.
 - 270. Contract which may Possibly be Performed within a Year.
 - 271. Agreement to be Performed on a Contingency.
 - 272. Contract for Service to Commence at a Future Day.
 - 273. Hiring for One Year.
 - 274. Contracts not to be Performed within a Year.
 - 275. When Contract may or may not be Performed within a Year.
 - 276. Contract, when Presumed to Commence at Once.
 - 277. Performance on one side, Effect of.
 - 278. Contract Defeasible within a Year.
 - 279. Contract Executed by one of the Parties.
 - 280. Agreement not to do Certain Things.
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SECTION 269. Contract must be One Not to be Completed within the Year.—In order to bring a contract within this clause of the statute it must be one *which from its very terms shows that the parties intended that it was not to be completed within the year*, and therefore part performance within the year will not take the case out of the statute.¹ This was decided in *Boydell v.*

¹ *Herrin v. Butters*, 20 Me. 119; *Harris v. Porter*, 2 Harr. (Del.) 27; *Comstock v. Ward*, 22 Ill. 248. An agreement to pay money *after* the lapse of a year, for land to be presently conveyed, is within the statute. *Marcy v. Marcy*, 9 Allen (Mass.) 8. An agreement made Dec. 14, 1856, to rent a house for the year 1857 is within the statute. *Atwood v. Norton*, 31 Ga. 507. So is a contract to marry *within five years*. *Derby v. Phelps*, 2 N. H. 515; *Paris v. Strong*, 51 Ind. 339; or to labor for another three years. *Tuttle v. Swett*, 31 Me. 555. But an agreement to work for another five years, *or so long as A shall remain agent for the company*, is not within the statute, because it may be performed within the year by A ceasing to be agent. *Roberts v. Rockbottom Co.*, 7 Met. (Mass.) 46. But a contract to work for another five years in consideration of certain things to be done by him, is within the statute. *Pitcher v. Wilson*, 5 Mo. 46; *Drummond v. Burrell*, 13 Wend. (N. Y.) 307; so also is an agreement to sell the crops of this and the succeeding year at a certain price. *Atwood v. Fox*, 30 Mo. 499. See also *Emery v. Smith*, 46 N. H. 151; *Hill v. Hooper*, 1 Gray (Mass.) 131. So a contract for board for one year to begin at a future day is within the statute. *Spencer v. Halstead*, 1 Den. (N. Y.) 606. So a contract for a lease for more than one year, to commence

Drummond.¹ There the defendant subscribed to the "Boydell Shakespeare," which it was intended to publish in numbers, at least one number to be published annually, and it was the intention of the parties that the period of publication should extend over several years. No sufficient contract was signed by the defendant, and after receiving and paying for several numbers, he refused to continue his subscription. It was held that no action could be maintained against him. LORD ELLENBOROUGH, C. J., said: "The whole scope of the undertaking shows that it was not to be performed within a year; and if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year. It has been argued that an inchoate performance within a year is sufficient to take the case out of the statute; but the word used in this clause of the statute is 'performed,' which *ex vi termini* must mean the complete performance or consummation of the work: and that is confirmed by another part of the statute requiring only part performance of an agreement, to supersede the necessity of reducing it to writing; which shows that when the legislature used the word 'performed' they meant a complete, and not a partial performance. . . . Here by the very terms of the contract, and clearly in the contemplation of the parties, from the whole scope of it, it was not to be performed within a year; for the agreement was, to publish at least one number annually, after the delivery of the first, and according to the number of pictures to be published, at the rate of two for each play, the work would consist of many numbers." And BAYLEY, J., said:² "It was clearly the understanding of all parties that the contract was not to be performed within a year, and if the publishers could by possibility have completed the work within that time, they could not have compelled the defendant to

at a future day, is invalid as being a contract not to be performed in one year, although by statute a parol lease for a longer period would be valid if to commence *instantly*. Streht v. D'Evens, 66 Ill. 77; Roberts v.

Tunnell, 3 T. B. Mon. (Ky.) 247; Wilson v. Martin, 1 Den. (N. Y.) 602; Atwood v. Norton, 31 Ga. 507; Comstock v. Ward, 22 Ill. 248.

¹ 11 East, 142.

² P. 159.

have taken and paid for it immediately. I use the word 'completed' because I think that is the true meaning of the word 'performed' used in the statute. The cases have decided that in order to bring a contract within this branch of the statute, it must either have been expressly stipulated, or it must appear to have been the understanding of the parties, that it was not to be performed within a year. That does appear in the present case, and I cannot say that a contract is performed, when a part of it remains unperformed within the year; or in other words, that part performance is performance."¹ So where the following memorandum was made between the plaintiff and defendant, and signed with their respective initials: "Diet of Practice £80 per annum, for five years, commencing Michaelmas, 1828: £60 per annum for the remainder of Mr. Lee's life, if he survive the first five years: payable in either case quarterly, the first payment Michaelmas, 1828. · Mr. Lee to separate the practices K B, and C P;" it was held that inasmuch as the memorandum appeared to be of a contract that was not to be performed within a year, and no consideration was stated on the face of it, it came within the fourth section of the statute, and was therefore not capable of being enforced by action.²

In *Eley v. The Positive Assurance Company*,³ the articles of association of a company contained a clause in which it was stated that the plaintiff should be solicitor to the company, and should not be removed from his office unless for misconduct. The articles were signed by seven members of the company, and were duly registered. The plaintiff was not appointed solicitor by any instrument under the seal of the company. It was held that the contract was one "not

¹ And see *Bracegirdle v. Heald*, 1 B. & Ald. 726. A parol promise to pay a father \$100, in four annual instalments of \$25 each, if he will name his son after the promisor, is within the statute, as not to be performed within a year. *Parks v. Francis*, 50 Vt. 626. So in Indiana is an agreement to support a young child until it attains the age of majority. *Goodrich v. Johnson*, 66 Ind. 258. Although in *McKinney v. McCloskey*, 8 Daly (N. Y. C. P.) 368, a different doctrine

was held, and the doctrine of this latter case is sustainable upon the ground that the contract is terminable upon a contingency, to wit, the death of the child. See also, to the same effect, *Dresser v. Dresser*, 35 Barb. (N. Y.) 573; *Peters v. Westborough*, 19 Pick. (Mass.) 364.

² *Sweet v. Lee*, 4 Sc. (N. R.) 77-90; and see *Roberts v. Tucker*, 6 Exch. 632.

³ L. R. 1 Ex. D. 20.

to be performed within a year," and must therefore be in writing, and that the signatures to the articles of association, which were affixed *alio intuitu*, were not signatures to a memorandum of the contract within the statute so as to bind the company. With great deference to the court, it seems to us that this decision is wrong, according to all the American and English authorities, and upon principle, because the contract might be terminated within a year by the *misconduct* of the plaintiff, and stands upon the same footing as a contract by which one agrees to serve another as long as they are mutually satisfied,¹ or so long as the parties shall respectively please,² which are held not to be within the statute.

Where a contract is void by reason of the statute, but services have been rendered and things actually done in pursuance of the contract, the terms upon which the services were rendered and the things done, may be proved by parol evidence.³

SEC. 270. Contract Which may Possibly be Performed within a Year. — But *where the contract is such that the whole may be performed within a year, and there is no express stipulation to the contrary, the statute does not apply.*⁴ Thus, a contract for the maintenance of a child at the defendant's request, to con-

¹ *Greene v. Harris*, 9 R. I. 401.

² *Beeston v. Collyer*, 4 Bing. 309; *Giraud v. Richardson*, 2 C. B. 835.

³ *Souch v. Strawbridge*, 2 C. B. 808; 15 L. J. C. P. 172; *Collis v. Bothamley*, 7 W. R. 87; and see *Add. on Contrs.* 7th ed. 153.

⁴ Where a contract may or may not be performed in a year, it is not within the statute. In order to bring it within the statute it must appear from the agreement itself, that it is not to be performed within a year. *Russell v. Slade*, 12 Conn. 455; *Blanchard v. Weeks*, 34 Vt. 589; *Sherman v. Champlain Transn. Co.*, 31 id. 162; *Izard v. Middleton*, 1 Dessau (S. C.) 116; *Burney v. Ball*, 24 Ga. 505; *Esty v. Aldrich*, 46 N. H. 127; *Blanding v. Sargent*, 33 N. H. 239; *Wiggins v. Kissner*, 6 Ind. 252; *Thourwin v. Lea*, 26 Tex. 612; *Rogers v. Bright-*

man, 10 Wis. 59; *Thompson v. Gordon*, 3 Strobb. (S. C.) 196; *Ellicott v. Peterson*, 4 Md. 476; *Scoggins v. Heard*, 31 Miss. 426; *Gladson v. Lance*, 1 McMull. (S. C.) Eq. 87; *Peters v. Westborough*, 19 Pick. (Mass.) 364; *Broadwell v. Getman*, 2 Den. (N. Y.) 87; *Moore v. Fox*, 10 John. (N. Y.) 244; *Lockwood v. Barnes*, 3 Hill (N. Y.) 128; *Houghton v. Houghton*, 14 Ind. 505; *Doyle v. Dixon*, 97 Mass. 208; *Scoggin v. Blackwell*, 36 Ala. 351; *Dresser v. Dresser*, 35 Barb. (N. Y.) 573; *Howard v. Burgen*, 4 Dana (Ky.) 137; *Bull v. McCrea*, 8 B. Mon. (Ky.) 422; *Worthy v. Jones*, 11 Gray (Mass.) 168; *Richardson v. Pierce*, 7 R. I. 330; *Lyon v. King*, 11 Met. (Mass.) 411; *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267; *Blair & Co. v. Walker*, 30 Iowa, 406; *Riddle v. Backus*, 38 id. 81.

tinue "so long as the defendant shall think proper," is a contract upon a contingency, the performance of which is not necessarily to take place beyond the space of a year, and therefore is not within the statute.¹ So where the defendant, who was the father of seven illegitimate children of the plaintiff, agreed with her verbally to pay her £300 per annum by equal yearly instalments, for so long as she should maintain and educate them, the eldest child being then fourteen years old, it was held that the agreement was binding.² So where a person contracts to support another during his or her life,³ or not to carry on a certain trade in a certain place,⁴ or to work for a person as long as he lives,⁵ or so long as a certain person remains agent for the employer,⁶ the contracts are not within the statute, because they may be performed within a year.

And an agreement whereby, in consideration of A not taking proceedings against B's son, B agreed to maintain and clothe A, and supply him with the grass for two sheep during his life, was held not to be within the statute, as the life of A was an uncertain event which might determine within a year.⁷ But an agreement to maintain a child known to be about five years old until she could "do for herself," was held to be within the statute, as it clearly contemplated an event not to be performed within a year, although it might be determined by the death of the child within a year.⁸

So where a testator promised by parol for valuable consideration to leave his brother's children a certain amount by will, it was held that a binding obligation was constituted

¹ *Souch v. Strawbridge*, 2 C. B. 808.

² *Knowlman v. Bluett*, L. R. 9 Ex. 1.

³ *Bull v. McCrea*, 8 B. Mon. (Ky.) 422; *Dresser v. Dresser*, 35 Barb. (N. Y.) 573; *Howard v. Burgen*, 4 Dana (Ky.) 151; *Hutchinson v. Hutchinson*, 46 Me. 154.

⁴ *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267; *Richardson v. Pierce*, 7 R. I. 330; *Doyle v. Dixon*, 97 Mass. 208; *Lyon v. King*, 11 Met. (Mass.) 411; *Worthy v. Jones*, 11 Gray (Mass.) 168; *Perkins v. Clay*,

54 N. H. 518, *Blanding v. Sargent*, 33 id. 239; *Packet Co. v. Sickles*, 5 Wall (U. S.) 580; *Somerby v. Buntin*, 118 Mass. 279; *Guerard v. Daudelet*, 32 Md. 561.

⁵ *Udike v. Ten Broeck*, 32 N. J. L. 105.

⁶ *Roberts v. Rockbottom Co.*, 7 Met. (Mass.) 46.

⁷ *Murphy v. O'Sullivan*, 11 Ir. Jur. 111.

⁸ *Farrington v. Donohoe*, 1 Ir. Rep. C. L. 675.

which could be specifically performed.¹ And where a parol promise was made to pay so much money upon the return of such a ship, which ship happened not to return within two years' time after the promise was made, it was held that this was a good promise, and not within the statute, as by possibility the ship might have returned within a year.²

SEC. 271. Agreement to be Performed on a Contingency.—

Where an agreement is to be performed on a contingency which may

¹ *Ridley v. Ridley*, 34 Beav. 478; 6 N. R. 11; 34 L. J. Ch. 462; and see *Fenton v. Emblers*, 3 Burr. 1282; 1 W. Bl. 353.

² *Anon.* 1 Salk. 280; and see *Francam v. Foster*, Skin. 326. The statute does not extend to contracts which are to be performed upon the happening of some uncertain event, and which may not consequently be completed within a year. An agreement consequently to pay the plaintiff so many guineas on the day of his marriage, was held not within the statute, although the marriage did not take effect for nine years, for it might have happened within a year. *Peter v. Compton*, Skin. 353; *Holt*, 326; *Smith v. Westall*, 1 Raym. 316; *Souch v. Strawbridge*, 2 C. B. 808; 15 Law J. C. P. 172. And where an oral promise was made to pay so much money on return of a ship, which ship happened not to return within two years after the time of the making of the promise, it was held that the promise was not within the statute, for that, by possibility, the ship might have returned within the year, though by accident it happened that it did not, and that the clause in the statute only extended to such promises and agreements as were, by the express appointment of the parties, not to be performed within a year from the time of making thereof. *Anon.* Salk. 280; *Fenton v. Emblers*, 3 Burr. 1282. And it has been laid down, that "where the agreement is to be performed upon a contingency, and it does not appear, within the agreement, that it is to be performed after

a year, there a note in writing is not necessary, for the contingent and uncertain event might happen within the year; but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is necessary, otherwise not." *Wells v. Horton*, 12 Moo. 182, 183; 4 Bing. 43, 44; *Moore v. Fox*, 10 John. (N. Y.) 244; *Harris v. Porter*, 2 Harr. (Del.) 27; *Broadwell v. Getman*, 2 Den. (N. Y.) 87; *Linscott v. McIntire*, 3 Shep. 201; *Peters v. Westborough*, 19 Pick. (Mass.) 364; *Kent v. Kent*, 18 Pick. (Mass.) 569; *Roberts v. Rockbottom Co.*, 7 Met. (Mass.) 46; *Russel v. Slade*, 12 Conn. 455; *Thompson v. Gordon*, 3 Strobb. (S. C.) 196; *Ellicott v. Peterson*, 4 Md. 476. Neither does the statute apply where the contract is wholly executed, or intended to be so, by one of the parties thereto, within the year, although there are some acts to be done by the other party beyond the prescribed limit. Thus, where a landlord agreed to lay out £50 in improvements upon the demised premises, and the tenant agreed to pay £5 per annum for the remainder of his term, of which several years were then unexpired, in addition to the reserved rent, and the £50 was expended within the year, and the landlord afterwards brought his action for the arrears of the £5, it was held that he was entitled to recover, though the agreement had not been put into writing and signed. *Donellan v. Read*, 3 B. & Ald. 906; *Cherry v. Heming*, 4 Exch. 631; 19 Law J., Exch. 63; *Mavor v. Pyne*, 11 Moore, 2.

happen within the year after it is made, and it does not appear on the face of the agreement that it is to be performed after the year, it does not fall within the statute.¹ Where, therefore, a debtor to the plaintiff stated to the plaintiff's solicitor, on being applied to for payment, that he, the debtor, could not pay then or during his lifetime, but that he had provided for payment by his will, and directed his executor to pay, it was held that the promise was binding on the executor, although there was no promise in writing by him to pay.²

So where the defendant promised for one guinea to give the plaintiff so many at the day of his marriage, and the marriage did not take place for nine years, it was held that a writing was not necessary, and the court said, that where the agreement is to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, then a note in writing is not necessary, for the contingent might happen within the year. Under this head is an agreement to pay a certain sum in consideration of acting as an agent for the defendant for "a reasonable time,"³ or to pay any excess over the purchase-price of land which may be sold "within five years,"⁴ or a contract of

¹ Doyle v. Dixon, 97 Mass. 208; Richardson v. Pierce, 7 R. I. 330; Dresser v. Dresser, 35 Barb. (N. Y.) 573; Wells v. Horton, 4 Bing. 40; Ridley v. Ridley, 34 Beav. 478; Jilson v. Gilbert, 26 Wis. 637; King v. Hanna, 9 B. Mon. (Ky.) 369; Izard v. Middleton, 1 Dessau (S. C.) Eq. 116; Clark v. Pendleton, 26 Conn. 495; Riddle v. Backus, 38 Iowa, 81; Walker v. Metropolitan Ins. Co., 56 Me. 371; Houghton v. Houghton, 14 Ind. 505; Esty v. Aldrich, 46 N. H. 127; Greene v. Harris, 9 R. I. 401; Abbott v. Inskep, 29 Ohio St. 59; Burney v. Ball, 24 Ga. 505; Wiggins v. Keizer, 6 Ind. 252; Blakeney v. Goode, 30 Ohio St. 350; Heath v. Heath, 31 Wis. 223; Trustees v. Brooklyn F. Ins. Co., 19 N. Y. 305; Alderman v. Chester, 34 Ga. 152; Thompson v. Gordon, 3 Strobh. (S. C.) L. 196; Talmadge v. Rens. & Sar. R. R. Co., 13 Barb. (N. Y.) 493; Gilbert v. Sykes, 16 East, 150; Jordan v. Miller, 75 Va. 442; Derrick v. Brown, 66 Ala. 162; East Tenn. & C. R. R. Co. v. Staet, 7 Lea (Tenn.) 397; Parker v. Siple, 76 Ind. 345; Niagara F. Ins. Co. v. Greene, 77 id. 590; Sherman v. Champlain Transn. Co., 31 Vt. 162; Knowlman v. Bluett, L. R. 9 Exchq. 1; Ellicott v. Turner, 4 Md. 476; Wilhelm v. Hardman, 13 id. 140; Frost v. Tarr, 53 Ind. 390; Bull v. McCrea, 8 B. Mon. (Ky.) 422; Hutchinson v. Hutchinson, 46 Me. 154; Updike v. Ten Broeck, 32 N. J. L. 105; Berry v. Doremus, 30 id. 399; Rhodes v. Rhodes, 3 Sanf. Ch. (N. Y.) 285; Talley v. Greene, 2 id. 91; Harper v. Harper, 57 Ind. 347; Howard v. Burgen, 4 Dana (Ky.) 137; Blake v. Cole, 22 Pick. (Mass.) 97; Sword v. Keith, 31 Mich. 247.

² Wells v. Horton, 12 Moo. 177; 4 Bing. 40; and see Smith v. Neale, 2 C. B. (N. S.) 67; Smith v. Westall, Ld. Raym. 316; 3 Salk. 9.

³ Niagara F. Ins. Co. v. Greene, 77 Ind. 590.

⁴ Parker v. Siple, 76 Ind. 345. But

partnership without any fixed or definite duration and the business of which *may* be terminated within a year,¹ or an agreement to employ a person in ill health until he gets well,² or to pay for lands when a certain pending suit is terminated,³ or by a tenant for a term of three years to build a fence during the term,⁴ or to take all the wood a person may cut not exceeding one thousand cords,⁵ or to print and sell the products of a certain mill until the owner has realized a profit of \$50,000,⁶ or a contract to continue as long as the parties are mutually satisfied,⁷ or to work for another as long as he lives,⁸ to educate a child,⁹ to support a person during his life,¹⁰ to pay a debt when a certain person dies,¹¹ to marry when a certain voyage is ended,¹² to pay a certain sum annually during coverture,¹³ not to carry on a certain trade in a certain place,¹⁴ to pay for services at the death of the employer or by will,¹⁵ or to pay a person a certain sum annually as long as he lives,¹⁶ or so long as another person lives,¹⁷ or, indeed, any contract the duration of which depends upon an uncertain event or contingency which *may* happen within one year, however improbable it may be that *it will* happen; *but where it appears by the whole tenor of the agreement that it is to be performed after the year, there a note is necessary.*¹⁸ Thus, where a person verbally agreed to work for another, and that he would not leave him for "two years," nor in the summer, nor without two weeks' notice, it was held to be a contract not to be performed within a year, and there-

see *Derby v. Phelps*, 2 N. H. 515, where a promise to marry "within five years" was held to be within the statute.

¹ *Jordan v. Miller*, 75 Va. 442.

² *East Tenn. &c. R. R. Co. v. Staub*, 7 Lea (Tenn.) 397.

³ *Derrick v. Brown*, 66 Ala. 162.

⁴ *Marley v. Noblett*, 42 Ind. 85.

⁵ *Van Woert v. Albany &c. R. R. Co.*, 1 T. & C. (N. Y.) 256. See also *S. P. Larimer v. Kelley*, 10 Kan. 298.

⁶ *Hodges v. Richmond Mfg Co.*, 9 R. I. 482.

⁷ *Greene v. Harris*, 9 R. I. 401.

⁸ *Kent v. Kent*, 62 N. Y. 560; *Updike v. Ten Broeck*, 32 N. J. L. 116.

⁹ *Ellicott v. Turner*, 4 Md. 476.

¹⁰ *Bull v. McCrea*, 8 B. Mon. (Ky.) 422; *Hutchinson v. Hutchinson*, 46 Me. 154.

¹¹ *Thompson v. Gordon*, *ante*.

¹² *Clark v. Pendleton*, 20 Conn. 495. See statement of case *ante*, p. 813.

¹³ *Houghton v. Houghton*, 14 Ind. 505.

¹⁴ *Richardson v. Pierce*, 7 R. I. 330; *Smalley v. Greene*, 52 Iowa, 241; 35 Am. Rep. 267.

¹⁵ *Kent v. Kent*, *ante*; *Bell v. Hewitt*, 24 Ind. 280.

¹⁶ *Hutchinson v. Hutchinson*, *ante*.

¹⁷ *Gilbert v. Sykes*, 16 East, 150.

¹⁸ *Peter v. Compton*, Skin. 353; *Holt*, 326; and see *Gilbert v. Sykes*, 16 East, 154.

fore within the statute.¹ The rule is that, *if the agreement cannot be fully performed within a year*, the fact that it may be terminated or further performance rendered impossible by the death of one or both the parties, is not sufficient to take it out of the statute, because the instances in which the death of one of the parties within the year takes the case out of the statute are *where the person's death leaves the contract fully performed*.² It was upon this rule that the doctrine of *Hill v. Hooper*³ was predicated. In that case, an agreement to employ a boy *for five years*, and to pay his father certain sums at stated periods during that time, was held to be within the statute, for, although by the death of the boy the services which were the consideration of the promise would cease, and the promise thereby be determined, *yet the contract would not be completely performed*. In a California case,⁴ an agreement to pay certain money borrowed when certain nut-bearing trees, about to be planted upon the borrower's farm, yield an income sufficient to pay the same over and above the expenses of the borrower's family, being impossible of performance within one year, was held to be within the statute. A contract to work for another two years, for \$100 for the first year and \$200 for the second year, is within the statute, because it cannot possibly be fully performed in one year.⁵ So also is a contract that a horse sold by the promisor shall prove sound for one year, and that if *after* the expiration of that time it proves unsound he will take it back and pay the purchaser \$100, because from the very terms of the contract it is not to be operative until *after* a year has elapsed.⁶ A contract to deliver a crop of hemp raised the present year, *and what may be raised in two succeeding years*, is clearly within the statute, because impossible of performance in one year.⁷

SEC. 272. Contract for Service to Commence at a Future Day.—A contract for a year's service to commence at a future day, being a contract not to be performed within a

¹ *Bernier v. Cabot Mfg Co.*, 71 Me. 506; 36 Am. Rep. 343.

² *Doyle v. Dixon*, 97 Mass. 212.

³ *Hill v. Hooper*, 1 Gray (Mass.) 131.

⁴ *Swift v. Swift*, 46 Cal. 266.

⁵ *Emery v. Smith*, 46 N. H. 151.

⁶ *Shipley v. Patton*, 21 Ind. 169.

⁷ *Holloway v. Hampton*, 4 B. Mon. (Ky.) 415. See also *Kellogg v. Clark*, 23 Hun (N. Y.) 393; *Day v. N. Y. Centl. R. R. Co.*, 22 id. 412.

year from the making, is within the statute. In *Bracegirdle v. Heald*,¹ LORD ELLENBOROUGH said: "If we were to hold that a case which extended one minute beyond the time pointed out by the statute, did not fall within its prohibition, I do not see where we should stop; for in point of reason, an excess of twenty years will equally not be within the act. Such differences rather turn upon the policy than the construction of the act."² In *Cawthorne v. Cawdrey*,³ it was held that a contract of hiring made on the 24th of March for a year's service to commence on the 25th, was not void by the statute; but that case was decided on the ground that there was evidence upon which the jury were at liberty to find that there was a contract on the 24th for a year's service. Although no action can be brought on the parol agreement, the servant may, in the event of sufficient service under it, acquire a settlement.⁴

SEC. 273. Hiring for One Year.—A general hiring for a year, and so on from year to year, for so long a time as the parties shall respectively please, is not within the statute.⁵

A contract for personal service which by its terms is to continue for a longer period than one year, even to the extent of one minute,⁶ is within the statute. Thus, a contract to labor for another three hundred and sixty-six days would clearly be within the statute:⁷ so when the master

¹ 1 B. & Ald. 722.

² And see *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20; 4 Tyr. 606; *Banks v. Crossland*, L. R. 10 Q. B. 97.

³ 18 C. B. (N. S.) 406; *Dickson v. Frisbie*, 52 Ala. 165; *Russell v. Slade*, 12 Conn. 455.

⁴ *Bracegirdle v. Heald*, 1 B. & Ald. 727, *per* BAYLEY, J.

⁵ *Beeston v. Collyer*, 12 Moo. 552; 4 Bing. 309; *Giraud v. Richmond*, 2 C. B. 835.

⁶ *Addison on Contracts*, 40; *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Snelling v. Lord Huntingford*, 1 C. M. & R. 25.

⁷ *Tuttle v. Sweet*, 31 Me. 55. A contract for a year's service, to commence at a subsequent day, is a contract not to be performed within the

year, and by the statute must be in writing; therefore no action can be maintained for the breach of a verbal contract made on the 27th May, for a year's service, to commence on the 30th June following. *Bracegirdle v. Heald*, 1 B. & Ald. 722.

In *Snelling v. Huntingfield*, 1 C. M. & R. 20; 4 Tyr. 606, A, on the 20th of July, made proposals in writing (unsigned) to B, to enter his service as bailiff for a year; B took the proposals and went away, and entered into A's service on the 24th of July. Held, that this was a contract on the 20th, not to be performed within the space of one year from the making, and within the 4th section of the statute of frauds.

In *Davenport v. Gentry*, 9 B. Mon.

loans the servant a certain sum, as £100, and the servant agrees to work it out at the rate of £60 a year;¹ so where the service is for one year, but part is to be performed in one year and part in another.² Thus a contract to deliver a crop of hemp raised the present year, and what may be raised the two succeeding years, is an entire contract, and within the statute;³ and, indeed, *any* contract which by its terms carries the performance beyond one year, *for however short a period*, is within the statute and cannot be enforced.⁴ A parol agree-

(Ky.) 427, several slaves agreed with the plaintiff that if he would purchase their freedom they would work for him five years. He sold his claim to the defendant for \$500. In an action to recover the amount, it was held that the contract was within the statute, and that the defendant was only liable for the actual value of the slaves' labor.

In *Hall v. Rowley*, 2 Root (Conn.) 161, in December, 1787, A made a parol agreement with C, that B, his minor son, should serve C five years. Within those five years B, having attained his majority, left the service of C. In an action on the case, brought by C against A, in January, 1793, it was held that the case was within the statute, and as the action was commenced more than three years after the making of the contract, it was not sustainable.

¹ *Currie v. McLean*, 2 Macph. (Sc.) 1076.

² *Hinckley v. Southgate*, 11 Vt. 428; *Foote v. Emerson*, 10 id. 338.

³ *Holloway v. Hampton*, 4 B. Mon. (Ky.) 415.

⁴ *Comstock v. Ward*, 22 Ill. 248; *Herrin v. Butters*, 20 Me. 119; *Harris v. Porter*, 2 Harr. (Del.) 27. In *Nones v. Homer*, 2 Hilt. (N. Y.) 116, the court say: "A contract to enter into the employ of another, and remain a day more than a year, is a contract not to be performed within a year, and is therefore void. But," say the court, "the employer having derived a benefit from the servant's part performance under such a contract, is liable to an action for the services

actually rendered." But in such cases the contract does not control, nor generally is it admissible in evidence to establish the value of the services. *Lang v. Henry*, 54 N. H. 57; *Kelley v. Terrell*, 26 Ga. 551; *Hearne v. Chadbourne*, 65 Me. 302; *Shipley v. Patton*, 21 Md. 169; *Kleeman v. Collins*, 9 Bush. (Ky.) 460; *Sharp v. Rhiel*, 55 Mo. 97.

Where an agreement distinctly shows upon the face of it that the parties contemplated its performance to extend over a greater space of time than one year, it is within the statute; but where the contract is such that the whole may be performed within a year, and there is no stipulation to the contrary, the statute does not apply. *Per TINDAL, C. J.*, *Souch v. Strawbridge*, 2 C. B. 815; *Boydell v. Drummond*, 11 East, 142. The cases on this subject will be found collected in 1 Smith's Lead. Cas., note to *Peter v. Compton*; and see *Cherry v. Heming*, 4 Exch. 631.

Accordingly, where the defendant verbally agreed on the 27th of May, to take the plaintiff into his service, as groom and gardener, for a year, to commence on the 30th of June following, but afterward refused to receive him, it was held that the plaintiff could not sustain any action for such breach of contract, as there was no written agreement; *LORD ELLENBOROUGH, C. J.*, saying: "If we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop; for, in point of reason,

ment that the son of A shall serve B four years is void, and a service of five months under it does not take the case out of the statute.¹

SEC. 274. Contracts not to be Performed within a Year. —

The rule is, that *all contracts which by their express terms are not to be performed within one year,*² or contracts in which *performance within one year is impossible*, are within the statute: as

an excess of twenty years will equally not be within the act." *Bracegirdle v. Heald*, 1 B. & Ald. 722.

So where the defendant, on the 20th of July, proposed to hire the plaintiff as bailiff for one year, to commence on the 24th of July, and the defendant at that time wrote a memorandum (but which was signed by neither of the parties), which was delivered to the plaintiff and by him taken away, stating the terms on which the plaintiff was to serve; and the plaintiff entered the defendant's service on the 24th, but before the expiration of the year, the defendant being displeased with the plaintiff, gave him a month's warning to quit his service; and the plaintiff left before the expiration of the year; it was held that he could not maintain an action against the defendant for not continuing the plaintiff for the year, as there was no agreement in writing, in conformity with the statute of frauds. *Snelling v. Lord Huntingfield*, 1 C. M. & R. 20. In *Hearne v. Chadbourne*, 65 Me. 302, a contract made on Friday, for one year, to begin the following Monday, was held to be within the statute. See also *Kleeman v. Collins*, 9 Bush. (Ky.) 460; *Wilson v. Martin*, 1 Den. (N. Y.) 602; *Broadwell v. Getman*, 2 id. 87; *Lewis v. Wilson*, 4 E. D. S. (N. Y. C. P.) 422; *Amburger v. Marvin*, 4 id. 393.

And where the plaintiff entered into the service of the defendant under the following agreement: "I agree to receive you as clerk or book-keeper in my establishment, in consideration of your paying me a premium of £300, and to pay you a salary at the following rates, viz.: for the first year, £70; for the second,

£90; for the third, £110; for the fourth, £130; and £150 for the fifth and following years that you remain in my employment; and I also agree, in case of the death of either of us, to return £150." It was held that the agreement was one that, by the statute of frauds, was required to be in writing; and that, there being a precise stipulation for yearly payments, evidence was not admissible to show a verbal agreement for quarterly payments. *Giraud v. Richmond*, 2 C. B. 835.

¹ *Squire v. Whipple*, 1 Vt. 69.

² *Herrin v. Butters*, 20 Me. 119; *Comstock v. Ward*, 22 Ill. 248; *Squire v. Whipple*, 1 Vt. 69; *Drummond v. Burrell*, 13 Wend. (N. Y.) 307; *Shute v. Dorr*, 5 id. 204; *Broadwell v. Getman*, 2 Den. (N. Y.) 87; *Fenton v. Emblers*, 3 Burr. 1281.

A parol agreement, which is not wholly to be performed within one year, is void, although some of the stipulations are to be executed within the year. And it seems that it is void, although one of the parties is to perform every thing, on his part within the year, if a longer time than a year is stipulated for the performance by the other.

A, in January, agreed by parol to clear a piece of woodland for B, and partly to fence one end of it, which he was to complete, the whole to be done in one year from the ensuing spring, when A was to put in a crop, which, with the wood and timber, except that used for the fences, he was to have for his compensation. In an action against A for non-performance, it was held that the contract was within the statute and void. *Broadwell v. Getman*, 2 Denio (N. Y.) 87.

where a railroad company entered into an arrangement with an individual to stop their trains at a certain place, as a permanent arrangement;¹ or where A contracted with B in January, 1841, that if he would clear a certain piece of land of A's, and make a fence around a part of it, he should have the use of the land for the summer of 1842, it was held that the contract was void, because performance within a year was impossible.² So *where it is the manifest understanding and intention of the parties that the contract shall not be performed within a year, although it is possible that it may be completed within that time, it is within the statute.* The true test as to whether such a contract is within the statute is, not whether it *may* be performed within a year, but *whether performance within a year operates as a full and complete performance of the contract according to the true intent and understanding of the parties.* The leading case upon this point is *Boydell v. Drummond*,³ which has been before referred to, in which the court laid down the doctrine that, *if it appears to have been the understanding of the parties to a contract that it was not to be completed within a year, though it might be and was in fact in part performed within that time, it is within the statute, and cannot be enforced.* In that case the plaintiffs proposed to publish large prints, illustrative of scenes

¹ *Pitken v. L. I. R. R. Co.*, 2 Barb. Ch. (N. Y.) 221. In *Day v. N. Y. & C. R. R. Co.*, 31 Barb. (N. Y.) 548, an agreement was made between the plaintiff and the defendant, a railroad company, by which the former was to convey to the latter a strip of land adjoining the railroad, and to erect on his own lands cattle-pens, a house, etc., and to provide for feeding the stock; and the latter was to build a track on its own land, alongside of the plaintiff's land, and there deliver all of certain stock; to the end that the plaintiff might enjoy the profits to arise from keeping and feeding the stock. The business contemplated by the contract could not be done without connecting the lands of the plaintiff with those of the defendant, by means of a platform or bridge resting partly upon the land of each party. Held, that the contract, if valid, in effect created an easement or servi-

tude which was to be binding upon the real property of the defendant, as the servient tenement, for the benefit of the plaintiff and his land, and those who should succeed the plaintiff in his real estate. That the negative easement acquired by the plaintiff in the lands of the defendant, by virtue of the agreement, was an incorporeal hereditament, the right or title to which could only pass by grant, or deed under seal, or be acquired by prescription; and that the contract in this case, being by parol, was void. That the agreement, being oral, was void by the statute of frauds, because, from its nature and terms, it was not to be performed within one year, but was to continue in operation, as a permanent arrangement, during the existence of the corporation.

² *Broadwell v. Getman*, *ante*.

³ *Boydell v. Drummond*, 11 East, 142.

from Shakspeare, to be issued in numbers at the rate of two to each play, and to embrace seventy-two scenes. The defendant became a subscriber to the series and paid two guineas in advance. The manner in which the defendant became a subscriber was by writing his name in a book entitled "Shakspeare's subscribers, their signatures." The plaintiffs had issued a prospectus of the work, with reference to which the parties appeared to have contracted, but which was not referred to or in any wise made a part of the subscription. In this prospectus it was stated that "one number at least should be published annually, and the proprietors were confident that they should be able to produce two numbers within the course of every year." The defendant received two numbers, and, declining to take any more, the plaintiffs brought this action to recover the price of the remaining numbers of the series. The court were unanimous in their judgment that the case was within the statute. LORD ELLENBOROUGH, C. J., said: "The whole scope of the agreement shows that it was not to be performed within a year, and *if, contrary to all physical probability, it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have enabled the publishers to demand payment of the whole subscription from them within the year.* It has been argued that an inchoate performance within a year is sufficient to take the case out of the statute; but the word used in the clause of the statute is '*performed,*' which must mean *ex vi termini*, complete performance, or a consummation of the work. If this were not the true construction of the statute, great inconvenience would ensue in the execution of contracts for large works, which must necessarily require a long time for their completion, as in the case of the Somerset House, which occupied many years in the building. If one stone were laid within a year from the making of the contract by parol, it would, according to the argument, have taken the case out of the statute," and thus have precipitated all the evils which the statute was intended to avoid.¹

¹ *Hinckley v. Southgate*, 11 Vt. (Ky.) 17; *Linscott v. McIntire*, 15 428; *Herrin v. Butters*, 20 Me. 119; Me. 201; *Peters v. Westborough*, 19 *Saunders v. Kastenbine*, 6 B. Mon. Pick. (Mass.) 365.

The *performance* contemplated by the statute is a full and complete performance, and not a performance that is partial or inchoate, and therefore, where from the stipulations of the contract it is evident that the parties intended that its performance should extend over a year, the agreement is within the statute.¹ As to whether the parties understood and intended that the contract might be performed within a year is to be gathered from the terms of the contract, and the subject-matter to which it relates. Thus, in a Maine case² the defendant entered into a contract with the plaintiff to clear eleven acres of his (the plaintiff's) land in three years from date. One acre to be seeded down the present spring, one acre the next spring, and one acre the following spring, for doing which the defendant was to have all the proceeds of the land during the entire three years, except of the two acres first seeded down. It was held that the contract was clearly within the statute, the court observing: "It is urged that the defendant might have cleared up the land and seeded it down in one year, and thereby performed his contract. But we are not to inquire what, by possibility, the defendant might have done by way of fulfilling his contract. We must look at the terms of the contract itself and see what he was bound to do, and what, according to the terms of the contract, it was the understanding of the parties he should do. Was it the *understanding and intention of the parties that the contract might be performed in one year?* If not, the case is clearly with the defendant."

In all cases, in order to take a contract out of the statute, it must not only be capable of complete performance within the year, but it must also be such a performance as is within the evident understanding and intention of the parties. That is, there must be nothing in the contract to prevent the enforcement of the claim for compensation for such performance.³

¹ *Souch v. Strawbridge*, 2 C. B. 815. At law nothing short of a full and complete performance by one party of an agreement within the statute of frauds will take it out of the operation of that statute. *Eaton v. Whitaker*, 18 Conn. 222. The provision of the statute, that any agreement that is not to be performed within the space

of one year from the making thereof shall be in writing, means an agreement expressly stipulated, and so appearing within the instrument not to be performed within the year. *Thompson v. Gordon*, 3 Strobb. (S. C.) 196.

² *Herrin v. Butters*, 20 Me. 119.

³ *Boydell v. Drummond*, *ante*; *Herrin v. Butters*, *ante*.

There seems to be no doubt that in all the States, where a person renders services under a contract within the statute, he may recover for such services what they are reasonably worth, if the defendant himself puts an end to the contract.¹

¹ In *White v. Wieland*, 109 Mass. 291, the defendant was a tenant of certain premises belonging to the plaintiff, paying therefor a monthly rent. In an action to recover the rent he declared in set-off for money, work and labor to the plaintiff's use in making repairs upon the premises, which were made under an oral agreement that the plaintiff should let him the house at \$8 a month; that he (the defendant) should make certain repairs on the house, and that the plaintiff should give him a lease for five years, and that the plaintiff, in violation of such agreement, ejected him from the premises and refused to give him the lease. The defendant had a verdict for a balance on his declaration in set-off of \$75.10, which was sustained on appeal. CHAPMAN, C. J., remarking: "The plaintiff's contract to give the defendant a lease for five years was within the statute of frauds and could not be enforced. But if he broke it before the defendant had broken the contract on his part, and expelled him from the premises, the defendant would thereby be entitled to recover of him for the repairs which he had made on the premises in conformity with the contract." *Williams v. Bemis*, 108 Mass. 91. See *McElroy v. Ludlum*, 32 N. J. Eq. 828.

In *Mavor v. Payne*, 2 C. & P. 91, the defendant subscribed for Payne's *History of the Royal Residences*, which was published in numbers at intervals of two months, at the price of £1 1s. each, and consisted of eighteen numbers. Eight of these were delivered to the defendant, at the plaintiff's residence, but he never called for the remaining numbers. It was objected that the contract was within the statute of frauds, as it was not to be performed within a year, and that, not having been performed,

no recovery could be had for the numbers delivered.

BEST, C. J., said: "If this case touched upon the principles laid down in *Boydell v. Drummond*, I should feel myself bound by the authority of that case. And even if I differed in opinion, it would govern me, sitting at *nisi prius*. But I subscribe to every word of it. If any inference at all can be deduced from that judgment bearing upon this case, it is an inference unfavorable to the objection which has been made to-day. I will state my brother Vaughan's proposition, and then he will see how monstrous a proposition it is, and how inconsistent with common sense and common justice, and how unlikely it is that a court of justice should ever have entertained it. He says, 'it is an entire contract.' I agree with him that it is so. But he says, 'that if there were twenty-four numbers, and twenty-three of them were delivered, and the twenty-fourth was not, the publisher could not recover for the twenty-three.' I am of opinion that there is a subordinate contract; an understanding that each number is to be paid for on delivery. It must be well known to the gentlemen of the jury, that in this city a similar course is constantly adopted in the cases of contracts for the sale of corn. It is necessary that publishers should have the money for each number as it comes out, in order that they may be able to go on with the work. This is always their object, and my brother Vaughan's argument goes to overthrow this. The object of publishers is the same, because it is not convenient for them to pay for the whole work at once. Taking it to be a contract for the whole, yet it is in part executed. But I will put this case on another ground. The evidence is,

But in some of the States, as has been previously observed, it is held that, if a person commences to labor under a contract for a term, within the statute of frauds, he cannot recover for part performance if he puts an end to the contract without a sufficient legal excuse. The theory upon which these cases proceed is, that the contract is not void, but that it is simply non-enforceable at law, hence, in order to entitle the servant to a recovery for any part of his services upon a *quantum meruit* even, full performance, or a legal excuse for a failure in that respect, must be shown. But the reasoning upon which this doctrine is predicated is not generally adopted, nor is it believed to be such as commends itself to favorable adoption by the courts. The statute in many of the States, it is true, does not, in express terms, declare such contracts void, but it deprives them of all legal validity as contracts, and cuts off any remedy upon the contract itself; but the doctrine of the courts in the cases referred to, practically gives validity to such contracts, permits them to be used in evidence, and measures the rights of parties by them.¹

A contract for services, void under the statute of frauds, cannot be enforced, nor can an action be maintained for wages earned in pursuance of it. The servant must sue upon a *quantum meruit*, and the contract is not admissible to control the damages.²

SEC. 275. When the Contract may or may not be Performed within a Year.—An agreement which *may* be performed within a year is not within the statute,³ however improbable

that the defendant agreed to take the numbers, and actually took and kept six, seven, or eight. He said, I shall not pay, because you have not given me the whole. To this it was answered: 'You may have the remainder; but we did not agree to deliver.' In common sense can a man say: 'I will not pay for the eight which I have had, and I will not take any more'? When the first contract was broken off, when the defendant said: 'I will not take the whole,' I think an implied contract was raised, which may be enforced in this form of action."

¹ Mack v. Briggs, *ante*.

² Emery v. Smith, 46 N. H. 151; Galvin v. Prentice, 45 N. Y. 162; Carter v. Brown, 3 S. C. 298.

³ Esty v. Haldrich, 46 N. H. 127; Blanding v. Sargent, 33 id. 239; Sherman v. Champ. Trans. Co., 31 Vt. 162; Moore v. Fox, 10 Johns. (N. Y.) 244; Russell v. Slade, 12 Conn. 455; Clark v. Pendleton, 20 id. 508; Linscott v. McIntire, 15 Me. 201; Gadsden v. Lance, 1 McMull (S. C.) 87; Rogers v. Brightman, 10 Wis. 55; Foster v. McO'Brien, 18 Mo. 88; Ellicott v. Peterson, 4 Md. 476; Barney v. Ball, 24 Ga. 505; Soggins v.

it may be that it will be performed within that period.¹ Thus, in *Fenton v. Emblers*, *ante*, it was held that an agreement by

Heard, 31 Miss. 426; *Blanchard v. Weeks*, 34 Vt. 589. An agreement that a policy of fire insurance shall be renewed from year to year, either party being at liberty to give notice at any time that the arrangement shall not be continued, is not within the statute. *Trustees of First Baptist Church v. Brooklyn Fire Insurance Co.*, 19 N. Y. 305. But an agreement by parol to employ a person for the term of one year, to commence *in futuro*, and to enter into a contract in writing so to employ, is not an agreement to be performed within one year from the making of it, and is, therefore, void by the statute. *Amburger v. Marvin*, 4 E. D. Smith (N. Y.) 393. Such a contract to employ is void, under the statute of frauds, if not in writing. *Little v. Wilson*, 4 E. D. S. (N. Y. C. P.) 422. An agreement by an infant to work seven years for his board is not within the statute. *Wilhelm v. Hardman*, 15 Md. 140. When a contract to be performed depends upon a contingency which may happen within a year, it is not within the statute. *Barney v. Ball*, 24 Ga. 505.

A contract to work for another as long as they are mutually satisfied, *Greene v. Harris*, 9 R. I. 401, or to print and sell the products of a factory, to continue two years, if necessary, until the contractor has made a profit of \$50,000, is not within the statute. *Hodges v. Richmond Manuf. Co.*, 9 R. I. 482.

An agreement to support one during his life is not within the statute. *Hutchinson v. Hutchinson*, 46 Me. 154. See *Houghton v. Houghton*, 14 Ind. 505, as to contracts dependent on a contingency. Also, *Rogers v. Brightman*, 10 Wis. 55; *Atwood v. Fox*, 30 Mo. 499. Promise to pay for boiler by first forty thousand feet of lumber sawed at defendant's mill, *Woodford v. Patterson*, 32 Barb. (N. Y.) 630; agreement to furnish and set up a

monument, *Mead v. Case*, 33 id. 202; agreement to furnish and *prepare* material for portable houses, are not within the statute, *Phipps v. McFarlane*, 3 Minn. 109; as they are not contracts for the sale of articles exclusively, but for work.

¹ In *Ellicott v. Peterson*, 4 Md. 476, it was held that the statute of frauds does not apply to any contract which can, by any possibility, be fulfilled or completed in the space of a year, though the parties may have intended that its operation should extend through a much longer period. Thus, where a grandfather of two minor children agreed, by parol, to pay the plaintiff, their step-father, whatever expense he might incur for their support and education, it was held that the agreement was not within the statute, because the death of the children might occur within a year and terminate the contract. In *Compton v. Martin*, 5 Rich. (S. C.) 14, the defendant let a negro to the plaintiff for two years, for \$140, and put the plaintiff in possession. In a few days the negro went back to defendant, and he sold him. Held, that the contract of hiring having been performed by the defendant, it was not within the statute. In Missouri it is held that only those contracts are intended, which, by express stipulation, are not to be performed within that time. *Foster v. McO'Brien*, 18 Mo. (3 Bennett) 88.

A contract by one not to sell, or assist others in selling, musical instruments, is not invalid under the statute of frauds, as being a contract not to be finished within one year, as it may be ended by the death of the contractor within that time. *Hill v. Jamieson*, 16 Ind. 125. If the thing promised may be performed within the year, the contract is not within the provision of the statute relative to time of performance. *Linscott v. McIntire*, 3 Shep. 201. Where the time for the

which the defendant employed the plaintiff to serve him as his housekeeper as long *as it should please him*, and to pay

complete performance of a contract is to be extended beyond a year, the fact that a part performance is to be made within the year by agreement, does not take the contract out of the statute of frauds. To bring a case within the statute of frauds, it must have been expressly stipulated by the parties, or it must, upon a reasonable construction of their contract, appear to have been understood by them, that the contract was not to be performed within a year.

A agreed, in writing, with B to do certain work in three years, a certain part to be done in each year. A verbally assigned one-half of his interest in the contract to C, who verbally assigned to D, C and D respectively agreeing, verbally, to perform one-half of the contract. A and D partially performed the contract. B recovered damages of A for non-performance. C paid one-half thus recovered to A, on demand, and then sued D for the same. Held, that the contract between C and D was void by the statute of frauds, and that the plaintiff was not entitled to recover. *Herrin v. Butters*, 20 Me. 119.

A contract for work and labor to be begun, but not completed, within one year from the making thereof, is within the statute of frauds, and must be in writing. *Hinckley v. Southgate*, 11 Vt. 428. A and B were co-trustees of the estate of a minor, and it was verbally agreed between them that, in consideration that A should be permitted to employ the trust fund in trade, on his own account, for the term of three years, he would pay the interest thereon to the *cestui que trust*, and would also pay in goods to B \$150 per year for three years. Held, that the whole contract was void by force of the statute of frauds, it being to be performed in part within one year, and in part thereafter. *Foote v. Emerson*, 10 Vt. 338. A parol contract is not void, as an agreement not

to be performed within a year from the making thereof, if the performance of it depends upon a contingency which may happen within the year, although, in fact, it do not happen till after the expiration of the year. Thus, a parol contract to support a person for a certain number of years, is not within the statute; for, if he dies within one year, having been supported under the contract until his death, the contract will have been fully performed. *Peters v. Westborough*, 19 Pick. (Mass.) 364; *Dresser v. Dresser*, 35 Barb. (N. Y.) 573. So, where one party agreed that another might cut certain trees on her land at any time within ten years, it was held not to be within the statute, for such an agreement may be performed within one year. *Kent v. Kent*, 18 Pick. (Mass.) 569. In an action by a surety on an administration bond against a co-surety for contribution, it appeared that the defendant signed the bond at the request of the plaintiff, and upon the plaintiff's verbal promise to save him harmless. Held, that, as this promise might be performed within a year, it was not required by the statute of frauds to be in writing. *Blake v. Cole*, 22 Pick. (Mass.) 97.

Where a contract within the statute is lawfully rescinded, either party may have an action against the other for the repayment of money advanced, or for labor performed, or the return of anything delivered under the contract, and may support such action by parol evidence. *Sherburne v. Fuller*, 5 Mass. 133, 139; *Kidder v. Hunt*, 1 Pick. (Mass.) 328. A, on the sale to B of a share in a patent right for a certain sum paid therefor by B, made an oral agreement with B to repay him said sum, if he should, within three years, not realize said sum out of the profits arising from said share. Held, that this agreement was within the statute of frauds, as it was not to

her at the rate of £6 a year, and also to bequeath to her the sum of £16 a year, payable to her yearly for each year of her life after his decease, was held not to be within the statute, although the employment might, and in point of fact did, extend beyond one year. DENNISON, J., in passing upon the question, laid down the doctrine which has been generally adopted ever since. He said: "The statute of frauds plainly means an agreement *not* to be performed within a year, *and expressly and specially so agreed*. A contingency is not within it, *nor any case that depends upon a contingency*. It does not extend to cases where the thing only may be performed within the year."¹

In *Peter v. Compton*,² an action was brought upon an agreement by which the defendant, in consideration of one

be performed within one year from the making thereof. *Lapham v. Whipple*, 8 Met. (Mass.) 59. A promise which arises by operation of law is not within the statute of frauds. *Smith v. Bradley*, 1 Root (Conn.) 150. A promise to pay for boarding a son two years is not within the statute of frauds. *Ives v. Gilbert*, 1 Root (Conn.) 89. A verbal contract, which it was agreed should go into effect on the 1st of April, 1854, and continue "as long as the parties are mutually satisfied"; held, not to be a contract within the statute of frauds, as it might be performed within one year. *Greene v. Harris*, 9 R. I. 401. In *Hodges v. Richmond Manuf. Co.*, 9 R. I. 482, the plaintiff alleged that a contract was made between him and the defendant, that the defendant should print and sell, at cost, the products of the plaintiff's mill, and that a memorandum of the terms of the contract was made by him, but not signed by the defendant, concluding as follows: "This agreement to continue two years, or longer if necessary, until I (plaintiff) have made the net profit of fifty thousand dollars. This contract is to take the place of the one I had previously made to sell them production of my mill for four months, at twenty cents per yard." Held, that, as the consideration of the

contract was the release of a former contract which might have been disadvantageous to the defendant, and as the object appeared to be to let the plaintiff make a sum of money from the new one, the money, and not the time, was the principal object of the contract, and, therefore, it might be performed within one year, and was not within the statute of frauds. Held, further, that the contract should be taken as if it was expressed to continue until the plaintiff had made a net profit of fifty thousand dollars, even if it took two years, or longer, to do it.

¹ *Fenton v. Emblers*, 3 Burr. 1278.

² *Peter v. Compton*, Skin. 353. In *Packet Co. v. Sickles*, 5 Wall. (U. S.) 580, the court held that an agreement to pay a certain sum annually for the right to use an invention on a certain steamboat during the term of the patent, which had twelve years to run, *if the boat should last so long*, was within the statute, notwithstanding it rested upon a contingency. But the doctrine of this case is not reconcilable with the authorities either of the English or American courts, and cannot be regarded as an authority to overthrow a doctrine sustained by such a mass of unbroken authorities as sustain the opposite doctrine. Its authority was questioned and denied

guinea, promised to give the plaintiff so many on the day of his marriage. The marriage did not happen within a year, and it was objected that it was void under the statute of frauds because the marriage did not happen within a year after the agreement was made. LORD HOLT said: "Where the agreement is to be performed upon a *contingent*, and it does not appear by the agreement that it was to be performed *after the year*, then a note in writing is not necessary, *for the contingent might happen within the year*; but when it appears from the whole tenor of the agreement that it is to be performed *after the year*, then the note is necessary, otherwise not."

Thus, a contract to pay a certain sum of money on the return of a certain ship, although it does not return within two years;¹ a contract to employ one so long as he lives,² or to work for another as long as he lives;³ for five years, or so long as a certain person remains the agent for the employer;⁴ or so long as the employer shall chose;⁵ or so long as the parties are mutually satisfied;⁶ or until the servant attains a certain age, which would involve several years if he lived,⁷ nor a parol contract not to engage in a particular business within a certain district, as a contract not to engage in the staging

by GRAY, J., in *Somerby v. Buntin*, 118 Mass. 286, and an opposite doctrine announced in a case involving quite similar questions. A contract for labor to be performed *and paid for* after the death of the employer, may be proved by parol. Such a contract is not within the statute, for the death *may* occur within the year. *Riddle v. Backus*, 38 Iowa, 81. In *Blair & Co. Land Co.*, 39 id. 406, it was held that in order to exclude parol evidence to prove a contract on the ground that it was not to be performed within a year, it must appear either from the express terms of the contract or necessary implication, that its performance within the year is prohibited or impossible. *Van Woert v. Albany & Co. R. R. Co.*, 1 T. & C. (N. Y.) 256. In *Marley v. Noblett*, 42 Ind. 85, it was held that an agreement connected with the letting of

lands, that the tenant move "during the term" (three years), is not within the statute, *for it may be performed within the first year*. *Larimer v. Kelley*, 10 Kan. 298.

¹ *Anon.*, Salk. 280.

² *Hutchinson v. Hutchinson*, 46 Me. 154.

³ *Udike v. Ten Broeck*, 32 N. J. L. 105.

⁴ *Roberts v. Rockbottom Co.*, 7 Met. (Mass.) 46.

⁵ *Souch v. Strawbridge*, 2 C. B. 808.

⁶ *Greene v. Harris*, 9 R. I. 401.

⁷ In *Wilhelm v. Hardman*, 15 Md. 140, a contract made by an infant to work until he should attain the age of twenty-one, which would not occur for seven years, for his board, was held not within the statute. *Peters v. Westborough*, 19 Pick. (Mass.) 865

business;¹ or to practise as a physician;² or to carry on the butchering business, or sell meat from a cart;³ an agreement not to run a mill or store, are not within the statute,⁴ because in all such cases the contract may be terminated within the year by the death of the party, or *any* contract which *may* be completed within a year by the happening of any event, is not within the statute.⁵ The rule is, that *if the time of performance may*, although it is highly improbable that it will, *arrive within the year*, the case is not within the statute.⁶ The fact that performance within a year is highly improbable does not bring it within the statute. The simple test is, whether it *may* be performed within the year, and whether such performance, although not expected to occur within that time, answers the contract;⁷ and the important question is, whether the contract, *by its terms*, is *necessarily incapable of performance within a year*.⁸ When it *may* by its

¹ Lyon v. King, 11 Met. (Mass.) 411.

² Blanding v. Sargent, 33 N. H. 239; Blanchard v. Weeks, 34 Vt. 589.

³ Richardson v. Pierce, 7 R. I. 330.

⁴ Worthly v. Jones, 11 Gray (Mass.) 168.

⁵ White v. Hanchett, 21 Wis. 415; McLees v. Hale, 10 Wend. (N. Y.) 426; Clark v. Pendleton, 20 Conn. 495; Houghton v. Houghton, 14 Ind. 505; Gilbert v. Sykes, 16 East, 150; Alderman v. Chester, 34 Ga. 153; King v. Hanna, 9 B. Mon. (Ky.) 369; Bell v. Hewitt, 24 Ind. 280; Wells v. Horton, 4 Bing. 40.

⁶ Fenton v. Emblers, *ante*; Plimpton v. Curtiss, 15 Wend. (N. Y.) 336; Lockwood v. Barnes, 3 Hill (N. Y.) 128.

⁷ Derby v. Phelps, 2 N. H. 515; McLees v. Hale, 10 Wend. (N. Y.) 426; Wells v. Horton, 4 Bing. 10; Lockwood v. Barnes, 3 Hill (N. Y.) 128; Blake v. Cole, 22 Pick. (Mass.) 97; Fenton v. Emblers, 3 Burr. 1278; Linscott v. McIntire, 15 Me. 201.

⁸ In Roberts v. Rockbottom Co., 7 Met. (Mass.) 46, the plaintiff entered the service of the defendants under an agreement to labor for the five years, from the 6th day of May, 1839,

or so long as John A. Leforest should continue their agent, at \$2 a day, payable quarterly. After serving a little more than a year he was discharged. There were two counts in the declaration, one for the wages earned and another for damages by being prevented from performing. The defendant insisted that the contract was within the statute, and that no recovery could be had for its breach. The jury returned a verdict for the plaintiff upon the first count for \$24.88, and upon the second count for \$475, but under direction from the court they reversed their verdict as to the second count and found for the defendant, upon the ground that the contract was within the statute of frauds. Upon appeal the verdict was set aside, the court holding that the contract, being dependent upon a contingency, was not within the statute, SHAW, C. J., observing: "We think it now settled by recent cases, that where the contract may by its terms be fully performed within the year, it is not void by the statute of frauds, although in some contingencies it may extend beyond a year." Lapham v. Whipple, 8 Met. (Mass.) 59; Blake v. Cole, 22 Pick. 97; Artcher v. Zeh, 5

terms be performed within that time, the fact that it is *not* performed within that period does not bring it within the statute.¹ Thus, in a New York case,² the plaintiff entered into a verbal agreement with the trustees of a school district, in October, 1876, to teach its school for the year ending October 1, 1877, at a fixed salary, and to teach the school for another year at the same salary, *if no notice to the contrary should be given by either party*, and it was held that the contract was not within the statute.³ The fact that performance is to begin within the year, and in fact does begin within that time, does not take the case out of the statute, *if it is not to be completely executed* within that time.⁴

The statute does not apply to a case where a contract of hiring is implied from circumstances, however long continued.⁵ Nor to a contract when no time for performance is named;⁶ nor when the agreement is by deed.⁷ But the mere fact that the contract may *possibly* be performed within a year, if by its terms it is to continue longer than a year, does not save it from the operation of the statute.⁸ Nor the fact that it in point of fact is performed.⁹ A verbal contract to labor for another one year, to commence in the future, is void under the statute of frauds, and no action can be maintained for its breach so long as it remains executory,¹⁰ and a

Hill (N. Y.) 200; *Doyle v. Dixon*, 97 Mass. 208.

¹ *Clark v. Pendleton*, 20 Conn. 495; *Fenton v. Emblers*, *ante*; *Blake v. Cole*, 22 Pick. (Mass.) 97.

² *Smith v. Conlin*, 19 Hun (N. Y.) 234.

³ *Trustees v. B. F. Ins. Co.*, 19 N. Y. 305; *S. C.* 28 id. 153; *Kent v. Kent*, 62 id. 560; *Moore v. Fox*, 10 John. (N. Y.) 244; *McLees v. Hale*, 10 Wend. (N. Y.) 426; *Kelley v. Terrell*, 26 Ga. 561.

⁴ *Boydell v. Drummond*, 11 East, 142; *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Birch v. Liverpool*, 9 B. & C. 392; *Lockwood v. Barnes*, 3 Hill (N. Y.) 130; *Reg. v. Lord*, 12 Q. B. 762.

⁵ *Beeston v. Collyer*, 4 Bing. 309.

⁶ *Russell v. Slade*, 12 Conn. 455; *Adams v. Adams*, 26 Ala. 272; *Suggett v. Cason*, 26 Mo. 224; *Soggins v. Heard*, 31 Miss. 426.

⁷ *Couch v. Goodman*, 2 Q. B. 580; *Cherry v. Heming*, 4 Ex. 631.

⁸ *Roberts v. Tucker*, 3 Ex. 632; *Herrin v. Butters*, 20 Me. 119; *Harris v. Porter*, 2 Harr. (Del.) 27; *Comstock v. Ward*, 22 Ill. 248.

⁹ *Lapham v. Whipple*, 8 Met. (Mass.) 59; *Marcy v. Marcy*, 9 Allen (Mass.) 8.

¹⁰ *Hinckley v. Southgate*, 11 Vt. 429; *Scoggin v. Blackwell*, 36 Ala. 351; *Nones v. Homer*, 2 Hilt. (N. Y.) 116; *Little v. Wilson*, 4 E. D. S. (N. Y. C. P.) 422; *Amburger v. Marvin*, id. 393; *Squire v. Whipple*, 1 Vt. 69. In *Banks v. Crossland*, L. R. 10 Q. B. 97; 11 Eng. Rep. (Moak's Ed'n) 168, an information was filed against the respondent under section 4 of the "Master and Servant act," that the respondent, at Howden, on the 11th of Nov. 1873, entered into a contract with the appellant to serve him one

contract partly in writing and partly by parol is within the statute if required to be in writing, as, in order to take a case out of the statute, all the essential elements of the contract must be in writing,¹ and parol evidence is not admissible to supply the defects in the written portion of it.²

SEC. 276. Contract, when Presumed to Commence at Once.—

When a contract for service for one year is entered into, and no time is named when the term is to commence, the presumption is that it was to commence *at once*, and it is not within the statute.³ But the doctrine of this case is denied

year for a certain compensation, which time had not expired, and which service the respondent refused to perform. It was proved that the hiring was by parol only, entered into Nov. 11, to commence Nov. 22. It was held that the contract being for a term to commence in the future, was within the statute of frauds, and therefore not enforceable under the act of 1867. A contract to labor for another a year from the following month, or day, is within the statute. *Scoggin v. Blackwell*, 36 Ala. 351; *Squires v. Whipple*, 1 Vt. 67; *Little v. Wilson*, 4 E. D. S. (N. Y. C. P.) 422. As an agreement made before Christmas of one year, to serve as overseer for the next year. *Kelley v. Terrell*, 26 Ga. 551. See, also, *Taggard v. Roosevelt*, 2 E. D. S. (N. Y.) 100.

¹ *Frank v. Miller*, 38 Md. 450.

² *Lang v. Henry*, 54 N. H. 57. The same principle was adopted in *Wilson v. Martin*, 1 Den. (N. Y.) 602, when it was held that an agreement made in April for the hire of board and rooms for one year from the 1st of May next ensuing, was within the statute of frauds, and that part performance would not take the case out of the statute. An agreement to employ a person for a term which commences at a future day is within the statute of frauds and void. *Levaux v. Brown*, 12 C. B. 701; *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Comes v. Lamson*, 16 Conn. 246; *Tuttle v. Sweet*, 31 Me. 555; *Kelly v. Terrell*, 26 Ga. 551; *Drummond v. Burrell*, 13 Wend. (N.

Y.) 307; *Kleeman v. Collins*, 9 Bush (Ky.) 460. A parol agreement made by the plaintiff a week prior to August 1, 1857, with the defendant, to enter his employment from August 1, 1857, to August 1, 1858, is an agreement which by its terms is not to be performed within one year from the making of it, and is therefore void. *Nones v. Homer*, 2 Hilt. (N. Y. C. P.) 116. A verbal agreement between parties, by which the one agrees to employ the other to work for one year, commencing *in futuro*, and to enter into a written agreement to that effect, is void by the statute of frauds. *Amburger v. Marvin*, 4 E. D. S. (N. Y. C. P.) 393. A verbal contract to employ a party to work for one year, to commence in future, is void, and even if the employment is entered upon, it may be terminated at any time by either party, and the employee is liable for the services rendered upon a *quantum meruit*. *Little v. Wilson*, 4 E. D. S. (N. Y. C. P.) 422.

³ In *Russell v. Slade*, 12 Conn. 455, the plaintiff entered into a contract to work for the defendant in his factory one year for one dollar a day. No time was fixed when he should commence. In an action against the defendant for not furnishing labor under the contract, it was objected that the contract was void under the statute of frauds. The court held that, as the plaintiff had a right to commence at once, the contract was not within the statute, and that the fact that he did

in a recent case in Rhode Island,¹ and it was held that, while the plaintiff under the contract might have commenced at once, but in point of fact did not commence until a week

not commence for some days after did not bring it within the statute. So, where a contract was made on Sunday to work one year, commencing the following Monday, it was held not to be within the statute, because it would be presumed that the parties had reference to a service to commence at once. *Wood v. Benson*, 2 Cr. & J. 95; *Chater v. Beckett*, 7 T. R. 201; *Thomas v. Williams*, 10 B. & C. 664.

¹ *Sutcliffe v. Atlantic Mills*, 13 R. I. 480; 43 Am. Rep. 39. In *Levison v. Stix*, N. Y. C. P., in June, 1881, it appeared that the plaintiff was by verbal contract, made on the 31st of December, 1879, engaged by defendant as a clerk for the term of one year, which year was to end December 31, 1880. Before the expiration of this time defendant discharged plaintiff from his employment, without cause, as it was alleged. From a judgment in favor of plaintiff the defendant appealed, and the judgment was reversed, the court saying: "In support of the position claimed upon the part of the respondent are cited the cases of *Marvin v. Marvin*, 75 N. Y. 242; *Kent v. Kent*, 62 id. 560; *Smith v. Conlon*, 19 Hun (N. Y.) 236; and certain other cases, holding that where an act is not to be done until a certain length of time has elapsed, that the day upon which the time is set running is to be excluded in the computation of time. The case of *Marvin v. Marvin* simply decides that where an act is to be done after the expiring of four days from the filing of a decision, the day of the filing of the decision must be excluded, because four full calendar days must elapse after the filing of the decision, before the act contemplated can be done; and that was all that was decided in that case. In the case of *Kent v. Kent*, the principle is recognized which was asserted in the case of *Boydell v. Drummond*, 11

East, 141, that a contract which may by its terms be performed within a year, is not within the statute of frauds; but where the agreement by its terms is not to be performed within one year, it is. To the same effect is the case of *Smith v. Conlon*, and in that case the various decisions of this State seem to be carefully collated, which established the proposition above mentioned. It is clear that the employment in the case in question was not to commence until the 1st of January, 1880, and upon precisely such a state of facts in the case of *Cawthors v. Carden*, 13 C. B. (N. S.) 406, it was decided that the contract was within the statute. In that case it was held that a contract entered into on the 24th to serve for twelve months, commencing on the 25th, is within the statute; and the case of *Bracegirde v. Heald*, 1 B. & Ald. 722, is there cited, in which it was held that a contract for a year's service, to commence at a subsequent day, being a contract not to be performed within a year, is within the statute of frauds. In fact it is impossible to see, if the term of service is to commence at any time subsequent to the time of making the contract, and the contract is for a full year, how it is possible that it should be performed within a year. It is undoubtedly the intention of the statute to require that all contracts which are not to be performed within the year from the time of making shall be in writing, and in order that they shall be completed within the year it is absolutely necessary that the time of making and the year of performance must be within the same year; and if the time of making is to be excluded and the time of performance is to be a full year, the contract cannot be performed within the year. See *Dickson v. Frisbie*, 52 Ala. 165; 23 Am. Rep. 565.

after the contract was made, it was within the statute as a contract not to be performed in one year, and such also was the rule adopted in *Snelling v. Lord Huntingford*.¹ In that case A on the 20th of July made proposals in writing, unsigned, to B to enter his service as bailiff for a year. B took the proposals, and went away and entered A's service on July 24. The court held that the contract was made on the 20th, and that it was not to be performed within a year, and therefore was within the statute. Where there is no evidence when the contract was in fact made, or was to begin, the rule adopted in the Connecticut case would apply; but where the time when the contract was made, and the time when the performance commenced, are shown, it would seem that the rule adopted in the Rhode Island case is more in conformity with the authorities.² In the case last cited, which the court in *Russell v. Slade* relied upon as an authority, there was a written contract and an absence of both of these elements, and the court held that it must be treated as a contract commencing *in praesenti*, and that parol evidence was not admissible to show that it was agreed that it should commence at a future time. It will be observed that in this case *there was a contract in writing*, and consequently that parol evidence could not be admitted to alter or vary its apparent meaning or intent; but, on the other hand, had it been a contract by parol, no one can doubt that the evidence would not only have been admissible, but also controlling.³ A contract by which a person agrees to serve another for "twelve months certain, after which time either party may terminate the agreement by giving three months' notice," is held a mere agreement for twelve months, and either party may, at the expiration of such time, put an end to the con-

¹ *Snelling v. Lord Huntingford*, 1 C. M. & R. 19.

² See *Williams v. Jones*, 5 B. & Ald. 108.

³ See *Sharp v. Rhiel*, 55 Mo. 97, where it was held that the year must begin at the date of the contract. In *Dickson v. Frisbie*, 52 Ala. 165, it was held that a verbal contract entered into Dec. 21, 1870, to serve the defendant as clerk for one year, ending

Dec. 22, 1871, was held not to be within the statute, because the court would presume that the service commenced Dec. 21, and that the contract did not contemplate that the plaintiff should serve on the 22d of Dec., 1871, but that the term expired at the close of the 21st and the coming in of the 22d. Upon no other ground can the doctrine of this case be supported.

tract without any notice, and that the notice only applies in case the service is prolonged beyond the twelve months.¹

When a contract is void under the statute, as when services are to be paid for in land, while the contract cannot be enforced by compelling a conveyance of the land, yet a recovery may be had for the actual value of the services, and in such a case, where the services are to be paid for in land *or other property*, which is fixed and determinate in its nature, and possessed at the time a determinable value, the contract may be referred to as a means of ascertaining the value of the services;² but a contract to give all the property, real and personal, as compensation for services, is void, and the value of the property cannot be shown as the measure of the value of the services.³

A parol agreement, with good consideration, that one of the owners of adjoining lands will build and maintain the division fence between them, is not within the statute;⁴ but an executory agreement between an individual and a railroad company, that the latter shall continue to stop with their cars at a particular place adjacent to the property, as a permanent arrangement, is, in substance, the grant of an easement or servitude, binding upon the property of the company, and is an interest in land, which is required by the statute of frauds to be in writing, and such an agreement by parol would also be void by the statute of frauds, as being an agreement not to be performed within one year from the making thereof.⁵

So, an oral contract to work for another for a year from the following month is void under the statute of frauds, and no action can be founded upon it for its breach or non-performance, so long as it remains executory.⁶

An agreement which may or may not be performed within a year is not required by the statute of frauds to be in writing; it must appear from the agreement itself that it is not to be

¹ *Langton v. Carleton*, L. R. 9 Exch. 57; *Brown v. Symons*, 8 C. B. (N. S.) 208; *Thompson v. Maberly*, 2 Camp. 573.

² *Lisk v. Sherman*, 25 Barb. (N. Y.) 433; *Burlingame v. Burlingame*, 7 Cow. (N. Y.) 92; *Fort v. Gooding*, 9 B. & Ald. (N. Y.) 371; *Thomas v. Dickinson*, 6 N. Y. 364.

³ *Lisk v. Sherman*, *ante*.

⁴ *Talmadge v. The Rensselaer & Saratoga Railroad Co.*, 12 Barb. (N. Y.) 493.

⁵ *Pitkin v. Long Island Railroad Co.*, 2 Barb. Ch. (N. Y.) 221.

⁶ *Scoggin v. Blackwell*, 36 Ala. 351.

performed within a year.¹ Thus, where A delivered to B six cows, which, by parol agreement, were to be returned to him at the end of two years, or their value in money, unless A should be dissatisfied with a certain trade or exchange of farms made between them, in which case they were to remain the property of A forever, it was held that the contract was not within the statute, though not in writing, and in part not to be performed within one year.²

The fact that a person who has contracted to serve another one year, to commence at a future day, enters upon the performance of his contract, does not take the case out of the statute, and the servant may quit at any time during the term and recover the value of the services rendered upon a *quantum meruit*, without deduction for loss to the employer, and the master may discharge the servant at any time without incurring any liability therefor.³

¹ Russell v. Slade, 12 Conn. 455.

² Holbrook v. Armstrong, 10 Me. 81.

³ In King v. Welcome, 15 Gray (Mass.) 41, the plaintiff entered into a contract with the defendant to work for him one year, to commence at a future day. Two or three days after the making of the contract, he quit before his term was ended, without cause, and in an action to recover the value of his services, the defendant set up the damages resulting to him from a breach of the contract by the plaintiff. The court held that the defendant could not avail himself of this defence. THOMAS, J., in disposing of the question, said: "Looking at the mere letter of the statute, the suggestion is obvious that no action can be brought upon this contract. But the defendant seeks to charge the plaintiff therewith, to establish it by proof, to enforce it in a court of law and to avail himself of its provisions. . . . A construction of the statute which would sanction this use of the contract would lose sight of the obvious purposes of the statute. It would adhere to the letter, at the expense of the spirit. It would operate unequally upon the parties. The weight of authority is against it."

On the 26th of October, 1841, A made a parol contract with B to labor one year for \$360, and to commence the service upon A's return from New York, which was to be in the course of a week or ten days thereafter. B, on the 9th of November following, after his return from New York, commenced his labor under the contract, and so continued until the 26th of June, 1842, when he left B's employment. In an action of book debt brought by A against B for his services, it was held that the contract, not being one which, by its terms, was to be performed within one year from the making thereof, and not being reduced to writing, was within the statute of frauds and perjuries; that the part performance of this contract by A, by serving under it more than six months, did not take it out of the statute so as to give it validity; that being thus within the statute, it was not available to defeat the claim of A, and that A's entering into B's service on the 9th of November furnished no presumption, to go to the jury, that the parties recognized the contract as one perfected and completed on that day. Comes v. Lamson, 16 Conn. 246.

A different doctrine is held in Vermont¹ and in Illinois,² but it is not believed that the doctrine of these courts can be sustained upon any reasonable grounds either of principle or authority.

There is no validity to such a contract, and it cannot be enforced in any respect. Thus, if the wages are payable monthly, no action upon the contract can be maintained therefor, and the statute would be a complete defence thereto.³ Neither party can enforce its provisions;⁴ but if the servant goes on and performs his contract, he cannot, upon a *quantum meruit*, recover more than the contract price. The contract *executed* by him is a complete answer to such a claim.⁵ Such contracts are not absolutely void unless so declared by the statute, and where they are not, they may be availed of for certain purposes by the parties thereto as evidence.⁶ This is upon the principle that, while such contracts, as executory contracts, cannot be enforced, yet, when fully performed, the statute does not apply, following the

In New York an agreement that is not, by its terms, to be completely executed within one year, is void unless in writing. One who refuses to complete an agreement which is void by the statute of frauds, after receiving a benefit from a part performance, must pay for what he has received. *Lockwood v. Barnes*, 3 Hill (N. Y.) 128.

When a contract is by parol to work for one year, to commence at a future day, the fact that the servant enters upon the discharge of his duties will not take the contract out of the statute so that a recovery can be had for non-performance; but the parties will be at liberty to put an end thereto at any time, and a recovery can only be had upon a *quantum meruit* for the services actually rendered. Thus in *Palmer v. Marquette Rolling Mill Co.*, 32 Mich. 274, on August 7, 1872, the plaintiff entered into the service of the defendants under a telegram: "You may come on at once at salary of two thousand, conditional only upon satisfactory discharge of business." He went into their service

August 14, 1872, and was discharged January 1, 1873. In an action for breach of contract, held there could be no recovery.

When a person has begun the performance of a contract, void under the statute, if the other party, after having derived a benefit from the contract, refuses to perform, he must pay for what benefit he has received, *Mavor v. Pyne*, 3 Bing. 285; *Kidder v. Hunt*, 1 Pick. (Mass.) 328; *Lane v. Shackford*, 5 N. H. 133, upon a *quantum meruit*. *Stone v. Dennison*, 13 Pick. (Mass.) 1; *King v. Brown*, 2 Hill (N. Y.) 485.

¹ *Mack v. Bragg*, 30 Vt. 571. See *King v. Welcome*, 15 Gray (Mass.) 41, for a contrary, and as we believe, the true rule in such cases.

² *Swanzy v. Moore*, 22 Ill. 63.

³ *Hill v. Hooper*, 1 Gray (Mass.) 131.

⁴ *Comes v. Lamson*, 16 Conn. 246; *Reade v. Lamb*, 6 Exch. 130; *Carrington v. Roots*, 2 M. & W. 248.

⁵ *Stone v. Dennison*, 13 Pick. (Mass.) 1.

⁶ *Laroux v. Brown*, 12 C. B. 801.

doctrine announced by TINDAL, C. J., in *Souch v. Strawbridge*, *ante*, that the statute does not apply to an executed consideration, but only to prevent the recovery of damages for its non-performance.

When a person enters into the employ of another under a valid contract for a year, if he remains beyond the time for which he is employed, he is entitled to recover for such services *pro rata* at the price provided in the former contract, and the statute of frauds does not apply to such a case. The continuance of service is not under the provisions of the original contract, except by inference of law. The original contract is merely evidence of the understanding of the parties as to the price, etc., which should be paid for such additional services, and when the original contract is proved, it does not afford conclusive evidence of the rights of the parties, but raises a presumption merely, which the defendant may rebut by any facts or circumstances that tend to show a different understanding.¹

SEC. 277. Performance on One Side Does not Take the Contract out of the Statute.—The fact that a servant has fully performed a contract for service void under the statute of frauds does not entitle him to recover upon the contract, but his remedy is upon a *quantum meruit*, and, except in those States where such contracts are declared void, the measure of his recovery would be the contract price, the law implying a promise to pay according to the terms of the agreement.² But where the contract has been fully performed on both sides, the statute does not apply.³ Full performance by the plaintiff and *part* performance by the defendant does not take the contract out of the statute, as to what remains to be done, but an action lies to recover the balance due.⁴ Only the party who has *not performed* can avail himself of the

¹ *Tatterson v. Suffolk Manuf. Co.*, 106 Mass. 60.

² *Carter v. Brown*, 3 Rich. (S. C.) 298; *Stone v. Dennison*, 13 Pick. (Mass.) 1; *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400; *King v. Brown*, 2 Hill (N. Y.) 485.

He is not deprived of all remedy for his services, but the law implies a request and promise to pay therefor

what the services are reasonably worth. *Annan v. Merritt*, 13 Conn. 478; *Miller v. Hower*, 2 Rawle (Penn.) 53; *Pugh v. Good*, 3 W. & S. (Penn.) 56.

³ *Stone v. Dennison*, *ante*; *McCue v. Smith*, 9 Minn. 252.

⁴ *Thomas v. Dickinson*, 14 Barb. (N. Y.) 90.

statute. One who has voluntarily performed cannot allege its invalidity.¹ The privilege is personal, and cannot be made available by a third person, a stranger to the contract,² and it may be waived, and is regarded as waived, unless the party avails himself of it either by his pleadings, or under the general issue where advantage may be taken of it without a special plea.³

A defendant, demurring to a bill, setting up a parol agreement, and admitting the agreement, will, nevertheless, be entitled to the protection of the statute of frauds, if, in his demurrer, he claims such protection. The demurrer will, in this respect, be treated like an answer. If the complainant relies on a part performance, he must allege the facts constituting it in his declaration. These facts are admitted by the demurrer, and it will then be the duty of the court to determine whether they are sufficient to constitute a part performance.⁴ A defendant can never shelter his fraudulent conduct behind the statute of frauds.⁵ The courts, of course, take judicial notice of the statute, but they will not take judicial notice that a given contract is void because not in

¹ *Westfall v. Parsons*, 16 Barb. (N. Y.) 645.

² In *McCoy v. Williams*, 6 Ill. 584, the court held that the plea of the statute of frauds is a personal privilege, which the party may waive; another cannot plead it for him, or compel him to plead it.

³ In Vermont, if a plea avers that the promise sued on was a promise to pay the debt of another, to wit, B, a replication that the promise was not a promise to pay the debt of said B is good, and the defence of the statute may be shown under the general issue, or pleaded specially. *Hotchkiss v. Ladd*, 36 Vt. 593.

In Illinois the statute must be pleaded, if it is to be relied upon by the defendant. He cannot set it up, for the first time, in an instruction. *Warren v. Dickson*, 27 Ill. 115.

So in Alabama, the defence arising under the statute must be pleaded; and, if waived, and the contract is admitted or established by proof, it will

be enforced. *Patterson v. Ware*, 10 Ala. 444.

In New Jersey the statute must be relied on; that this, the party must either plead it specially or urge it as a ground of defence. Thus, a defendant may insist upon the benefit of the statute of frauds, although he admits the parol agreement; but if he does not insist upon the statute, he is not entitled to its benefit. *Ashmore v. Evans*, 11 N. J. Eq. 151.

In Missouri the statute must not only be pleaded, but the plea must set forth the grounds that bring the contract within the statute. Thus, when the statute of frauds is pleaded in defence, it is not sufficient to allege that the account stated is void by the statute; the facts relied upon in defence under the statute should be set out. *Dinkel v. Gundelfinger*, 35 Mo. 172. See, also, *Rabsuhl v. Lack*, id. 316.

⁴ *Van Dyne v. Vreeland*, 11 N. J. Eq. 370.

⁵ *Hidden v. Jordan*, 21 Cal. 92.

writing. The party must allege and prove such ground of defence.¹

SEC. 278. Contract Defeasible within the Year.—The fact that a contract, not to be performed within a year, is defeasible within the year, will not take a case out of the statute. Thus it was held that a contract, whereby a coachmaker agreed to let a carriage for a term of five years, in consideration of receiving an annual payment for the use of it, but which, by the custom of the trade, was determinable at any time within that period, upon the payment of a year's hire, was an agreement not to be performed within a year, within the meaning of the statute, and must be in writing.²

SEC. 279. Contract Executed by One of the Parties.—In England, and most of the States of this country, it is held that the statute only applies to contracts *which are not to be performed by either side within a year, and therefore where a contract has been completely performed on one side within the year, the case will not be within the statute.*³ The doctrine as stated in the text is adopted in Kentucky,⁴ Missouri,⁵ Maine,⁶ Maryland,⁷ Indiana,⁸ Illinois,⁹ New Jersey,¹⁰ Alabama,¹¹ Georgia,¹² South Carolina,¹³ Texas,¹⁴ Wisconsin,¹⁵ and

¹ *Burnard v. Nerat*, 1 C. & P. 578.

² *Birch v. Earl of Liverpool*, 9 B. & C. 392; S. C. nom. *Burch v. Earl of Liverpool*, 4 Man. & Ry. 380; and see *Roberts v. Tucker*, 3 Ex. 632; *Dobson v. Collis*, 1 H. & N. 81; *re Pentre-ginea Coal Co.*, 4 De G. F. & J. 541.

³ *Suggett v. Casson*, 26 Mo. 212; *Pinney v. Pinney*, 2 Root (Conn.) 191; *Watrous v. Chalker*, 7 Conn. 224; *Cody v. Cadwell*, 5 Day (Conn.) 67; *Berry v. Doremus*, 30 N. J. L. 399; *Curtis v. Sage*, 35 Ill. 22; *McClellan v. Sanford*, 26 Wis. 595; *Ellicott v. Turner*, 4 Md. 476; *Hardesty v. Jones*, 10 G. & J. (Md.) 404; *Haugh v. Blythe*, 20 Ind. 24; *Blanton v. Knox*, 3 Mo. 241; *Suggett v. Casson*, 26 Mo. 221; *Self v. Cordell*, 45 id. 345; *Johnson v. Watson*, 1 Ga. 348; *Zabel v. Schroder*, 35 Tex. 308; *Miller v. Roberts*, 18 id. 16; *Rake v. Pope*, 7 Ala. 161; *Compton v. Martin*, 5 Rich (S. C.) L. 14; *Holloway v. Hampton*, 4 B. Mon. (Ky.) 415; *Perkins v.*

Clay, 54 N. H. 518; *Holbrook v. Armstrong*, 10 Me. 31.

⁴ *Gully v. Grubbs*, 1 J. J. Mar. (Ky.) 387; *Montague v. Garrett*, 3 Bush. (Ky.) 297.

⁵ *Self v. Cordell*, 45 Mo. 345; *Suggett v. Casson*, 26 id. 221; *Blanton v. Knox*, 3 id. 241.

⁶ *Holbrook v. Armstrong*, 10 Me. 31.

⁷ *Hardesty v. Jones*, 10 G. & J. (Md.) 404; *Ellicott v. Turner*, 4 Md. 476.

⁸ *Haugh v. Blythe*, 20 Ind. 24.

⁹ *Curtis v. Sage*, 35 Ill. 22.

¹⁰ *Berry v. Doremus*, 30 N. J. L. 399.

¹¹ *Rake v. Pope*, 7 Ala. 161.

¹² *Johnson v. Watson*, 1 Ga. 348.

¹³ *Compton v. Martin*, 5 Rich. (S. C.) L. 14; *Bates v. Moore*, 2 Bailey (S. C.) 614.

¹⁴ *Miller v. Roberts*, 19 Tex. 16; *Zabel v. Schroder*, 35 id. 308.

¹⁵ *McClellan v. Sanford*, 26 Wis. 595.

New Hampshire,¹ while in Massachusetts² and Vermont³ the doctrine is distinctly repudiated, and in New York the question does not seem to be definitely settled,⁴ and in Ohio⁵ and Mississippi⁶ it is criticised. It will thus be seen that the tendency of our courts is to sustain the rule as stated, and whatever might be said as to the soundness of the rule, it is quite too late to effect a change by any line of argument that might be pursued. The meaning of the section is, that no action shall be brought to recover damages in respect of the non-performance of such contracts as are referred to in it; its design was to prevent the setting up, by means of fraud and perjury, of contracts or promises by parol, upon which parties might otherwise have been charged for their whole lives, and for that purpose it requires that certain contracts shall be evidenced only by the solemnity of writing, and has no application to actions founded upon an executed consideration.⁷ Where a

¹ Perkins v. Clay, 54 N. H. 518; Blanding v. Sargent, 33 id. 239. But see Emery v. Smith, 40 id. 151, *contra*.

² Marcy v. Marcy, 9 Allen (Mass.) 8; Cabot v. Haskins, 3 Pick. (Mass.) 83; Frary v. Sterling, 99 Mass. 46.

³ Pierce v. Paine's Est., 23 Vt. 34.

⁴ Dodge v. Crandall, 30 N. Y. 294; Bartlett v. Wheeler, 44 Barb. (N. Y.) 162; Weir v. Hill, 2 Lans. (N. Y.) 278; Adams v. Honess, 62 Barb. (N. Y.) 326.

⁵ Reinheimer v. Carter, 31 Ohio St. 579.

⁶ Duff v. Snider, 54 Miss. 245.

⁷ Donellan v. Read, 3 B. & Ad. 899; Souch v. Strawbridge, 2 C. B. 814, *per* TINDAL, C. J.; and see *re* Pentre-guinea Coal Co., 4 De G. F. & J. 541; Smith v. Neale, 2 C. B. (N. S.) 67. It was hinted in *Bracegirdle v. Heald*, and decided in *Donellan v. Read*, 3 B. & Ad. 899, that an agreement is not within the statute, *provided that all that is to be done by one of the parties is to be done within a year*. There the defendant was tenant to the plaintiff under a lease of 20 years, and in consideration that the plaintiff would lay out £50 in alterations, the defendant promised to pay an additional £5 a

year during the remainder of the term.

The alterations were completed within the year, and an action brought for the increased rent. It was objected among other things, that the contract could not possibly be performed within a year, and therefore ought to have been in writing. The court, however, held that it was not within the statute. "We think," said LITTLEDALE, J., delivering the judgment of the court, "that as the contract was entirely executed on one side within the year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the statute of frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer time than a year; and surely the law would not sanction a defence on that ground, where the buyer had had the full benefit of the goods on his part." See *Hoby v. Roebuck*, 7 Taunt. 157.

But the contrary seems to have been taken for granted in *Peter v. Compton*, Skin. 353, and other of the older cases; for instance, in *Peter v. Compton*, there would have been no

landlord who had demised premises for a term of years at £50 a year, agreed with his tenant to lay out £50 in making

occasion to argue the question, whether the possibility that the plaintiff's marriage might not happen for a year brought the case within the statute or no, if the payment of the guinea, which took place immediately, had been considered sufficient to exempt the agreement from its operation. The decision in *Donellan v. Read*, *ante*, makes the word *agreement* bear two different meanings in the same section of the statute of frauds. But it seems to be quite well settled that the word *agreement*, when lastly used in the section, means what is to be done *on both sides*: and it has frequently been held upon that very ground, that guaranties are void, if they do not contain the consideration as well as the promise. *Wain v. Warlters*, 6 East, 10; *Jenkins v. Reynolds*, 3 B. & B. 14; *Saunders v. Wakefield*, 4 B. & Ad. 595; *Sykes v. Dixon*, 9 Ad. & El. 693; but a much more confined sense appears to be bestowed upon the word *agreement* when it is held that an *agreement* is capable of being executed within a year, where one part only of it is capable of being so. In the case put by *LITTLEDALE, J.*, of goods delivered immediately, to be paid for after the expiration of a year, great hardship certainly would be inflicted on the vendor, if he were to be unpaid because he could not show a written agreement. But it may be worthy of consideration, whether, even if he were to be prevented from availing himself of the special contract under which he sold the goods, he might not still sue on a *quantum meruit*. See *Teal v. Auty*, 2 B. & B. 99; *Earl of Falmouth v. Thomas*, 1 C. & M. 109; *Knowles v. Mitchell*, 13 East, 249. In *Boydell v. Drummond*, 11 East, 159, it is expressly settled that *part performance* will not take an agreement out of the statute, and that upon principles which seem not inapplicable to the question in *Donellan v. Read*.

"I cannot," said LORD ELLENBOROUGH, "say that a contract is *performed*, when a great part of it remains *un-performed* within the year; in other words, that *part performance* is *performance*. The mischief meant to be prevented by the statute was the leaving to memory the terms of a contract for a longer time than a year. The persons might die who were to prove it, or they might lose their faithful recollection of the terms of it." *Smith v. Westall*, L. Ray. 316. These observations seem applicable to such a case as *Donellan v. Read*. The performance of one side of the agreement within the year could not be said to be more than part performance of the agreement; and the danger that witnesses may die, or their memories fail, seems to be pretty much the same in every case where an agreement is to be established, after the year is past, by *parol evidence*. Indeed, if there is any difference at all in the danger of admitting oral testimony after the year, it seems greater in a case where one side of the agreement only has been performed, than in such a case as *Boydell v. Drummond*; since, where the agreement has been partially performed on both sides, as in the latter case, a witness giving a false or mistaken account of its terms, would have to render his tale consistent with what had been done by *both* the contractors; whereas, if the part performance had been on one side only, the witness would only have to make his tale consistent with what had been done on that side. It is true that in *Donellan v. Read* there was a part performance on both sides; but so there was in *Boydell v. Drummond*: and the reason assigned for the decision in *Donellan v. Read*, viz., that the whole of one side of the agreement was performable within the year, would equally apply in a case where there had been, and could be, no part performance on the other side

certain improvements upon them, the tenant undertaking to pay him an increased rent of £5 a year during the remainder of the term, it was held that the landlord having done the work might recover the arrears of the £5 a year, although the agreement had not been signed by either party.¹

SEC. 280. **Agreement not to do Certain Things.** — An agreement to refrain from doing a certain act in a certain locality, *for an indefinite period*, as we have seen, is not within the statute, although the parties may really have expected that the contract would be in force for many years, because it *may* be determined within a year by the death of the party contracting.² But if a definite period is fixed upon, as if the party engages not to exercise a certain trade at a certain place “for three years,” then as the parties do not contemplate a performance in one year, the contract is within the statute.³ But this is only the case when the contract shows that it is not to be performed within a year, or that it is impossible of performance within that time.⁴ If it

for twenty years. *Donellan v. Read* is fully confirmed in *Cherry v. Heming*, 4 Exchq. 631; and *BARON PARKE* there says: “The learned observations of Mr. Smith are not sufficient to induce me to say that it was wrongly decided.” The case of *Peter v. Compton*, which he relies on, does not support his view. 41 *Smith’s Leading Case*, 433.

¹ *Donellan v. Read*, 3 B. & Ad. 906; *Mavor v. Pyne*, 3 Bing. 285; *Cherry v. Heming*, 4 Exchq. 631.

² *Hill v. Jamieson*, 16 Ind. 125; *Blanchard v. Weeks*, 34 Vt. 384.

³ *Davey v. Shannon*, 4 Ex. Div. 81. In *Wilson v. Martin*, 1 Den. (N. Y.) 602, a parol agreement for board and lodging for one year, made before the commencement of the year, is within the statute. See also *Spencer v. Halstead*, 1 id. 606. So in *Kelley v. Terrell*, 26 Ga. 551, an oral agreement made before Christmas, 1854, to serve as overseer during the year 1855, was held to be within the statute; and the same rule was applied to a contract made Dec. 14, 1856, to rent a house for the year 1857. *Atwood v. Norton*,

31 Ga. 507. And also to a contract to serve three years, at a certain sum per day. *Tuttle v. Sweet*, 31 Me. 555. In *Bartlett v. Wheeler*, 44 Barb. (N. Y.) 294, A delivered to B four sheep, B agreeing, by parol, to return *twenty* sheep therefor at the end of four years. At the expiration of four years, the parties entered into another parol agreement by which B, instead of delivering the *twenty* sheep, was to deliver *forty*, of equal quality, at the end of four years. The last contract was held to be within the statute, because not possible of performance within a year.

⁴ *Thomas v. Hammond*, 47 Tex. 42; *McPherson v. Cox*, 96 U. S. 404; *Duff v. Snider*, 54 Miss. 247; *Blakency v. Goods*, 30 Ohio St. 350; *Walker v. Johnson*, 96 U. S. 424; *Van Woert v. Albany & C. R. R. Co.*, 67 N. Y. 538; *Paves v. Strong*, 51 Ind. 339; *Rogers v. Brightman*, 10 Wis. 55; *Hodges v. Strong*, 3 Oreg. 18; *Blackburn v. Mann*, 85 Ill. 222; *Marley v. Noblett*, 42 Ind. 85; *Adams v. Adams*, 26 Ala. 272; *Plimpton v. Curtis*, 15 Wend. (N. Y.) 336; *Saunders v. Kastebine*, 6

may be performed within that time, the circumstance that it is improbable that it will be so performed does not bring it within the statute,¹ *nor even although it was not expected by the parties that it would be performed within the year.*² Courts will not weigh probabilities, but simply inquire whether performance is possible, and the contract is one which can be fully met and satisfied by a performance within the year.³ But while an agreement to refrain from doing a certain act for an indefinite time is not within the statute, because it may be fully performed within the year by the death of one of the parties, a contract not to do a certain act for a *definite* time, exceeding one year, as for thirteen months, two years, etc., is held to be within the statute *because not possible of performance within a year*,⁴ and it affirmatively appears in the contract itself that it cannot in law⁵ or in the common course of nature, be performed within a year.⁶ Thus in the case last cited the parties orally agreed that the defendant should have a colt at a certain sum agreed upon, and to be paid for on delivery, to be got out of the defendant's mare

B. Mon. (Ky.) 17; *Archer v. Zeh*, 5 Hill (N. Y.) 200.

¹ *Gault v. Brown*, 48 N. H. 183.

² *Kent v. Kent*, 62 N. Y. 560; *Clark v. Pendleton*, 20 Conn. 495; *Roberts Rockbottom Co.*, 7 Met. (Mass.) 46; *Randall v. Turner*, 17 Ohio St. 262; *Southwell v. Breezeley*, 5 Oreg. 143; *Lockwood v. Barnes*, 3 Hill (N. Y.) 128. In *Gault v. Brown*, *ante*, the contract was for the sale of all the cord-wood on a certain lot to be delivered all that was possible that winter, and the rest the next. The court held that it was not within the statute, because it might *possibly* be completed within the year.

³ *Southwell v. Breezeley*, 5 Oreg. 458. In *Kent v. Kent*, *ante*, a contract to labor for another, the services to be paid for at the death of the employer, was held not to be within the statute, although the parties did not expect the contract to be performed within the year. It is not what the parties expect, *but is performance within a year possible*. *Southwell v. Breezeley*, 5 Oreg. 143; S. C. 5 id. 458; *Frost*

v. Tarr, 53 Ind. 390. In *District &c. v. Moorhead*, 43 Iowa, 466, a school-house was erected, and a parol agreement made with the owner of the land that the district should have free use of the land *as long as the school-house stood thereon*; and it was held that as the user depended upon a contingency which might occur within a year, it was not within the statute. See also *White v. Smith*, 51 Ala. 405, where a parol agreement to give a person the use of land during his life, was held not to be within the statute.

⁴ *Davey v. Shannon*, 4 Exchq. Div. 81; *Perkins v. Clay*, 54 N. H. 518; *Self v. Cordell*, 45 Mo. 345; *Gottschalk v. Wittes*, 25 Ohio St. 76. But see *Doyle v. Dixon*, 97 Mass. 208, where a contract not to engage in a certain trade in a certain place for five years, was held not to be within the statute.

⁵ *Lawrence v. Cooke*, 56 Me. 187; *Walker v. Johnson*, 96 U. S. 424.

⁶ *Lockwood v. Barnes*, 3 Hill (N. Y.) 128.

by the plaintiff's stallion. The latter was to take the mare and keep her in his possession during the period of gestation and until the ordinary weaning time, *or* until it was four or six months old. In an action upon this contract held that as the usual period of gestation for horses was eleven months, and the common weaning time from four to six months more, the contract could not possibly be performed within the year, and was therefore within the statute. This rule is also illustrated by a California case¹ in which the defendant promised to pay money loaned him by the plaintiff, when certain nut-bearing trees to be set out that season, should bear nuts sufficient so as to yield a sufficient income for that purpose over and above the expenses of the family. The court held that this was clearly within the statute, because in the common course of events the trees would not bear and produce nuts within the year. The rule may be illustrated thus. A contract to labor for another as long "as wood grows and water runs" would clearly be within the statute, because in the common course of nature, wood will continue to grow, and water continue to run until the end of time. But a contract to labor for another as long as he lives, is not within the statute, because although that person may continue to live for many years, yet in the common course of nature he may die within the year, so that however improbable the happening of the contingency upon which the duration of the contract depends within a year, may be, yet it is possible, and therefore not within the statute. Therefore it may be said that *where in the common course of events it is possible that the contract may be performed within a year*, it is not within the statute however improbable it may be that such performance will be accomplished within that period.² But *if performance within a year, either because of the express terms of the contract, or in the ordinary course of events is impossible*, then the contract is within the statute, and inoperative unless in writing.³ Thus an agreement made

¹ Swift v. Swift, 46 Cal. 266.

² Gault v. Brown, 48 N. H. 183. In Clark v. Pendleton, 20 Conn. 495, a promise by the defendant to marry the plaintiff upon his return from a certain voyage, which it was expected

would take nearly, if not quite, two years, was held not to be within the statute, because, possibly, it might end within the year. See also Randall v. Turner, 17 Ohio St. 262.

³ Davey v. Shannon, 4 Exchq. Div.

March 31, 1883, to pay money April 1, 1884, would clearly come within the statute, or to pay a sum of money in annual instalments,¹ or in quarterly or semi-annual instalments, if the whole sum is not to be paid in one year,² or to pay a mortgage when certain land is sold, which the promisor is bound by his contract not to sell for three years,³ or to sell the product of land for two years,⁴ because they are not capable of performance within a year; because however ready one party might be to perform, the other party is not bound to accept such performance within the year.⁵

SEC. 281. **Vendition of Right.** — An agreement entered into by a contractor to share in the profits of an undertaking is not, although the contract is not capable of being performed within a year, required to be in writing, and may be proved by parol. The contract is merely one for the vendition of a right; *it is performed as soon as the agreement is entered into*, and from that time the parties have all the mutual rights and liabilities of partners in the concern.⁶

85; *Tiernan v. Granger*, 65 Ill. 351; *Y.* 307; *Giraud v. Richmond*, 2 C. B. 835.

Lower v. Winters, 7 Cow. (N. Y.) 263; *Lapham v. Whipple*, 8 Met. (Mass.) 39; *Cowles v. Warner*, 22 Minn. 449; *Curtis v. Sage*, 35 Ill. 22; *Frary v. Sterling*, 99 Mass. 461; *Hill v. Hooper*, 1 Gray (Mass.) 131; *Lawrence v. Woods*, 3 Bos. (N. Y.) 354.

¹ *Lower v. Winters*, 7 Cow. (N. Y.) 263. ² *Park v. Francis*, 50 Vt. 626; *Drummond v. Burrell*, 13 Wend. (N. Y.) 307; *Giraud v. Richmond*, 2 C. B. 835. ³ *Hill v. Hooper*, 1 Gray (Mass.) 131. But see *Moore v. Fox*, 10 John. (N. Y.) 244.

⁴ *Frary v. Sterling*, *ante*. ⁵ *Holloway v. Hampton*, 4 B. Mon. (Ky.) 415.

⁶ *McKay v. Rutherford*, 6 Moo. P. C. 414; *Essex v. Essex*, 20 Beav. 449; *Hoare v. Hindley*, 49 Cal. 274.

SECTION XVII.

SALE OF GOODS.

“No contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

CHAPTER VIII.

WHAT IS SALE OF GOODS.

SECTION.

- 282. Exceptions Contained in the Statute.
 - 283. What are Goods, etc.
 - 284. Contracts to Make up Materials and Affix them to Land.
 - 285. What is a Sale.
 - 286. Defeasible Contracts of Sale.
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SECTION 282. Exceptions Contained in the Statute.—The general intention of the statute is that there should be a writing,¹ but there are certain instances named, in which a writing may be dispensed with.

1st. Where the buyer shall “accept part of the goods so sold, *and actually receive the same*.” 2d. Or give something in earnest to bind the bargain or in part payment.² 3d. Or, that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

SEC. 283. What are Goods, Wares, or Merchandise.—The question as to whether choses in action, as bills of exchange, promissory notes, bank bills, stocks in corporations, etc., come within this section of the statute, has been variously decided in the courts of this country, as well as in England;

¹ Bushel v. Wheeler, 15 Q. B. 445, *per* DENMAN, C. J.

² In California, the expression is “or pay at the time some part of the purchase-money,” § 2794, sub-div. 4, and also in Dakota, Minnesota, § 7; Mississippi, § 2895; Montana, § 13; Nebraska, § 9; Nevada, § 62; New York, § 2, tit. 2, sub-div. 3; Oregon, § 775, sub-div. 5; Utah, § 6; Wisconsin, § 2308; and Wyoming, § 2. In

Iowa the words are “where the purchase-money, or any portion thereof, has been received by the vendor.” The omission of the words “or give something in earnest,” in these statutes, is important under this head, and entirely defeats the efficacy of “earnest” in giving validity to such contracts, except when it is given as a part of the purchase-money.

but, whatever may formerly have been the rules in England, it is now well settled that choses in action do not come under this head, and contracts for their sale are not within the statute.¹ But in this country, so far as the question has been before the courts, there seems to be considerable conflict. In New Hampshire,² Indiana,³ Georgia,⁴ and Alabama,⁵ the English rule seems to prevail. But in Massachusetts,⁶ Maine,⁷ Maryland,⁸ Vermont,⁹ and Connecticut,¹⁰ choses in

¹ Benjamin on Sales, 3d Eng. ed., § 111. In *Powell v. Jessop*, 18 C. B. 336; and *Watson v. Spratley*, 10 Exchq. 222, a sale of shares in a mining company, on the cost-book plan, was held not to be within the statute; and the same was held in *Humble v. Mitchell*, 11 Ad. & El. 205, as to shares in a banking company; and in *Heseltine v. Siggers*, 1 Exchq. 856, as to stock of a foreign State; and in *Duncroft v. Albrecht*, 12 Sim. 189; *Tempest v. Kilner*, 3 C. B. 249; *Bradley v. Holdsworth*, 3 M. & W. 422; and *Bowlby v. Bell*, 3 C. B. 284, as to sales of railway shares. But see *Crull v. Dodson*, Sel. Cas. in Ch. 41; and *Mussel v. Cook*, Pre. Ch. 533, early cases, holding that shares in a corporation were goods, wares, or merchandise within the meaning of the statute.

² *Whittemore v. Gibb*, 24 N. H. 484. Promissory notes were held not to be goods, wares, or merchandise within the meaning of the statute.

³ *Vawter v. Griffin*, 40 Ind. 593. In this State the statute omits the words "wares or merchandise," and extends only to sales of "goods"; but the same effect is given to the statute as though those words were included.

⁴ *Beers v. Crowell, Dudley* (Ga.) 28. An agreement to transfer treasury checks was held not to be within the statute.

⁵ *Hudson v. Weir*, 29 Ala. 294. In this case, a contract for the sale of notes, for a price not exceeding \$200, was held not to be within the statute.

⁶ In *Baldwin v. Williams*, 3 Met. (Mass.) 365, a contract for the sale of promissory notes; in *Somerby v. Bun-*

tin, 118 Mass. 279, an agreement for the sale of an interest in an invention; and in *Eastern R. R. Co. v. Benedict*, 10 Gray (Mass.) 212; *Boardman v. Cutter*, 128 Mass. 390; *Tisdale v. Harris*, 20 Pick. (Mass.) 9, a contract for the sale of shares in a corporation were held to be within the statute, as being contracts for the sale of "goods, wares, or merchandise."

⁷ In *Gooch v. Holmes*, 41 Me. 323, and in *Riggs v. Magruder*, 2 Cr. (U. S. C. C.) 143, which arose, in that State, a sale of bank bills was held to be a sale of "goods, wares, or merchandise."

⁸ *Calvin v. Williams*, 3 H. & J. (Md.) 38.

⁹ *Fay v. Wheeler*, 44 Vt. 292.

¹⁰ *North v. Forest*, 15 Conn. 400. In this case, a contract for the sale of the plaintiff's stock in a corporation was held to be within the statute, as being a contract for the sale of "goods, wares, or merchandise." But by statute, in Connecticut, the shares of such stock are made personal property; but from the language of the court, it is evident that this circumstance did not affect the question. *WAITE, J.*, said: "In consequence of the great increase in corporations, and the amount of capital invested in them, the stock of such companies has become a large and valuable portion of the personal estate of our citizens. Contracts for the sale of such property are almost daily made, and often to a very large amount. Such contracts fall clearly within the mischiefs which the legislature, by the statute, intended to remedy. There is as much danger of fraud and perjury in the parol proof

action seem to be regarded as "goods, wares, or merchandise" within the meaning of the statute, and contracts for their sale for a price, beyond that fixed in the statute, are required to be in writing. In many of the States, this question has been decisively put at rest by an express provision including "things in action" therein, as in California, Dakota, Nebraska, Nevada, New York, Minnesota, Montana, Utah, Wisconsin, and Wyoming; while in Connecticut, Florida, Mississippi, and Oregon, the statute is extended to sales of "personal property." In some of the States, the statute does not extend to contracts for the sale of goods, wares, or merchandise, or other *personal* property, as in Alabama, Delaware, Illinois, Kansas, Kentucky, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and West Virginia. Any species of personal property, subject to the limitations stated in this and the following section, come under the head of goods, wares, and merchandise within the meaning of the statute.

SEC. 284. Contracts to Make Up Materials and Affix them to Land.—A contract to make up materials and affix them to land, as, a contract to build a house or to manufacture an engine to be fixed to realty, is not a contract for the sale of goods, and the contractor cannot recover for the materials in an action for goods sold and delivered, even though by a deviation from the original plan, the contract is superseded as to price,¹ because, in such a case, as soon as the chattels are annexed to the land, they become a part thereof, but, until they are so annexed, they remain chattels. Thus, in a case cited in the last note,² B, a builder, contracted with A and others, trustees of a new hotel about to be erected by a company of proprietors, to build the hotel, except as to the ironmonger's, plumber's, and glazier's work, for a specified sum, and cove-

of such contracts as in any other. The statute is highly important and beneficial in its operation, and ought not to be narrowed by any very rigid construction. *Howe v. Palmer*, 3 B. & Ad. 321. And we think it no strained construction of its language to say that the contract in question falls within the letter as well as within the spirit of the act."

¹ *Cottrell v. Apsey*, 6 Taunt. 322; *Tripp v. Armitage*, 4 M. & W. 687; *Clark v. Bulmer*, 11 id. 243.

² *Tripp v. Armitage*, 4 M. & W. 687.

to say that the contract in question

nanted to complete certain portions of the work within certain specified periods, being paid by instalments at corresponding dates; and that if he should neglect to complete any portion within the time limited, he should forfeit and pay the sum of £250 as liquidated damages. The agreement then contained a clause empowering the trustees, in case (*inter alia*) B should become bankrupt, to take possession of the work already done by him, and to put an end to the agreement, which should be altogether null and void; and that the trustees, in such case, should pay B or his assignees only, so much money as the architect of the company should adjudge to be the value of the work actually done and fixed by B, as compared with the whole work to be done. The course of business during the progress of the work was for the clerk of the works to inspect every article which came in under the contract, and none were received except on his approval. After the works had proceeded some time, B became bankrupt. Before his bankruptcy, certain wooden sash-frames had been delivered by him on the premises of the company, approved by the clerk of the works, and returned to B for the purpose of having iron pulleys, belonging to the trustees, affixed to them; and at the time of the bankruptcy, these frames, with the pulleys attached to them, were at B's shop. He afterwards, but before the issuing of the fiat, redelivered them to the trustees; and the sash-frames being afterwards demanded of them by B's assignees, they gave an unqualified refusal to deliver them up. It was held that the property in the wooden sash-frames had not passed to the trustees at the time of the bankruptcy, and that they were not entitled to hold them under the agreement as being work already done, they not having been *fixed* to the hotel. LORD ABINGER, C. B., said: "This is not a contract for the sale and purchase of goods, as movable chattels. It is a contract to make up goods and fix them, and, until they are fixed, by the nature of the contract, the property will not pass." Upon the same principle a sale of tenant's fixtures, while they are still connected with the land, is not a sale of "goods, wares, or merchandise."¹ But a sale of growing crops *fructus industriales*, is treated as a sale of

¹ Lee v. Gaskell, 1 Q. B. D. 700.

goods,¹ etc., but as to crops *fructus naturales*, as we have seen, considerable conflict exists as to whether contracts for their sale come within the fourth or the seventeenth section of the statute, with the weight of authority in favor of the latter.²

SEC. 285. **What Is a Sale.**—It is not necessary in order to constitute a *sale* of property, that there should be an agreement to pay for it in money, and contracts of *barter* or for the exchange of one article for another, come clearly within this section of the statute,³ and so do contracts for the delivery of certain property in discharge of a previous indebtedness,⁴ although in one case the Supreme Court of New York⁵ has held that such a contract is not within the statute. But the latter ground is not sustainable because the agreement of the creditors to take such property is clearly a contract for its purchase, and in no sense can it be said that the previous indebtedness can be regarded as a payment of earnest, or as a part payment within the meaning of the statute.⁶ A mort-

¹ *Ross v. Welch*, 11 Gray (Mass.) 235; *Kingsley v. Holbrook*, 45 N. H. 313; *Moreland v. Myall*, 14 Bush. (Ky.) 474; *Purner v. Piercy*, 40 Md. 212; *Buck v. Pickwell*, 27 Vt. 157; *Bull v. Griswold*, 19 Ill. 631; *Howe v. Batchelder*, 49 N. H. 204; *Brittain v. McKay*, 1 Ired. (N. C.) 265; *White v. Frost*, 102 Mass. 375; *Miller v. State*, 39 Ind. 267; *Cutler v. Pope*, 13 Me. 377; *Bryant v. Crosby*, 40 id. 9; *Stewart v. Doughty*, 9 John. (N. Y.) 112; *Marshall v. Ferguson*, 23 Cal. 65.

² See chap. 6.

³ *Dowling v. McKenney*, 124 Mass. 478; *Rutan v. Hinchman*, 30 N. J. L. 255; and this is the rule both as to personal property and real estate. *Maydwell v. Carroll*, 3 H. & J. (Md.) 361; *Newell v. Newell*, 13 Vt. 24; *Lane v. Shackford*, 5 N. H. 130; *Lindsley v. Cootes*, 1 Ohio, 245; *Clark v. Graham*, 6 Wheat. (U. S.) 577.

⁴ *Sawyer v. Ware*, 36 Ala. 675.

⁵ *Woodford v. Patterson*, 32 Barb. (N. Y.) 630. But see *Walrath v. Richie*, 5 Lans. (N. Y.) 362, in which a different doctrine was held. In this case, A being the owner of a mowing machine, and being indebted to B in

the sum of \$55, proposed to B, verbally, the machine being present, that he should take it to satisfy his indebtedness, to which B assented. The machine remained in the hands of A for sometime, when, without B's request, it was delivered into C's possession, from whom it was taken under an execution against A. In an action by B to recover the value of the machine from the constable who levied upon it, it was held that there was not a valid sale of the machine to B under the statute of frauds. See also *Brabin v. Hyde*, 32 N. Y. 519, where there was a sale of property to apply on a previous debt, and the court said: "If the purchase-money is to be applied to pay an open account, in whole or in part, the creditor and purchaser should part with some written application of such application, which will bind him, and put it in the power of his debtor and vendor to enforce the contract. Without this, or something like it, the contract is a mere collection of words, and the statute is evaded."

⁶ See *Brabin v. Hyde*, *ante*.

gage of chattels is not a sale within the statute, as the statute only applies to an actual or absolute sale;¹ and consequently an agreement to mortgage chattels to secure a debt, is not within the statute,² nor is any agreement by a purchaser of property covered by a valid mortgage, but which does not operate as against him in consequence of the mortgagee's failure to comply with certain statutory requirements, to deliver up the property to the mortgagee upon his performing certain conditions, come within the statute; because instead of amounting to a contract of sale, it is a mere agreement to waive his claim to the property and allow the mortgage to take effect.³

SEC. 286. Defeasible Contracts of Sale.—The rule seems to be that, *where an agreement for the sale of an article is made defeasible upon certain conditions, such conditions form a part of the agreement, and an acceptance of the article by the vendee takes the whole contract out of the statute.*⁴ In other words, where the vendor, at the time the property is sold, agrees with the vendee that he will take the property back, if the vendee is dissatisfied with it, or from any cause desires to return it, and refund the whole or a part of the purchase-money, upon such redelivery, this part of the contract is not affected by the statute, because the contract was taken out of the statute by the delivery and receipt of the property and the payment of the purchase-money by the vendee.⁵ In an English case,⁶ where the plaintiff entered into a parol agreement to send the defendant a mare for £20, subject to the condition that, if she should prove to be in foal, the defendant should, on receiving £12 from the plaintiff, return it on request; and the plaintiff delivered the mare and received the £20, and on its proving to be in foal, he tendered £12 to the defendant and requested him to return the mare, which the defendant refused to do, it was held that the contract to return it on payment of £12 was not a distinct contract of sale, *but one of the conditions of the original*

¹ Gleason v. Drew, 9 Me. 79.

⁴ Williams v. Burgess, 10 Ad. & El.

² Alexander v. Ghislen, 5 Gill. (Md.) 180.

499; Callis v. Bothamley, 7 W. R. 87.

⁵ Wooster v. Sage, 9 Hun (N. Y.)

³ Clark v. Duffy, 24 Ind. 271; Phelps v. Hendrickson, 105 Mass. 106,

285; Fay v. Wheeler, 44 Vt. 292.

⁶ Williams v. Burgess, 10 Ad. & El. 499.

sale to the defendant, and that the delivery of the mare to the defendant took the whole agreement out of the statute, so as to enable the plaintiff to sue the defendant for the refusal to return it. The application of this rule is well illustrated by a New York case¹ in which the defendant sold the plaintiff two bonds of the Des Moines Valley R. R. Co. of the par value of \$2,000, for the sum of \$1,800, with the agreement that if the plaintiff at any time became sick of the bonds he might redeliver them to the defendant and he would return him the purchase-money therefor. The plaintiff immediately sold the bonds to other parties upon the same terms that he purchased them, and those parties having kept the bonds nearly two years, became dissatisfied with them and returned them to the plaintiff who reimbursed them the purchase-money, and then took the bonds to the defendant and offered to return them to him and demanded a return of the purchase-money. The defendant refused to accept the bonds or return the purchase-money, and an action was brought against him therefor. Among other things the defendant insisted that the contract was void under the statute of frauds; but the court held otherwise, TALCOTT, J., saying: "We understand the rule to be that such a contract being taken out of the statute by having been consummated by the delivery and receipt of the property and the payment of the price, the statute has no application."² In such cases the return of the goods does not amount to a resale of them, but merely to a rescission of the contract according to its terms. If, instead of a contract to take the goods back and return the purchase-money, the vendor should agree to buy them of the vendee within a certain time, or whenever he desired to sell them, at another and different price, or even at the same price, there can be no question but that the latter contract would come within the statute, because instead of being a contract for the rescission of the original contract of sale, it is an independent agreement to buy the goods. But, so long

¹ *Wooster v. Sage*, 9 Hun (N. Y.) 285.

² *White v. Knapp*, 47 Barb. (N. Y.) 549; *Eno v. Woodworth*, 4 N. Y. 249. In *Fay v. Wheeler*, 44 Vt. 292, it was held that where one purchases stock

and the seller agrees to take it back, and repay the purchaser for the same, or request a tender of the stock, and demand for repayment, is such a part performance of the contract as takes it out of the operation of the statute.

as it is merely an agreement to rescind the original contract, it is not within the statute. And it seems that in equity an agreement to take back goods sold, made after the contract of sale, at the same price, or in discharge of the debt created by their sale, amounts merely to a rescission of the original contract and is not within the statute. In a Connecticut case¹ the plaintiff, upon entering into a partnership with the defendants, sold certain goods to the firm. Shortly after the formation of the partnership, it was dissolved by mutual consent, and it was orally agreed between them that the plaintiff's claim for the goods should be cancelled by his taking them back. The plaintiff orally assented to this arrangement, but did not take the goods away, but obtained the consent of the defendants to let them remain where they were for a short time, when he would take them away, but which he did not do. Afterwards he brought a bill in equity to compel the defendants to pay their share for these goods, but the court held that the arrangement by which the goods were to be taken back, was not to be regarded as a resale of the goods, or as an independent transaction, *but as a mutual rescission of the original contract of sale*, and that therefore the agreement on the part of the plaintiff to take back the goods and cancel his debt against the firm therefor, was valid, although not in writing, especially as the dissolution, of which the agreement to take back the goods was a part, was not in writing. "There was nothing written between these parties," said HINMAN, J., "in respect to the formation of their partnership or its dissolution, or in respect to the sale of these goods or the rescission of the sale, or of any of their transactions between themselves; and his rescission is not to be viewed in the light of an independent sale or resale of the goods." This was a proceeding in equity, and there were quite strong equitable grounds against the plaintiff's claim, but whether such a transaction at law would be regarded as a rescission of the original contract and therefore not within the statute, or as an agreement for a resale of the goods at the original price, and therefore within the statute, may be regarded as doubtful, with the preponderance of reasons strongly in favor of the latter view.

¹ Dickinson v. Dickinson, 29 Conn. 600.

CHAPTER IX.

PRICE OR VALUE OF £10.

SECTION.

287. Purchase of Several Articles at Distinct Prices.

288. Sales at Auction of Distinct Articles.

289. When Value is Uncertain.

SECTION 287. Purchase of Several Articles at Distinct Prices.

— Where several articles are purchased at the same time, so that the contract can be said to be entire, it will, if the aggregate price or value exceeds the sum designated in the statute, be within the statute, although the price or value of each particular article is less than that amount.¹ Thus, in *Baldey v. Parker*, *ante*, the defendant went to the shop of the plaintiffs, who were linen drapers, and contracted for the purchase of several articles at distinct prices for each, the price of no one of which amounted to £10, but the aggregate of which was £70. Some were measured in the defendant's presence, others were marked with a pencil, and others he assisted to cut from a larger bulk. He then desired that an account of the whole should be sent to his house, and went away. Upon the goods being sent with the account, the defendant asked for a discount of £20 per cent. This was refused, and thereupon the defendant refused to accept the goods. The court held that this was all one contract, and within the statute. "Looking at the whole transaction," said ABBOTT, C. J., "I am of the opinion that the parties must be considered to have made one entire contract for the whole of the articles." Said BAYLEY, J., "It is conceded that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater

¹ *Baldey v. Parker*, 2 B. & C. 44; (N. Y.) 333; S. C. 20 id. 431; *Gault v. Gilman v. Hall*, 36 N. H. 311; *Price Brown*, 48 N. H. 183; *Deming v. v. Lea*, 1 id. 156; *Allard v. Greasart*, Kemp, 4 Sandf. (N. Y.) 147; *Seymour v. Davis*, 2 id. 239; *Aldrich v. N. H. 63*; *Mills v. Hunt*, 17 Wend. Pyatt, 64 Barb. (N. Y.) 391.

amount than £10. Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than £10, within the seventeenth section; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law." "This was all one transaction," said HOLROYD, J., "though composed of different parts. At first it appears to have been a contract for goods of less value than £10, but in the course of the dealing it grew into a contract for a much larger amount. At last, therefore, it was one entire contract within the meaning and mischief of the statute of frauds, it being the intention of that statute that where the contract, either at the commencement or the conclusion, amounted to or exceeded the value of £10, it should not bind, unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of £10, as if it had been originally of that amount." Said BEST, J., "Whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account." In New Hampshire,¹ it has been held that an acceptance of a *part* of the articles takes the whole contract out of the statute.² In *Gault v. Brown*,³ a contract was made for the sale of wood, part in one winter and part in the winter next following, each winter's lot to be paid for respectively on delivery. It was held that this constituted an entire contract of sale of the whole quantity, and that the acceptance of the first lot took the whole contract out of the statute.⁴ But, in a New York case,⁵ it was held that where there is a purchase of different articles, *deliverable at different times*, the subsequent delivery of one will not take

¹ *Jenness v. Wendell*, 51 N. H. 63.

² See also *Mills v. Hunt*, 17 Wend. (N. Y.) 333; S. C. 20 id. 431; *Allard v. Greasart*, 61 N. Y. 1.

³ *Gault v. Brown*, 48 N. H. 183.

⁴ In this case there was a stipulation by the seller to deliver *all the wood he could* the first winter, so that it was held not to be a contract not

to be performed in one year, as it was possible that the whole quantity would be delivered within a year.

⁵ *Aldrich v. Pyatt*, 64 Barb. (N. Y.) 391. See also *Wells v. Day*, 124 Mass. 38, where a sale of separate lots of real estate at auction constituted separate sales.

the case out of the statute as to the other. The distinction between this and the preceding case consists in the circumstance that in this case only *one* article could be delivered at the same time, while in the former it was the privilege of the vendor to deliver the *whole* at one time if he could.

SEC. 288. Sales at Auction of Several Articles.—In England it is held that where several articles are sold at auction to the same person at distinct and separate prices, a distinct contract arises for each lot; and if the price of no one of the articles amounts to £10, the fact that the aggregate prices exceed that sum does not bring the case within the statute.¹ But in this country the rule is generally otherwise,² and no distinction is made in this respect between sales at auction and ordinary sales, and the entire transaction is treated as one contract; and consequently, if the aggregate prices of all the articles bid off in separate and distinct lots exceeds the limit named in the statute, the contract is within the statute.³ “In this country,” says SARGENT, J.,⁴ “where the household furniture, farming tools, and such like articles about a farm or a hotel are sold, or where the sale also includes the stable stock, as in this case, or the farm stock and produce, we think there is ordinarily very little difference, in fact, between sales at an auction and a sale at any other place, or contracted in any other way, of several articles at an agreed price, which are all put together in one amount.”

SEC. 289. Sales, when Value is Uncertain.—Where, at the time when a contract of sale is entered into, the value of the

¹ *Emerson v. Heelis*, 2 Taunt. 38; *Causton v. Chapman*, L. R. 2 Sc. Div. 250; *Rugg v. Minett*, 11 East, 218; *Roots v. Lord Dormer*, 4 B. & Ad. 77; *Watts v. Friend*, 10 B. & C. 446; *Wells v. Hunt*, 17 Wend. (N. Y.) 333; *Lampkins v. Hoos*, 2 Penn. St. 74; *Messer v. Woodman*, 22 N. H. 172; *Coffman v. Hampton*, 2 W. & S. (Penn.) 377.

² But see *Wells v. Day*, 124 Mass. 38, in which it was held that, where a person, at a sale by auction of distinct parcels of *land*, which were separately described in the advertisement of the sale, and separately sold, purchases a certain number of the parcels, *signing*

a separate memorandum of the purchase of each, which states the price of each, and binds him to the terms of the sale, the purchase of each parcel is a distinct contract, and the failure of the vendor to tender in season, a deed of one parcel does not discharge the vendee from his obligation to perform his contract respecting the other parcels.

³ *Messer v. Woodman*, 22 N. H. 172; *Jenness v. Wendell*, *ante*; *Lampkins v. Hoos*, 2 Penn. St. 74; *Coffman v. Hampton*, 2 W. & S. (Penn.) 377; *Wells v. Hunt*, 17 Wend. (N. Y.) 333.

⁴ *Jenness v. Wendell*, *ante*.

property is uncertain, and, when the property is ready for delivery, its value may be less or more than the statutory limit, the contract will be valid if the value is less than the amount named in the statute, and will be invalid if in point of fact it turns out to be more; but the burden is upon the vendor to show that the value is not beyond the amount limited in the statute. Thus, in an Indiana case,¹ it was held that a verbal agreement to purchase all the mules which may be bred from a certain jack during a certain season, at \$46 each, is within the statute and cannot be enforced, unless the amount claimed is shown to be less than \$50, the statutory limit in that State.² In a Minnesota case,³ a contract for the sale of all the flax straw which might be raised from forty-five bushels of flax seed, at \$5 a ton, was held to be within the statute, it appearing that in fact from twenty-five to fifty tons of straw were raised.⁴

¹ *Carpenter v. Galloway*, 73 Ind. 418.

² See also *Bowman v. Conn*, 8 Ind. 58, where a contract to sell all the broom-corn which might be raised in 1853, on twenty-five acres of land, at \$60 a ton, was held to be within the statute.

³ *Brown v. Sanborn*, 21 Minn. 402.

⁴ See *Watts v. Friend*, 10 B. & C. 446, where a similar doctrine was held as to a contract for the sale of a future crop of turnip seed, which might, or might not, exceed the value of £10.

CHAPTER X.

EARNEST AND PART PAYMENT.

SECTION.

- 290. Effect of Payment of Earnest before the Statute.
 - 291. Conditionally, Alters the Property.
 - 292. Effect of the Statute on Bargains and Sales.
 - 293. What is Payment of Earnest and Effect of, since the Statute.
 - 294. Part Payment; When must be Made; What is; Effect of.
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SECTION 290. Effect of Payment of Earnest before the Statute.

— Before, as well as since the statute, payment of earnest was always considered as perfecting the bargain, so as to preclude the retraction by the one without the consent of the other, and to give to the buyer an action for the goods, and to the seller an action for his money, the property being changed by such payment of earnest, no matter how small the sum. If I say that I will sell my horse for a certain price, and a person offers to buy it at that price, but does not at once tender the money, it is no contract; and although he afterwards comes with the money, I am at liberty to accept it, or to refuse to sell it, or to demand a larger sum, according to my pleasure. But if he had proceeded forthwith, upon the price being named, to count out his money, and in the meantime I had sold the horse to another, he might take his remedy against me by action upon the case.¹ In the language of an old and reputable author, “If a man, by word of mouth, sell to me his horse, or any other thing, and I give or promise him nothing for it, this is void, and will not alter the property of the thing sold. But if one sells me a horse, or any other thing for money, or other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is appointed for the payment of the money, or all or part of the money

¹ Noy's Max. c. 42 n. 87; Dyer, 30, 76; Shep. Touchstone, 222; Hob. 41, 42; Plowd. 432.

is paid in hand, or I give earnest money to the seller, or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day appointed for the payment; in all these cases there is a good bargain and sale of the thing to alter the property thereof. And in the first case, I may have an action for the thing, or the seller for his money; in the second case, I may sue for and recover the thing bought; in the third case, I may sue for the thing bought, and the seller for the residue of his money; in the fourth case, *i.e.*, where earnest is given, we may have reciprocal remedies against each other; and in the last case, the seller may sue for his money.”¹

SEC. 291. Payment of Earnest Alters the Property Conditionally, but does not Give a Right to the Possession without Payment. — *By the payment of earnest the bargain is complete, and the property is conditionally transferred from the vendor to the vendee, and the price to be given for it is vested in the vendor, and the vendee may, upon performance of the conditions, bring his action for the goods, and the vendor his action for the price of them. But neither the title nor the absolute right to the immediate possession is so transferred with the property in the thing, as that the vendee may take the goods without first paying or tendering the price agreed upon;*² but if he tenders the price to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. The rule was stated in *Langfort v. Tiler*,³ by HOLT, C. J., to be that, notwithstanding the earnest, *the money must be paid upon fetching away the goods, where no other time for payment was appointed.* That earnest only binds the bargain,⁴ and gives the party a

¹ Shep. Touchstone, 222. The question whether money was paid in earnest or not must be determined by the destination expressly given to it by the person paying, for *quidquid solvitur ad modum solventis*, Pinnel's Case, 5 Coke, 117. But then it seems he ought to declare on what account he pays it at the time of paying it. See *Manning v. Western*, 1 Vern. 606; 2 Esp. 666.

² Hob. 41.

³ 1 Salk. 113.

⁴ A considerable difference exists between the effect of earnest (*arrha*) in the civil law and in our own, to which probably another striking difference in the circumstances constituting the perfection of the contract upon the *emptio et venditio* and our bargain and sale has given birth. A bargain and sale, by the common law, where no future day is assigned by the parties for the payment or de-

right to demand; but a demand without payment of the purchase-money does not give a right of action for the goods,

livery, nor any earnest given, requires an immediate delivery or payment to fix the contract and make it obligatory upon the parties; and upon ready money contracts (and every contract must be so understood unless the contrary be expressed), if the buyer makes no payment or tender upon the spot, the owner is at liberty to dispose of the goods to whom he pleases. The dread of perjury, characteristic of the earliest legal ordinances, required some ostensible act to assure the bargain, and the payment of earnest had this effect given to it, the law considering that without this act of confirmation the transaction imported not a settled bargain, but only a communication about a bargain.

But in the civil law neither payment nor delivery nor earnest was necessary to conclude the bargain, but simply the convention of the contracting parties. The perfection of the contract was one thing and the consummation or fulfilment another. Agreement concerning the thing purchased and the price to be given established the *emptio et venditio*, which was consummated by the payment and delivery. As soon as the bargain was struck the obligation of performance reciprocally attached, and a right of action respectively to enforce it. Ut primum de re et pretio convenit, emptio perfecta intelligitur, quamvis nec res traditur, nec pretium numeratum, nec arrha data sit. Atque in contractibus qui consensu perficiuntur, distinguenda perfectio contractus a consummatione sive implemento. Emptionem et venditionem perficit solus consensus de re et pretio; consummat rei traditio et pretii numeratio, qui extremus est contrahentium finis; simul atque autem emptio perfecta est, nascitur utrinque obligatio, teneturque emptor actione ex vendito, ut nummos, quos pretii nomine pro re vendita promisit, solvat; ven-

ditur actione ex empto, ut rem venditam tradat emptori. — Vin. lib. 3, tit. 24.

But though the perfection of the contract arose upon the agreement without payment, delivery, or earnest, yet this was not a mere loose and casual agreement, but was required to be negotiated in certain stipulatory forms of question and answer, which served to mark a deliberate purpose in the parties, and therefore could better dispense with the circumstances of authentication made necessary by the common law; and though the *solemnia verba*, the determinate forms of interrogation and response, as *spondeo? spondeo? promittes? promitto; fide promittis? promitto; fide jubes? fide jubeo; dabis? dabo; facies? facio*; settled by the earlier jurisconsults of the Roman law, were relaxed by the Leonine constitution, their substance and effect always remained essential to the constitution of a binding bargain. Etsi autem scrupulosa haec verborum observatio a Leoni postea sublata est, illud tamen ad vim atque substantium stipulationis adhuc requisitur, ut fiat utroque loquente, ac proinde verba ex utraque parte interveniant, ut promittens respondeat congruenter interrogationi, idque sine notabili intervallo, et animo ac proposito contrahendae verborum obligationis. — *Id.* Lib. 3, tit. 16.

There being no such solemn verbal ratification of a bargain in our law, an effect is given to the earnest which did not belong to it in the civil law, viz., that of specifically binding the bargain. According to the text and commentaries of the civil lawyers, the *arrha* or earnest is given, not to perfect the contract, which is complete without it by virtue of the stipulation, but it is given for the better manifestation of the agreement, *quo facilius probari possit convenisse de pretio*. It is, say those writers, either symbolical, as where a ring is given, or it may be

or for a breach of the contract; but after the payment of earnest, the vendor cannot sell the goods to another, without a default in the vendee; and, therefore, if the vendee does not pay for and take the goods, the vendor must request him to do so; and then, if he does not pay for and take them away within a reasonable time, the agreement is dissolved, and the seller is at liberty to sell them to any other person.

SEC. 292. Effect of the Statute on Bargains and Sales of Goods.—The statute gives no new efficacy to the payment of earnest; it only excepts cases where earnest has been paid out of the new requisition it has made for written evidence of a contract for the sale of goods above a certain price. In respect to executed bargains, in which the nature of the dealing between the parties implies an immediate delivery of the thing and payment of the price, where there is hardly room to interpose a written contract, the transactions of mankind continue the same; but their rights and obligations, even in these hourly dealings, are materially varied. If before the statute a man offered to sell his horse for \$100, and another offered to buy him at that price, and at once tendered the money, the bargain was cancelled, and the party disposing of the horse was not at liberty to dispose of him to

a part of the purchase; and if it is in part payment, yet this is not considered as a part execution of the contract; so that if the agreement be not otherwise perfected, as for example, if it was part of the agreement that the contract should be reduced into writing, which is not yet done, whereby the perfection of the contract is suspended, the anticipated payment of a part of the price by way of earnest will not prevent the contract from being *integral*, as it is called; the consequence whereof is that either party may recede from the bargain. But such refusal after earnest given must, if made on the part of the buyer, be followed by the forfeiture of the earnest so paid, and if on the part of the seller, by a return of the earnest with a duplication of its value. With this consequence the payment of earnest, according to the civil law, *leaves a*

locus penitentiae to both parties if the bargain has been otherwise left incomplete; but it does not give or create any *locus penitentiae*, as seems by some commentators to have been erroneously conceived, so that if the bargain has been by other means rendered perfect, by the payment of earnest the remedy is doubled to the parties, who may either sue upon their rights reciprocally to have the bargain completed, or may resort to the compensation afforded them respectively by the payment of earnest, the seller to the forfeiture thereof, and the buyer to his action for compelling the restoration of what he has so paid, with a duplication of its amount. See Dig. lib. 18, 19, tit. 1, C. lib. 4, tit. 38, 40; and see the Commentary of Vinnius thereon, lib. 24, tit. *De emptione et venditione*.

another. But since the statute, the owner of the horse would be at liberty to sell the horse to another, unless the person first offering to purchase at the price named could substantiate the first bargain by the production of a note or memorandum in writing, signed by the seller, of the terms of such bargain; and the same rule would prevail, even though the owner of the horse had agreed to keep it for a day or two, to enable the first purchaser to get the money. The statute, in such cases, affords a *locus penitentie*, and without a note in writing, signed by the seller, the buyer would lose his bargain by the delay, as under the statute, there being neither earnest, delivery, nor agreement in writing, the title to the property does not vest in the purchaser.¹

SEC. 293. **What is Payment of Earnest.**—The words of the statute,—“give something in earnest to bind the bargain or in part payment,”—clearly indicate that it was intended by the legislature that the thing given should be *something of value, as money or its equivalent*, although the amount may be merely nominal.² It must be given to bind the bargain, and consequently *it must be accepted and received by the vendor of the goods* for that purpose, because, being a substitute for the written evidence required by the statute, *it must afford evidence of a complete contract* between the parties, which is not the case unless it is shown that the minds of the parties met. Therefore, proof that the vendee *tendered* money in earnest, or part payment, which the vendor refused to accept, is of no value to take the sale out of the statute.³ Not only must the thing given in earnest be accepted and received as

¹ Alexander v. Combes, 1 H. Bl. 20; Roberts on Frauds, 165–170.

² Artcher v. Zeb, 5 Hill (N. Y.) 200; Combs v. Bateman, 10 Barb. (N. Y.) 573; Goodall v. Skelton, 2 H. Bl. 316; Blakey v. Dinsdale, 2 Cowp. 664; Bach v. Owen, 5 T. R. 409. Money deposited with a third person by the parties to an oral contract, to be by him paid to either of them as a forfeiture, if the other should neglect to fulfil his part of the contract, is not given in earnest to bind the bargain within the statute of frauds. Howe v. Hayward, 108 Mass.

54. In Shep. Touch. 224, the giving of *one penny* is said to be sufficient. See also Noy's Maxims, 87; and even a half-penny is sufficient; Bach v. Owen, 5 T. R. 409; or indeed anything of value, however small the value may be, if the value is real.

³ Edgerton v. Hodges, 41 Vt. 676. Thus, in this case the vendee sent to the vendor in a letter a sum of money to bind a bargain, and the court held that upon its receipt the vendee was at liberty to keep it to bind the bargain, or to return it and repudiate the verbal agreement.

such, but it must be *actually handed over* to the vendor, and merely giving it and taking it back again, or, in other words, "crossing the hand" with it, is held insufficient.¹ Thus, in the case last cited, the purchaser drew the edge of a shilling over the hand of the vendor, and returned the money to his own pocket, which in the north of England is called "striking off a bargain"; and it was held insufficient. If a bargain is made, and bound by the giving of earnest, without any agreement as to the time of payment, the money must be paid before the goods can be removed, and a demand of the goods without a tender of the money is void, because it is not according to the intent of the bargain, which the only effect of the tender was to bind;² and, as before stated, if the vendee does not take the goods within a reasonable time, the vendor should request him to do so, and if he then fails to take and pay for them, the bargain is dissolved.³ Where a contract is taken out of the statute by the payment of earnest, it is held not to contravene the spirit or policy of the statute to permit parol evidence to vary its terms as to the time of performance.⁴ The distinction between the giving of earnest and a part payment is marked. A part payment, in its very nature, presupposes a previous contract or

¹ *Blenkinsop v. Clayton*, 7 Taunt. 597. That the money or other valuable thing must be actually handed over to the vendor is shown by several cases, and is a necessary inference from the language of the statute. Thus it has been held that the deposit of the money with a third person, to be handed over when the goods are delivered, is not a giving of earnest, and does not take the case out of the statute. *Noakes v. Morey*, 30 Ind. 103; *Howe v. Hayward*, 108 Mass. 54.

² *Langford v. Tyler*, 6 Mass. 162. In a work of high authority the author says: "If a man, by word of mouth, sell to me his horse or any other thing, and I give him or promise him nothing for it, this is void, and will not alter the property of the thing sold. But if one sell me a horse or any other thing for money or any other valuable consideration, and the same thing is to be delivered to me at a day cer-

tain, and by our agreement a day is set for the payment of the money; or all or part of the money is paid in hand; or I give earnest money, albeit it is only a penny, to the seller, or I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment; in all these cases there is a good bargain and sale of the thing to alter the property thereof, and in the first case I may take an action for the thing and the seller for his money. In the second case I may sue for and recover the thing bought. In the third I may sue for the thing bought, and the seller for the residue of his money; and in the fourth case, where earnest is given, we may have reciprocal remedies one against another." *Shep. Touch.* 224.

³ *Langford v. Tyler*, *ante*; *Blakey v. Dinsdale*, 2 Cowp. 664.

⁴ *Parker v. Steward*, 34 Vt. 127.

liability, while the giving of earnest merely shows *that at that time* the minds of the parties met, and a contract was entered into and concluded by the giving of earnest.¹ As previously stated, *the giving of earnest does not in all cases change the title to the property*, but only vests in the person giving it the right to have it, upon performance of the conditions of the bargain. *If the sale is upon credit, and the articles are ready for delivery, and nothing remains to be done to complete the transaction*, as between the parties, the title to the property passes to the purchaser by the giving of the earnest;² *but, if no mode or time of payment is agreed upon, or anything remains to be done to the property*,³ the title to the property is not changed by the payment of earnest, *but only a right to have it when it is ready, upon payment of the price, or performance of any other conditions of the contract.* MR. BENJAMIN, in his excellent treatise upon Sales,⁴ expresses the opinion which we believe is well sustained by the principles upon which the effect of contracts is based, that the title to the property in such cases does not pass, where the "completed bargain, if proved in writing, or any other sufficient manner, would not equally have altered the property," . . . and "that the inquiry whether the property has passed in such cases is to be tested, not by the fact that earnest was given, *but by the true nature of the contract concluded by the giving of earnest.*"

SEC. 294. Part Payment; When Must Be Made; What Is; Effect Of. — The statute evidently contemplates that *the part payment shall be made at the time when the contract is entered into, and shall be in money or something of value which is accepted as its equivalent*, and must be such as amounts to a payment in other transactions, and it must be a payment of part of the purchase-money of the very goods purchased.⁵

¹ Groot v. Gile, 51 N. Y. 481; Jennings v. Flanagan, 4 Dana (Ky.) 217; Nesbitt v. Barry, 25 Penn. St. 208; Joyce v. Adams, 8 N. Y. 291.

² Bach v. Owen, 5 T. R. 409.

³ Acraman v. Morris, 8 C. B. 449; Logan v. Le Mesurier, Mas. P. C. 116.

⁴ Benjamin on Sales, 4th Am. Ed. (Bennett's), § 357.

⁵ In Organ v. Stewart, 60 N. Y. 413, the defendant being the owner of three lots of wool, the plaintiffs entered into a verbal agreement with him for their purchase, in pursuance of which two lots were delivered, and payment therefor demanded by the defendant, and was refused by the plaintiffs, who claimed that the third

In New York, the statute in express terms provides that earnest or part payment shall be made *at the time* the contract is entered into. But in that State, a part payment made at a subsequent time, and *accepted by the vendor, the contract being re-stated*, is held to be sufficient to validate the contract;¹ and in all the States, while a payment subsequently made and accepted will be sufficient to take the sale out of the operation of the statute, yet *it must be shown to have been understandingly made and accepted with reference to such previous contract*, so that it can be said to operate as a payment upon a *present contract*, and not upon a past void transaction.² If goods are sold for a certain price, and the vendor agrees to accept from the vendee a horse at a certain price, in part payment, the delivery of the horse by the vendee operates as a part payment under the statute to take the contract out of its operation, and the same may be said as to any kind of property.³ So the delivery and acceptance of a check, drawn against funds deposited in a bank, by the vendee, which is paid upon presentation, has been held sufficient as a part payment, even in New York under its peculiar statute, although it was not, in fact, presented and paid

lot was included in the sale, but which the defendant denied. Subsequently a further agreement was entered into by the parties, embracing the third lot of wool, which was to be delivered at the store of one Rankin in May, and assorted and shrunk by the assorters of said Rankin, and delivered to the plaintiffs, who were to accept the same at the shrinkage as made by them at the price originally agreed upon. The plaintiffs thereupon sued the defendant for the two lots of wool delivered. The defendant refused to deliver the third lot of wool, and the plaintiff brought this action to recover damages therefor. The defendant set up the statute of frauds, and the court held, reversing the judgment at General Term, 1 Hun (N. Y.) 411, that the payment could not be said to have been made in part payment for the third lot of wool, and consequently that the contract, as to that, was within the statute and void.

¹ Hunter v. Wetzell, 84 N. Y. 549; 38 Am. Rep. 544; Bissell v. Balcom, 39 N. Y. 275; Webster v. Zeilley, 52 Barb. (N. Y.) 482. But see Thompson v. Alger, 12 Met. (Mass.) 428, in which the construction of this clause of the New York statute was involved, and it was held that a part payment made *after* the contract was entered into, and the contract was expressly renewed, was not sufficient to validate the contract. But it is evident that the New York cases are not open to criticism, because the contract, being re-stated at the time of such part payment, may well be treated as a contract made at that time. Artcher v. Zeb, *ante*; Hawley v. Keeler, 53 id. 114.

² Whitwell v. Wyer, 11 Mass. 6; Gault v. Brown, 48 N. H. 183; Sprague v. Blake, 20 Wend. (N. Y.) 61; Vincent v. Germond, 11 John. (N. Y.) 283.

³ Bates v. Chesboro, 36 Wis. 636; Paine v. Fulton, 34 id. 83.

for two or three days afterwards.¹ In the case last cited, the parties entered into a verbal contract for a lot of hops, which were to be delivered where the defendants determined and requested, and even to be paid for within a few weeks, upon such delivery at the rate of fifty cents a pound, with \$10 additional on the whole lot. No part of the purchase-money was paid at the time, but subsequently the defendant delivered to the plaintiff in part payment for the hops a check for \$200, which the plaintiff accepted, the contract on that occasion being re-stated. FINCH, J., said: "It is now objected that, conceding the fact of such re-statement, there was no payment of any part of the purchase-money at that time. It is admitted that the check was then given, and it cannot be denied that *it was both delivered and received as a payment upon the contract price of the hops*, but it is claimed that the check was not in and of itself payment, and, having been drawn upon a bank, could not have been in fact paid until afterwards, and so there was no payment "at the time"² to satisfy the requirements of the statute. *It is quite true, that a check, in and of itself, is not payment, but it may become so when accepted as such and in due course actually paid.* While not money, *it is a thing of value*, and is money's worth when drawn against an existing deposit, which remains until the check is presented. We must assume that the check of the vendee in this case was good when drawn, and was duly paid upon presentation in the usual and regular way, for it appears in the possession of the drawers, and they practically assert the fact of its payment by their counter-claim in the action, by which they seek to recover back the money so paid. There was, therefore, an actual and real payment made by the vendees to the vendor, upon the purchase-price of the hops."

So, too, the delivery of the note of a third person to a vendor in part payment under such a contract *which is received and accepted by him as a part payment*, and not as merely collateral, has been held sufficient under the statute,³ but

¹ Hunter v. Wetsell, 84 N. Y. 549; statute, see Hunter v. Wetsell, 57 N. Y. 375; 15 Am. Rep. 508.

² As required by the New York

³ Coombs v. Bateman, 10 Barb. (N. Y.) 573.

the giving of the vendee's own note is not,¹ at least unless it is expressly agreed between the parties that it shall be accepted as a payment, so as to merge the vendor's claim for the property sold *pro tanto*, so that he cannot sue upon the original claim for that portion of it represented by the note. An agreement to apply or set off a debt due from the vendor to the vendee, in part payment for the goods, is not a sufficient part payment to take a contract out of the statute, *unless the debt is then discharged and a receipt or other evidence of its satisfaction is given therefor*.² In the words of COWEN, J.,³ the object of the statute is to have something pass between the parties besides mere words; some symbol, like earnest-money, and not leave everything resting in parol. Until a receipt for the debt is given, or it is actually endorsed or credited, the agreement amounts to no more than a contract to pay in that mode; and, so far as the statute is concerned, it no more aids to prove the contract valid than does an agreement to pay the price in an ordinary sale, where actual payment is expected.⁴ In an English case,⁵ which seems to be the only case involving that question which has been before the English courts, it was held that a mere agreement of the vendee that a debt due to him from the vendor should be deducted from the price of the goods purchased, made at the time when the contract of purchase was entered into, no

¹ Ireland v. Jackson, 18 Abb. Pr. (N. Y.) 392; Coombs v. Bateman, ante. But see Phillips v. Ocmulgee Mills, 55 Ga. 633, where it was held that the giving of the buyer's own note takes the sale out of the statute.

² Matthieson Refining Co. v. McMahon, 38 N. J. L. 537; Gaddis v. Leeson, 55 Ill. 83.

³ Artcher v. Zeb, 5 Hill (N. Y.) 205.

⁴ Clarke v. Tucker, 2 Sandf. (N. Y.) 157; Brabin v. Hyde, 32 N. Y. 519; Gilman v. Hill, 36 N. H. 319. In Leed v. Leed, 44 Barb. (N. Y.) 96, the defendant agreed orally to deliver a quantity of butter to the plaintiff, and to apply, in part payment therefor, a sum due from himself to the plaintiff for a barrel of flour charged in account. The plaintiff entered the sale in his memorandum-book; the entry

also stating that the defendant accepted the barrel of flour upon the butter. It was held not a sufficient part payment to take the case out of the statute of frauds. In Mattia v. Allen, 33 id. 543, the seller borrowed money, agreeing that if a proposed sale should be made it should be applied in payment. A few days afterwards the parties agreed to make the sale and that the money should be applied thereto. It was held that this was a payment at the time of the agreement, under the New York statute, and therefore operative to take the case out of the statute. But this was reversed by the Court of Appeals, 3 Keyes (N. Y.) 492, and the doctrine stated in the text was applied.

⁵ Walker v. Nussey, 16 M. & W. 302.

receipt or other discharge of the debt being given, did not amount to a part payment within the meaning of the statute. In that case, the plaintiff owed the defendant a debt, and, while it remained due, sold him goods by sample, to a larger amount, and exceeding £10, without a note or a memorandum in writing. Part of the bargain was that the debt due from the plaintiff was to go in part payment by the defendant to him, but no actual payment of money was made nor was any receipt given by the defendant for the plaintiff's debt due to him. The goods were supplied to the defendant, who returned them as inferior to the sample, and the jury found that he never accepted them. It was held that nothing had been given in part payment to make the contract binding on the defendant.¹ When the plaintiff sent the goods to the defendant, he sent with them an invoice charging him with the price, under which was an entry as follows: "By your account against me, £4 14s. 11d." PLATT, B., said: "You rely on a part of the contract itself as being part performance of it." POLLOCK, C. B., said: "Here was nothing but one contract, whereas the statute requires a contract, and if it be not in writing, something besides." PARKE, B., said: "Had there been a bargain to sell the leather at a certain price, and *subsequently* an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff, either might have been equivalent to payment of money. *But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract*, it was not a giving something to the plaintiff by way of earnest or in part payment, then or subsequently." ALDERSON, B., said: "The seventeenth section of the statute of frauds implies that to bind a buyer of goods of £10 value, without writing, he must have done *two* things: first, made a contract; and next, he must have given something as earnest, or in part payment or discharge of his liability." The doctrine of this case is substantially that *the contract to sell, and the contract to set-off, must be distinct contracts made in the*

¹ See also *Hart v. Nash*, 2 C. M. & R. 337; *Hopper v. Stephens*, 4 Ad. & El. 71.

order given, and that the set-off should have been completed by the extinguishment of the debt by the giving of a receipt or other discharge therefor. But our courts adopt a more sensible rule, and one much more in the interest of the commercial world, by holding that such contracts, although contemporaneous, are sufficient, *if the debt or obligation is at that time discharged*. In other words, *if the set-off is actually made*; and this certainly seems fairly to meet the requirements of the statute, and to be the most sensible and satisfactory doctrine.

The same rules apply where there is an agreement to apply the price of the goods or a part thereof in liquidation of a debt due from the vendor to a third person. In such a case, *the third person must not only assent to the arrangement, but must also, at the time, discharge the indebtedness of the vendor, by the giving of a receipt for the amount, or other evidence that the vendor is released from the debt*. It is not enough that there is an express agreement to that effect between the parties, unless this agreement is in some manner evidenced in writing. Thus, in a New York case,¹ which is regarded as a leading case upon this point, the defendant was indebted to a third party, who was in turn indebted to the plaintiff in a larger sum, upon a promissory note, and it was mutually agreed between the three that the defendant should pay to the plaintiff directly the amount he owed to the third party, and that the plaintiff should credit the amount upon such third party's note. The agreement was by parol, and the statute of frauds, which in New York extends to the sale of choses in action as well as goods, was relied on. It was insisted upon the trial that the terms of the agreement were such as to extinguish *pro tanto* the debt due from the third party, and consequently that there was a part payment. But it was held by the court that so long as the matter merely rested in agreement, however well understood by the parties, it was not sufficient to take the case out of the statute, *because no endorsement or receipt was ever actually made*. COWEN, J., said: "The object of the statute was to have something pass between the parties besides mere words; some symbol like earnest-money. Here everything lies in

¹ *Artcher v. Zeb*, 5 Hill (N. Y.) 205.

parol.”¹ But where the creditor of the vendor under such an agreement *discharges* the debt against him, and accepts the vendee as debtor in his place and stead, it is held to be a part payment within the meaning of the statute,² and the question is for the jury whether there was an actual transfer of money or money’s worth, from the buyer to the seller, made in pursuance of the agreement.³

¹ This doctrine is sustained by the later cases. *Brabin v. Hyde*, 32 N. Y. 519, reversing S. C. 30 Barb. (N. Y.) 265; *Mattice v. Allen*, 3 Keyes (N. Y.) 492, reversing S. C. 33 Barb. (N. Y.) 343; *Walrath v. Richie*, 5 Lans. (N. Y.) 362; *Buskirk v. Cleaveland*, 41 Barb. (N. Y.) 610; *Leed v. Leed*, 44 id. 96; *Paine v. Fulton*, 34 Wis. 83; *Geddis v. Leeson*, *ante*; *Gilman v. Hall*, *ante*; *Walrath v. Ingles*, 64 Barb. (N. Y.) 265. In Canada it has been held that an actual payment made by the vendee subsequent to the contract to such third person takes the case out of the statute. *Brady v. Hanahy*, 21 N. C. Q. B. 340; *Furniss v. Sawers*, 3 id. 77.

² *Cotterell v. Stevens*, 10 Wis. 422.

³ *Cotterell v. Stevens*, *ante*; *Worthen v. Dow*, 37 Vt. 108; *Organ v. Stewart*, *ante*.

CHAPTER XI.

EXECUTORY SALES.

SECTION.

- 295. What Contracts are within the Statute.
 - 296. When for Sale of Goods, and when for Work, etc. English Rule.
 - 297. American Rule, as to Purely Executory Sales.
 - 298. Contracts of Sale or for Work and Labor. Rule in New Hampshire.
 - 299. Rule in New York.
 - 300. Rule in Maine.
 - 301. Rule in Massachusetts, New Jersey, and Wisconsin.
 - 302. The Essence Rule.
 - 303. Contracts to Produce and Deliver.
 - 304. When the Property Vests in the Vendee.
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SECTION 295. What Contracts are within the Statute.—In England, before Lord Tenterden's Act¹ was passed in 1829, the decisions were conflicting as to whether or not an executory agreement was within the statute of frauds.² By the seventh section of Lord Tenterden's Act, after reciting that it had been held that the provisions of the seventeenth section of the statute of frauds "do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied," it was enacted that the provisions of the seventeenth section "shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

These two sections are construed as incorporated together,

¹ 9 Geo. IV. c. 14.

² In *Towers v. Osborne*, 1 Str. 506; *Clayton v. Andrews*, 4 Burr. 2101; and *Groves v. Buck*, 3 M. & Sel. 178, it was held that such agreements were not within the statute. In *Rondeau v. Wyatt*, 2 H. Bl. 63; *Cooper v. Elston*, 7 T. R. 14; and *Garbutt v. Watson*, 5 B. & Ald. 613, in which case *Clayton v. Andrews* was expressly overruled, it was held that such agreements were within the statute.

the word "value" being substituted for "price."¹ In Arkansas, the word "price" is retained,² so in California,³ Dakota,⁴ Indiana,⁵ Massachusetts,⁶ Michigan,⁷ Minnesota,⁸ Mississippi,⁹ Missouri,¹⁰ Montana,¹¹ Nebraska,¹² Nevada,¹³ New Hampshire,¹⁴ New Jersey,¹⁵ New York,¹⁶ Oregon,¹⁷ Vermont,¹⁸ Utah,¹⁹ Wisconsin,²⁰ and Wyoming.²¹ In Connecticut,²² neither the word "price" nor "value" is used, but "an agreement for the sale of personal property for fifty dollars or upwards" is declared not to be good "unless, etc."; such also is the case in Florida²³ and Maine.²⁴ In Iowa the words are, "when no part of the property is delivered, and no part of the price is paid";²⁵ and the statute applies to all contracts for the sale of personal property, without reference to the price. By section 3,665, it is provided that this section shall not apply in cases where the personal property at the time of the contract is not owned by the vendor, and ready for delivery, "but labor, skill, or money are necessarily to be expended in producing or procuring the same." In Georgia, Maryland, and South Carolina, the statute is substantially the same as the English statute. In Alabama, this clause of the statute does not exist, having been repealed in 1862, nor is there any provision in this respect in the statute of Delaware, Illinois, Kansas, Kentucky, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, West Virginia, and Wyoming. Thus it will be seen that in twenty-nine of the States and Territories of this country the seventeenth section of the statute is in force, while in fourteen of them it has no application whatever.

¹ *Scott v. Eastern Counties Railway Co.*, 12 M. & W. 38; *Harman v. Reeve*, 18 C. B. 587; 25 L. J. C. P. 257.

² § 2952.

³ § 2794, sub-div. 4.

⁴ § 626.

⁵ § 7. But the words "accept and actually receive" are not contained in the statute of this State, but the words "shall receive part of such property" are substituted.

⁶ § 5.

⁷ § 3.

⁸ § 7.

⁹ § 2895.

¹⁰ § 6.

¹¹ § 13.

¹² § 9.

¹³ § 62.

¹⁴ § 14.

¹⁵ § 6.

¹⁶ § 3, tit. 2.

¹⁷ § 775, sub-div. 5.

¹⁸ § 982.

¹⁹ § 6.

²⁰ § 2307.

²¹ § 2.

²² § 41.

²³ § 2, c. 29.

²⁴ § 4.

²⁵ § 3664, sub-div. 1.

SEC. 296. When Contract is for Sale of Goods, and when for Work and Labor done, and Materials Furnished. English Rule.—It is often a question as to whether a contract is for the sale of goods, wares, and merchandises, or whether it is for work and labor done, and materials furnished.¹

In England the rule now appears to be, that *if the subject-matter of the contract is such that it will result in the sale of a chattel to be afterwards delivered, then the action must be for goods sold and delivered; if, however, the subject-matter of the contract is such that when completed it will not result in anything which can properly be said to be the subject of a sale, then the action must be for work and labor done, and materials furnished.*² Thus, it has been held that a contract to print so many copies of a treatise at a certain price per sheet is not a contract for the sale of goods within the statute, but a contract for work, labor, and materials.³ In the case in which this rule was adopted,⁴ the defendant entered into a contract with the plaintiff, a printer, to print for him a second edition of a work previously published by the defendant, *the plaintiff to find materials, including paper*. The court held that the contract was for work, labor, and materials, and not for goods to be delivered at a future time within Lord Tenterden's Act. POLLOCK, C. B., said: "As to the first point, whether this is an action for goods sold and delivered, and requiring a memorandum in writing within the seventeenth section of the statute of frauds, I am of opinion that this is properly an action for work and labor and materials found. I believe that it is laid down in the commencement of Chitty on Pleading, that that is the count that may be resorted to by farmers, by medical men, by apothecaries, and I think he mentions surveyors, distinctly, and that is the form in which they are in the habit of suing. The point made in the case,⁵

¹ See *Towers v. Osborne*, 1 Str. 506; *Clayton v. Andrews*, 4 Burr. 2101; *Groves v. Buck*, 3 M. & S. 178; *Rondeau v. Wyatt*, 2 H. Bl. 63; *Garbutt v. Watson*, 5 B. & Ald. 613; and *Benj. on Sales*, 4th Am. Ed. (Bennett's) § 90, *et seq.*

² In *Prescott v. Locke*, 51 N. H. 98, this rule, as laid down by BLACK-

BURN, J., in *Lee v. Griffin*, 1 B. & S. 272, was approved.

³ *Clay v. Yates*, 1 H. & N. 73; 25 L. J. Ex. 237, approving of *Grafton v. Armitage*, 2 C. B. 336; 15 L. J. C. P. 20; and dissenting from a dictum of BAYLEY, J., in *Atkinson v. Bell*, 8 B. & C. 277; 2 M. & R. 301.

⁴ *Clay v. Yates*, 1 H. & N. 73.

⁵ *Atkinson v. Bell*, 8 B. & C. 277.

in which BAYLEY, J., gave an opinion, I think may be answered by the opinion of MAULE, J., in the court of common pleas,¹ and then we have to decide the matter as if it were now without any authority at all. It may be that in all these cases part of the materials is found by the party for whom the work is done, and the other part found by the person who is to do the work. There may be the case where the paper is to be found by the one and the printing by the other, and so on; the ink, no doubt, is always found by the printer. But it seems to me the true rule is this: *whether the work and labor is of the essence of the contract, or whether it is the materials that are found*, my impression is that in a case of a work of art, whether it be silver or gold, or marble or common plaster, that is a case of the application of labor the highest description, and the material is of no sort of importance compared with the labor,² and therefore that all this would be recoverable as work and labor, and materials found. I do not mean to say the price might not be recovered as goods sold and delivered, if the work were completed and sent home. No doubt it is a chattel that was bargained for and delivered, and it might be recovered as goods sold and delivered; but still it would not prevent the price being recovered as work and labor, and materials found. It appears to me, therefore, that this was properly sued for as work and labor, and materials found, and that the statute of frauds does not apply; and *I am rather inclined to think that it is only where the bargain is merely for goods thereafter to be made, and not where it is a mixed contract of work and labor, and materials found, that the act of Lord Tenterden applies; and*

¹ Grafton v. Armitage, 2 C. B. 336.

² But in Wolfenden v. Wilson, 33 U. C. Q. B. 442, where the materials formed the principal value, and the labor was only a small element of the value, it was held that the contract must be treated as for a chattel. In this case, a tombstone was verbally ordered by the defendant to be put up at her husband's grave, and work was commenced upon it before the husband's death, and was put up after his death and burial. The court held that the contract was for the sale of

a chattel, and not one for work and labor, and was therefore within the statute. The text thus stated by POLLOCK, C. B., was rejected by CAMPBELL and BLACKBURN, JJ., in Lee v. Griffin, 1 B. & S. 272, but it has been followed and applied in several of the States of this country. Edwards v. Grand Trunk R. R. Co., 48 Me. 379; 54 id. 105; Prescott v. Locke, 51 N. H. 94; Pitkin v. Noyes, 48 N. H. 294; Passaic Manuf. Co. v. Hoffman, 3 Daly (N. Y. C. P.) 495.

one of the reasons why you can find no cases on this subject in the books is, that before Lord Tenterden's Act passed, the statute of frauds did not apply to the case of a thing begun, whatever it might be." ALDERSON, B., concurred, and MARTIN, B., said: "There are three matters of charge well known in the law: for labor simply, for work and materials, and another for goods sold and delivered. And I apprehend every case must be judged of by itself. What is the present case? The defendant, having written a manuscript, takes it to the printer to have it printed for him. What does he intend to be done? He intends that the printer shall use his types, and that he shall set them up by putting them in a frame; that he shall print the work on paper, and that the paper shall be submitted to the author; that the author shall correct it and send it back to the printer, and then the latter shall exercise labor again, and make it into a perfect and complete thing, in the shape of a book. I think the plaintiff was employed to do work and labor, and supply materials for it, and he is to be paid for it, and it really seems to me *that the true criterion is this: Supposing there was no contract as to payment, and the plaintiff had brought an action, and sought to recover the value of that which he had delivered, would that be the value of the book as a book? I apprehend not, for the book might not be worth half the value of the paper it was written on. It is clear the printer would be entitled to be paid for his work and labor, and for the materials he had used upon the work; and, therefore, this is a case of work, labor, and materials, done and provided by the printer for the defendant.*" The learned baron also put this case: "Suppose an artist paints a portrait for 300 guineas, and supplies the canvas for it worth 10 s., surely he might recover on a count for work and labor."

The case which may be considered to have settled the law on this point is that of *Lee v. Griffin*.¹ There the action was brought against an executor to recover a sum of money for two sets of artificial teeth ordered by his testatrix. It was held that the contract was for the sale of goods, wares, or merchandises, and that the plaintiff could not recover in an action for work and labor done, and materials provided.

¹ 1 B. & S. 272; 30 L. J. Q. B. 252.

CROMPTON, J., said: "The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labor, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but, *where the contract is for a chattel to be made and delivered*, it clearly is a contract for the sale of goods.¹ There are some cases in

¹ The doctrine relative to this section of the statute has undergone many changes in the English courts as well as our own. It was formerly so narrow as to regard *executory* contracts for goods as entirely out of its reach. *Towers v. Osborne*, 1 Str. 506; *Clayton v. Andrews*, 4 Burr. 2101; *Groves v. Buck*, 3 M. & S. 178. Thus, in

Towers v. Osborne,
1722.

the defendant, in the quaint language of the reporter, bespoke a chariot, and when it was completed, refused to accept it; and in an action for its value, the statute was pleaded, no note in writing or earnest having been given. PRATT, C. J., holding that the statute applied only to contracts for the *actual sale of goods where the buyer is immediately liable, without time given him by special agreement*, and the seller was to deliver the goods immediately. Upon the authority of this case, the *nisi prius* case of

Clayton v. Andrews,
1767.

terminated, in 1767, by LORD MANSFIELD, C. J. In this case, the defendant agreed to deliver a certain quantity of wheat to the plaintiff within three weeks or a month from the time of the agreement, at a certain rate, to be paid on delivery, which wheat was understood by both parties to be at that time unthrashed. No part of the wheat so sold was delivered, nor any money paid by way of earnest for the same, nor any memorandum thereof made in writing, and the question for the opinion of the court was, whether this agreement was within the statute of frauds. LORD MANSFIELD held, upon the authority of the case in *Strange*, that it was not.

And YATES, J., observed that the clause of the statute relates only to *executed* contracts. Here wheat was sold to be delivered at a future time. It was unthrashed at the time when the contract was made; therefore, it could not be delivered at that time. See *Eichelberger v. McCauley*, 5 H. & J. (Md.) 213; and *Brown v. Wiman*, 10 Barb. (N. Y.) 406, to same effect. In *Rondeau v. Wyatt*, 2 H. Bl. 63, decided in 1792, and *Cooper v. Elston*, 7 T. R. 14, in 1796, this doctrine was practically denied; but in

Groves v. Buck,
1814.

Groves v. Buck, 8 M. & S. 178, the doctrine of *Towers v. Osborne* and *Clayton v. Andrews* was reiterated. In that case the defendant agreed to purchase of the plaintiff a quantity of oak pins not then in existence, but which were to be thereafter cut by the plaintiff out of slabs owned by him, and to be delivered at a future time. The case was tried before GIBBS, C. J., who cited and followed *Towers v. Osborne, ante*, and a verdict having been found for the plaintiff, it was sustained on appeal to the King's Bench. LORD ELENBOROUGH saying: "The subject-matter of this contract did not exist in *rerum natura*; it was incapable of delivery and part-acceptance; and where that is the case, the contract has been considered as not within the statute."

As previously stated, the doctrine of the first two cases cited, so far as it exempted all *executory contracts* from the operation of the statute, was not merely shaken, but decisively overthrown by *Rondeau v. Wyatt* and *Cooper v. Elston, ante*; but in *Buck v. Groves, ante*, the court treated the doctrine of the first two cases as not

which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labor done, and materials provided, as

having been impugned by the two last-named cases, because the court, in those cases, attempted to distinguish them from those under consideration, upon the ground that in the former *there was some work to be done before the goods were ready for delivery*, while

Rondeau v. Wyatt,
1792.

in *Rondeau v. Wyatt*,
ante, the contract was simply for the delivery of articles already existing. In this case the contract was for the sale of 3,000 sacks of flour, to be delivered at a future day, at a certain price per sack. LORD LOUGHBOROUGH, in commenting upon the doctrine of *Towers v. Osborne*, and *Clayton v. Andrews*, ante, while disapproving that portion of it which held that executory contracts were not within the operation of the statute, nevertheless said: "The case of *Towers v. Osborne* was clearly out of the statute, *because it was for work and labor to be done, and materials and other necessary things to be found*, which is different from a mere contract of sale, to which alone the statute is applicable."

Cooper v. Elston,
1796.

In *Cooper v. Elston*,
ante, the contract was by parol for fifty quarters of wheat at four guineas per quarter, to be thereafter delivered by the defendant. No earnest was paid, nor was any part of the goods delivered. The defendant refused to deliver the wheat, and in an action to recover damages for this breach of the contract, it was held that the contract was within the statute, the court following *Rondeau v. Wyatt*, and distinguishing between merely executory contracts of sale, and those where work and labor were to be performed to bring the goods into existence. Opinions were given by LORD KENYON, C. J., and by GROSE and LAWRENCE, JJ., and this point of distinction was observed by all of them.

In *Garbutt v. Watson*,
1822.

a verbal contract for the sale of 100 sacks of flour, to be manufactured by the plaintiffs, who were millers, and thereafter delivered to the defendant, was held to be within the statute, notwithstanding the flour, at the time the contract was entered into, had not been manufactured, the court proceeding upon a distinction not before noticed *between articles to be manufactured, in the regular course of the vendor's business, and those which would not have been manufactured except for the order of the party desiring to acquire it*. "This," said BAYLEY, J., "was substantially a contract for the sale of flour, and it seems to me immaterial whether the flour was, at the time, ground or not. The question is, whether this was a contract for goods, or for work and labor and materials found. I think it was the former, and if so, it falls within the statute of

Atkinson v. Bell,
1828.

In *Atkinson v. Bell*, 8 B. & C. 277, decided in 1828, the action was for goods sold and delivered, and work and labor and materials furnished. The facts were, that one Kay had patented a certain pinning machine, and the defendants, who were thread manufacturers, desired to try it, and wrote him ordering him to procure to be made for him as soon as possible some spinning frames, in the manner he most approved of. Kay employed one Sleddon to make them for the defendants, informing him of the order received by him, and he superintended the work. After the frames were made, they lay for a month on Sleddon's premises, while he was doing some other work for the defendants under Kay's superintendence. Kay then ordered Sleddon to make some changes in the frames,

it could hardly be said that the subject-matter of the contract was the sale of a chattel; perhaps it is more in the nature of

and after this was done, the frames were put into boxes by Kay's directions, and remained in the boxes for some time on Sleddon's premises. On the 23d June, Sleddon wrote to the defendants that the machines had been ready for three weeks, and asked how they were to be sent. On the 8th August, Sleddon became bankrupt, and his assignees required the defendants to take the machines; but they refused, whereupon action brought. The judges were all of opinion that the property in the goods had not vested in the defendants: *Hazeltine v. Rice*, 62 Barb. (N. Y.) 593-8; *Mixer v. Howarth*, 21 Pick. (Mass.) 205; and that a count for goods bargained and sold could not be maintained; but BAYLEY and HOLROYD, JJ., expressed the opinion that a count for not accepting would have supported the verdict in the plaintiff's favor. On the count for work and materials, the judges were also unanimous that these had been furnished by Sleddon for his own benefit, and not for the defendants', that is to say, that the contract was an executory agreement for sale, and not one for work, etc. BAYLEY, J., said: "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request, on your materials, he may maintain an action against you for work and labor done. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labor and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer has accepted it, the party employed may maintain an

action for goods sold and delivered. *Gooderham v. Dash*, 9 U. C. C. P. 413. Or if the employer refuses to accept, a special action on the case for such refusal; but he cannot maintain an action for work and labor, *because his labor was bestowed on his own materials, and for himself, and not for the person who employed him.*" MR. BENJAMIN, in his work on Sales, says in reference to this case: "The concluding passage of this opinion is no doubt too broadly expressed; for, although true generally, it is not universally the case that an action for work and labor will not lie when performed on materials that are the property of the workman. This inaccurate *dictum* had the effect for a time of weakening the authority of *Atkinson v. Bell*, subjecting it to the criticism of MAULE and ERLE, JJ., in *Grafton v. Armitage*, *ante*, and of POLLOCK, C. B., in *Clay v. Yates*, 1 H. & N. 73; but it was fully recognized in the subsequent case of *Lee v. Griffin*, 1 B. & S. 270. In *Smith v. Surnam*, 9 B. & C. 561, the question arose as to whether executory contracts were within the statute, and the doctrine of *Towers v. Osborne*, *ante*, was distinguished, but not questioned. This was the state of the law in England upon the question whether executory contracts are within the statute or not, down to the passage of what is known as LORD TENTERDEN'S Act in 1829, being Stat. 9 Geo. 4 c. 1487, by which it was expressly provided that the act "shall extend to all contracts for the sale of goods of the value of £10 sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some set way be requisite for the making or completing thereof, or rendering the same fit for delivery," thus forever putting this question at rest, and put-

a contract merely to exercise skill and labor. *Clay v. Yates* turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labor, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labor, or for the sale of a chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment." HILL, J., said: "I think that the decision in *Clay v. Yates* is perfectly right. That was not a case in which a party ordered a chattel of another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labor. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labor. *Atkinson v. Bell* is, in my opinion, good law, with the exception of the dictum of BAYLEY, J., which is repudiated by MAULE, J., in *Grafton v. Armitage*." And BLACKBURN, J., said: "I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. . . . In the present case, the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is

ting an end to the vacillating tendency of the court upon the question. But this statute did not affect the question as to contracts for the manufacture of articles, and leaves the

question open to judicial construction, which has given rise to the rule stated in the text, which now seems to be firmly established in the English courts.

whether the value of the work exceeds that of the materials used in its execution, for if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel."

In *Grafton v. Armitage*,¹ the plaintiff was a working engineer, and the defendant was the inventor of a life-buoy, in the construction of which curved metal tubes were used. The defendant employed the plaintiff to devise some plan for a machine for curving the tubes. The plaintiff made drawings and experiments, and ultimately produced a drum or mandrel, which effected the object required. His action was *debt* for work, labor, and materials, and for money due on accounts stated. The particulars were: "for scheming and experimenting for, and making a plan-drawing of a machine, etc., engaged three days, at one guinea per day, £3 3s.; for workman's time in making, etc., and experimenting therewith, £1 5s.; for use of lathe for one week, 12s.; for wood and iron to make the drum, and for brass tubing for the experiments, 5s." The defendant insisted, on the authority of *Atkinson v. Bell*, that the action should have been *case* for not accepting the goods, not *debt* for work and labor, etc., citing the *dictum* at the close of *BAYLEY J.*'s opinion. But *MAULE, J.*, said: "In order to sustain a count for work and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the defendant, or that are to be handed over to him." *ERLE, J.*, said: "Suppose an attorney were employed to prepare a partnership or other deed, the draft would be upon his own paper, and made with his own pen and ink. Might he not maintain an action for work and labor in preparing it?" In delivering the decision, *TINDAL, C. J.*, pointed out as the distinction, that in *Atkinson v. Bell* the substance of the contract was that the machines to be manufactured were to be sold to the defendant, but that in the case before the court, the substance of the contract was not that plaintiff should manufacture the article for sale to the defendant, but that he should employ his skill, labor, and materials in devis-

¹ *Grafton v. Armitage*, 2 C. B. 336.

ing for the use of the defendant a mode of attaining a given object. COLTMAN, J., concurred, and said that the opinion of BAYLEY, J., was on precisely the same ground as the Lord Chief Justice put this case. The claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work and labor bestowed by him in the fabrication of them. In this case, it will be observed, the contract was for the exercise of the plaintiff's skill and ingenuity in producing something out of his usual line of business, and the plaintiff's right to compensation did not depend upon the successful result of his labor. But being successful, and the article invented and produced by him being suitable for the purpose for which it was ordered, there can be no reason to doubt that a recovery could be had for the material furnished, as well as the labor, whether the person ordering it took it or not; and, in view of the grounds upon which the doctrine of the case was put by TINDAL, C. J., it cannot be said to be seriously at variance with that of the subsequent cases of *Clay v. Yates*, or *Lee v. Griffin*, *post*, as the contract was in no sense for the *sale* of an article, but purely one for work and labor, which must be paid for, whether any useful result or product ensued or not.

SEC. 297. **Rule in this Country.**—In all the States of this country it is held that *merely executory contracts are within the statute*, and are not taken out of it *by the mere circumstance that the goods are not ready for delivery, or that something remains to be done before they will be*.¹ Thus, in a New

¹ *Casson v. Cheeley*, 6 Ga. 554; *Edwards v. Grand Trunk R. R. Co.*, 48 Me. 379; *Crookshank v. Burrell*, 18 John. (N. Y.) 58. In *Waterman v. Meigs*, 4 Cush. (Mass.) 497, a contract for the delivery of a quantity of planks for ship-building, at a future time, and at a specified price, was held to be within the statute. In *Kirby v. Johnson*, 22 Mo. 354, it was held that if a bargain be made between two for the sale of cattle which they are looking at in the field, and it is agreed that the cattle shall be from that time the property of the purchaser, and be kept at his expense by

the vendor, *but the payment and delivery are postponed to a future day*, it is no sale within the statute of frauds. In *Reutch v. Long*, 27 Md. 188, a parol sale of corn, *to be gathered and husked*, was held not to amount to a sale of goods within the statute. But see *Downs v. Ross*, 23 Wend. (N. Y.) 270, and *Jackson v. Covert*, 5 id. 139, where it was held that a sale of wheat not then threshed was a sale of goods. In *Bennett v. Nye*, 4 Greene (Iowa) 410, it was held that a parol contract to deliver hogs at a future day might be taken out of the statute on the ground that "*labor, skill, or money,*"

York case,¹ the plaintiff had in his warehouse sofas and chairs already manufactured, but not upholstered, but left uncovered, in order that the purchaser might have a covering according to his taste. The defendant selected a sofa and some chairs, and gave orders to have them covered with a certain material. The price was agreed upon, amounting to more than \$50. It was held to be a contract for the sale of goods within the statute.² In a later New York case,³ the doctrine stated *supra*; that the mere circumstance that something remains to be done to the article contracted for, and although *it is done by the order and direction of the vendee*, does not change the character of the transaction from a sale to a mere contract for skill and labor, is well illustrated. In that case, the defendant being desirous of purchasing a stallion colt owned by the plaintiffs, verbally agreed that, *if they would castrate him, and keep him until he got well*, he would give them \$1,000 for him. To this the plaintiffs assented, and afterwards caused the colt to be castrated, and after his recovery tendered him to the defendant, who refused to receive him. The court held that the contract was essentially one of sale, and therefore within the statute. BOCKES, J., in a very able opinion, said: "When the subject of the contract exists *in solido*, but *something is agreed to be done to*

was to be expended in producing the same, within the meaning of the peculiar provisions of the statute of that State.

¹ Flint v. Corbitt, 6 Daly (N. Y. C. P.) 429.

² In a Massachusetts case, Mixer v. Howarth, 21 Pick. (Mass.) 407, the defendant went to the plaintiff's carriage shop, where the plaintiff had the unfinished body of a carriage, and gave him directions to finish it and trim it with a certain lining, selected by him. The carriage was to be finished in about a fortnight. The court held that this was not a contract of sale within the statute, but rather an agreement on the part of the plaintiff to build a carriage, and upon the defendant's part to take and pay for it when finished. But, while the court of that State seemed to recognize the authority of this case, Goddard v. Binney,

115 Mass. 450, yet it is entirely inconsistent with the doctrine of the later cases, and has partially been overruled, and is clearly opposed to the rule established in Clark v. Nichols, 107 Mass. 507, where a verbal contract for the delivery of a certain quantity of planks, *to be sawed from the logs into various dimensions under the defendant's directions*, was held to be within the statute as being a contract for the sale of goods. In Goddard v. Binney, ante, it was held, however, that where a person ordered a buggy to be built for him by the plaintiff, *to be painted and lined in a certain way, and provided with a seat to be made of certain materials, and marked with the defendant's initials*, was not a contract for the sale of goods, and consequently not within the statute.

³ Bates v. Coster, 1 Hun (N. Y.) 400.

it, to put it in condition for use, or to make it marketable, the contract is held to be one of sale, and void within the statute.¹ . . . It is said in many of the cases when this question has been considered, that the true test for determining whether the contract was one of sale, or for work and labor, is to inquire whether the work to be performed, in order to prepare the property for delivery, was to be done for the vendor or the vendee. If for the former, the contract is one of sale, and void under the statute. According to the above cases, it must be quite obvious, I think, that the contract here under consideration was one of sale, not one for work and labor. It was a simple contract for the sale of the colt, to be delivered at a future time, gelded and well, at the price of \$1,000. The animal was present before the contracting parties, and was the precise property agreed to be delivered. True, an operation was to be performed of great hazard, involving however little labor and trifling expense. The plaintiffs assumed the expense and risk, for they were to deliver the colt gelded and well. It was the animal that

¹ The court referred to *Mead v. Case*, 33 Barb. (N. Y.) 202, in which it was held that a contract for a marble monument, *which was then complete in form*, but was to be polished, lettered, finished, and set up, for \$200, was held to be a contract for the manufacture of a monument, and not within the statute. But *BOCKES, J.* (in *Bates v. Coster, ante*), says: "The decision was by a divided court, and is of doubtful authority on the facts proved." In *Fitzsimmons v. Woodruff*, 1 N. Y. Superior Ct. 3, a contract for a marble mantle was entered into, the defendant selecting a mantle *which was to be altered in certain respects*, and set up by the plaintiff in the defendant's house in another town, for the price of \$80. The court held that the contract was one of sale, and within the statute. In *Cooke v. Millard*, 5 Lans. (N. Y.) 243, the defendants verbally ordered, at a price exceeding \$50, from the yard of the plaintiffs, who were lumber dealers, and also had a planing mill at which they cut and dressed lumber for sale, certain lum-

ber to be cut and dressed from lots examined by the defendants according to certain directions given by them, and when ready the lumber was directed to be placed on the plaintiff's dock, and to notify one P, a forwarder, who would send a boat for it. The lumber was prepared and placed on the dock according to the instructions given by the defendants, and the forwarder notified to send a boat for it. The next day the lumber still remaining on the dock was consumed by fire, and in an action for the price agreed upon, it was held that the contract was one of sale, and void within the statute. In *Smith v. N. Y. Cent. R. R. Co.*, 4 Keyes (N. Y.) 180, a contract was entered into for the sale of a quantity of wood which at the time was growing upon the plaintiff's land. The wood was to be cut by the plaintiff. The court held that it was a contract for the sale of goods, and within the statute. See also *Downs v. Ross*, 23 Wend. (N. Y.) 270; *Garbutt v. Watson*, 5 B. & Ald. 613.

was contracted for, not the incident of castration. The labor, expense, and risk of the operation were for the plaintiffs. The animal was the subject of the purchase and sale, to be gelded before delivery. The language of BAYLEY, J., in *Smith v. Surman*,¹ well applies here; he says: 'the vendor, so long as he was felling it (the timber) and preparing it for delivery, was doing work for himself, and not for the defendant;' and he adds: 'it was a contract for the future sale of the timber when it should be in a fit state for delivery.' There was not, certainly, any idea of manufacture involved in the agreement in this case; no idea of compensation for work and labor, as such. In no fair and just sense can this contract be deemed one for work and labor; it was manifestly a contract of sale for the price of \$1,000, and, not being in writing, was void by the statute of frauds."

SEC. 298. Contracts of Sale, or for Work and Labor. Rule in New Hampshire. — We have previously stated that it is held in all the States, that a contract for the sale of goods which is purely executory is as much within the statute as one to be executed *in praesenti*;² but when we get beyond that, and look for the rule in cases where work and labor enter into the contract as an element, or rather where goods contracted for are to be manufactured, we enter a field where the conflict is sharp, and where much inconsistency is evinced, even in the same courts. It may be stated here that, as a matter of course, where a person furnishes materials, and procures another to manufacture them into a chattel, or even furnishes any considerable part of the materials, although not all, the cases all agree that the contract is for work and labor, and not of sale. But when a chattel is ordered from a manufacturer, which, at the time, does not exist *in solido*, and for the construction of which he furnishes the materials, the question as to whether the contract is one of sale or for work and labor is of grave importance, upon which there is considerable conflict in our courts. As we have seen, the question is decisively settled in England, partly by 9 Geo. 4, Cap. 14, and partly by the case of *Lee v. Griffin*.³ It is proper to state here that the doctrine of the English case last cited

¹ 9 B. & C. 561. ² *Finney v. Apgar*, 31 N. J. L. 270. ³ 2 B. & S. 272.

does not prevail in any of our courts, *as applied in that case*. In New Hampshire,¹ the rule as stated in *Lee v. Griffin*, by BLACKBURN, J., was applied *to the facts of that case*, FOSTER, J., saying: "Where the contract is for a chattel to be made *and delivered*, it clearly is a contract for the sale of goods. In such case, the party supplying the chattel cannot recover for the labor in making it." In that case, the defendant entered into a verbal contract with the plaintiff, to purchase of him such walnut spokes as the plaintiff should saw at his mill, not exceeding 100,000, at \$40 a thousand, in lots of 10,000 each, *subject to the defendant's selection*. It is true that FOSTER, J., in the course of his opinion, says, that the rule stated by him *supra* applies "even where the peculiar skill of the maker is considered to be an important element in the consideration of the contract; for," he adds, "the value of the skill and labor, as compared with that of the material supplied, is not a criterion to determine what the contract is." And this language would seem to involve a repudiation of the rule known as the "essence test," which had previously been adopted and acted upon in that State.² But the language thus used by him, and the doctrine expressed therein, are mere *dicta*, and have no real application to the facts of the case, and the actual judgment in the case is consistent with the rule as adopted in the cases cited in the last note; and it is believed that, in that State, the rule as expressed by BELLOWS, J.,³ still prevails. In that case, the defendant verbally contracted with the plaintiff to raise three acres of potatoes, and deliver them to the plaintiffs, who were starch manufacturers, at a certain price per bushel, and the court left it to the jury to say whether, in view of all the circumstances, the work and labor of the vendor was of the essence of the contract, and upon appeal this was held not to be erroneous, BELLOWS, J., saying: "If a person contracts to manufacture and deliver at a future time certain goods, at prices then fixed, or at reasonable prices, *the essence of the agreement being that he will bestow his own labor and skill upon the manufacture*, it is held not to be within the statute.

¹ *Prescott v. Locke*, 51 N. H. 98.

* In *Pitkin v. Noyes*, 48 N. H.

² *Pitkin v. Noyes*, 48 N. H. 294; 294.

Gilman v. Hill, 36 id. 311.

If, on the other hand, the bargain be to deliver goods of a certain description at a future time, and they are not existing at the time of the contract, *but the seller does not stipulate to manufacture them himself, or procure a particular person to do so*, the contract is within the statute. The distinction is, that in the one case the party stipulates that he will himself manufacture the article, and the buyer has the right to require him to do it, and cannot be compelled to take one as good, or even better, if made by another; while in the other case the seller only agrees to sell and deliver the article, and is under no obligation to make it himself, but may purchase it of another."

SEC. 299. **Rule in New York.**—In New York, in a recent case,¹ the court speaks approvingly of the rule adopted in *Lee v. Griffin*, *ante*, but admits that it is too late to adopt it, and virtually adopts the "essence test," and states the rule in that State to be that *when the chattel is in existence*, so as not to be governed by *Parson v. Loucks*,² *the contract should*

¹ *Cooke v. Millard*, 65 N. Y. 359; 22 Am. Rep. 619.

² In *Parsons v. Loucks*, 48 N. Y. 17; 8 Am. Rep. 517, an action was brought for an alleged breach of a verbal contract *to manufacture and deliver* a quantity of paper, and the contract was held not to be within the statute. The distinction is stated in that case to be between the sale of goods in existence at the time when the contract is made, *and an agreement to manufacture goods*. The former is within the prohibition of the statute, and void unless it is in writing, or there has been a delivery of a portion of the goods sold, or a payment of the purchase-price. This case follows the doctrine of *Crookshank v. Burrell*, 18 John. (N. Y.) 58; *Sewall v. Fitch*, 8 Cow. (N. Y.) 215; *Robertson v. Vaughan*, 5 Sandf. (N. Y.) 1; *Donnovan v. Wilson*, 26 Barb. (N. Y.) 138; *Parker v. Schenck*, 28 id. 38, and *Mead v. Case*, 33 id. 202. In *Crookshank v. Burrell*, *ante*, a contract for the woodwork of a wagon, to be manufactured by the plaintiff by the special order of the defendant, was held not

to be within the statute. SPENCER, C. J., said: "In *Bennett v. Hull*, 10 John. (N. Y.) 364, we declared that the statute applied to executory as well as other contracts, and we recognized the cases of *Rondeau v. Wyatt*, and *Cooper v. Elston* (*ante*), as containing a just and sound construction of the statute. In giving the opinions in those cases, the judges referred to the case of *Towers v. Osborne* with approbation. . . . The distinction taken by LORD LOUGHBOROUGH in *Rondeau v. Wyatt*, *ante*, and by the judges who gave opinions *searati* in *Cooper v. Elston*, was between a contract for a thing existing *in solido* and an agreement for a thing not yet made, to be delivered at a future day. The contract in the latter case they consider not to be a contract for the sale and purchase of goods, but a contract for work and labor merely. However refined this distinction may be, it is well settled, and it is now too late to question it." In *Sewall v. Fitch*, *ante*, a contract for nails, to be thereafter manufactured; in *Mead v. Case*, *ante*, a contract for a monu-

be deemed to be one of sale, even though it may have been ordered from the seller, who is to do some work upon it to adapt it to the uses of the purchaser. This rule makes but a single distinction, and that is between existing and non-existing chattels.¹ In the case in question,² the rule was applied to a verbal contract for the purchase of lumber exceeding fifty dollars in value, which was to be dressed and cut by the plaintiffs, according to directions given by the defendants, and then to be placed on the plaintiffs' dock, to be taken away by a boat to be sent for that purpose by the defendants. The lumber was dressed, cut, and delivered on the dock as directed; but the next day, and before the defendants had an

ment to be made from blocks of marble then in the yard to be polished, lettered, and finished; in *Robertson v. Vaughan*, 5 Sandf. (N. Y.) 1, a contract to make and deliver one thousand molasses shooks; in *Wright v. O'Brien*, 5 Daly (N. Y. C. P.), a contract to make a crayon drawing from a photograph; in *Webster v. Zeilley*, 52 Barb. (N. Y.) 482, a contract to furnish the defendant with hop roots, to be thereafter purchased by the plaintiff, and dug; and in *Stephens v. Santee*, 51 id. 532, a contract to cut and deliver railroad ties at a certain price, were all held not to be within the statute. But in *Downs v. Ross*, 23 Wend. (N. Y.) 270, a contract for wheat to be thereafter threshed; in *Flint v. Corbett*, 6 Daly (N. Y. C. P.) 529, a contract for furniture to be thereafter upholstered; and in *Bates v. Coster*, 1 Hun (N. Y.) 400, a contract for a colt to be castrated by the vendor, and kept until he recovered from the effects thereof, were held to be within the statute. See also *Miller v. Fitzgibbons*, 9 Daly (N. Y. C. P.) 505; *Seymour v. Davis*, 2 Sandf. (N. Y.) 239; *Bronson v. Wyman*, 10 Barb. (N. Y.) 406; *Courtwright v. Stewart*, 19 id. 455; *Kellogg v. Wetherhead*, 4 Hun (N. Y.) 273.

¹ *Downs v. Ross*, 23 Wend. (N. Y.) 270; *Deal v. Maxwell*, 51 N. Y. 652; *Bates v. Coster*, 1 Hun (N. Y.) 400.

² *Cooke v. Millard*, *ante*. In this case at General Term, see 5 Lans.

(N. Y.) 246, *PARKER, J.*, said: "The work to be done upon the lumber, was not work which the defendants had hired the plaintiffs to do for them, but was manifestly work which the plaintiffs were to do for themselves, in putting their lumber in condition for sale to the defendants. Defendants did not hire the plaintiffs to slit and plane the lumber. They agreed for the lumber in such a condition, and though it was to be lumber from certain piles in the plaintiffs' yard, yet it was no less a purchasing of lumber, and not a hiring of the plaintiffs to manufacture it. There is a marked distinction between such a transaction and an agreement for the manufacture of an article. This was not a manufacture of lumber. That existed *in solido*, and what was to be done was to put it into marketable condition. It was part of it in the rough, and this was to be planed and matched. It was not of the desired size, and it was to be slit. It was in this respect like the unthreshed wheat, a sale of which by parol, with an agreement that it should be threshed by the vendors, was held to be within the statute. *Downs v. Ross*, 23 Wend. (N. Y.) 270. The doctrine stated in that case is, that if the thing sold exists *in solido*, the mere fact that something remains to be done to put it in a marketable condition will not take the contract out of the operation of the statute."

opportunity to take it away, it was burned; and the court held that the contract was within the statute, and that the loss fell upon the plaintiffs. From this case, and those previously cited, it will be seen that after all, in New York, in effect, the question as to whether a contract of sale is within the statute or not, depends upon the circumstance *whether the work, labor, and skill to be bestowed upon the article by the vendor is the essence of the contract, or whether the contract is essentially for a chattel*. If the former, the statute does not apply; if the latter, it does.¹ The language of the judges in the different cases cited might be construed to support a multitude of rules, but the actual decision of the cases, applied to the facts in hand, invariably supports the rule as stated *supra*. This is well illustrated by a recent case,² in which the defendant contracted verbally for the purchase of a sofa, two arm-chairs, and four other chairs. The articles in question were selected by the defendant from patterns shown him, which were not covered, or only in part. The defendant selected the material with which they were to be covered, selecting brocatelle, which was not a usual covering. When the chairs were covered and varnished, and ready for delivery, the defendant refused to take them; and in an action therefor, he set up the statute of frauds in defence. The court held that the contract was within the statute,³ DALY, C. J., saying: "When the contract is for the

¹ *Downs v. Ross*, 23 Wend. (N. Y.) 270; *Flint v. Corbitt*, 6 Daly (N. Y. C. P.) 429.

² *Flint v. Corbitt*, *ante*.

³ In *Kilmore v. Howlett*, 48 N. Y. 569, a contract to cut trees growing upon the contractor's land into cordwood, and deliver them at so much a cord, was held to be within the statute. See also *Smith v. N. Y. Central R. R. Co.*, 4 Keyes (N. Y.) 180, where the same doctrine was held. In *Courtwright v. Stewart*, 19 Barb. (N. Y.) 455, a contract with a mechanic, to furnish materials and do the carpenter work and turning for a building to be erected upon the land of another, was held to be a contract for work, labor, and materials, and therefore not with-

in the statute. In *Passaic Manufacturing Co. v. Hoffman*, 3 Daly (N. Y. C. P.) 495, the court attempted to establish the rule that a contract for the manufacture of an article of goods, such as the vendor usually makes and sells in the course of his business, is within the statute, but that, where it is manufactured under a special order, and when produced is unfitted for general sale, it is not within the statute, thus attempting to overrule *Donovan v. Wilson*, 26 Barb. (N. Y.) 138, and *Ferren v. O'Hara*, 67 id. 517. But this doctrine is clearly opposed to that held by the Court of Appeals in *Cooke v. Millard*, *ante*; *Deal v. Maxwell*, 51 N. Y. 652 (where a contract to make and deliver a certain quantity of paper at a future day was

purchase of an article which the vendor usually has for sale in the course of his business, which he keeps in his warehouse substantially made, but not entirely finished, that the taste or wish of the customer may be consulted as to the final finish, *the finishing of it in the way that the purchaser prefers* does not change it from a contract of sale into a contract for work and labor. What is in contemplation of the parties is the purchase and sale of an article which is examined and selected, but upon which something more is to be done, which, as a matter of taste, choice, or expense, is left to the purchaser."

SEC. 300. **Rule in Maine.**—In Maine, the rule appears to be that *a contract for an article to be thereafter manufactured by the vendor, where the work, labor, and skill of the vendor or those in his employ, or the peculiar mode and manner or material is of the essence of the contract*, is a contract for work and labor rather than of sale, and so not within the statute.¹ In *Hight v. Ripley*, *ante*, which was the case of a verbal contract by the defendants to furnish the plaintiff as soon as practicable 1,000 to 1,200 pounds of malleable hoe-shanks, agreeably to certain patterns left with them by the plaintiff, and to furnish a larger amount, if required, at a diminished price, it was held that the contract must be treated as one

held not to be within the statute), and *Parsons v. Loucks*, 48 id. 17, where a contract quite similar to that in *Deal v. Maxwell*, *ante*, except that the paper was to be of such a description, sizes, and weights, as directed by the vendee; and also held not to come within the operation of the statute. In these last two cases, there was no evidence that the paper, when produced, was, by reason of the quality, sizes, or weights, unfit for the general trade, but the doctrine was rested upon the broad ground that the contract was for work, labor, and skill in the making of the paper, and for materials used in the manufacture, under the rule as stated in *Passaic Manufacturing Co. v. Hoffman*, *ante*, while it might be held that there could be a recovery in *Parsons v. Loucks*, *ante*; yet there could have been no

recovery in *Deal v. Maxwell*, *ante*, and the plaintiff should have been permitted to recover in *Cooke v. Millard*, *ante*, because, by the special direction of the defendant the vendor changed the character of the lumber, and fitted it for the special use of the defendant, and presumably rendered it unfit for the general trade, and under this rule there should have been a recovery in *Flint v. Corbett*, *ante*, because it appeared in that case that by the direction of the defendant the vendor covered the furniture with brocatelle, which the case shows was not *usually* employed for that purpose.

¹ *Edwards v. Grand Trunk R. R. Co.*, 48 Me. 379; *S. C.* 54 id. 105; *Fickett v. Swift*, 41 id. 68; *Hight v. Ripley*, 19 id. 137; *Abbott v. Gilchrist*, 38 id. 260; *Cummings v. Dennett*, 26 id. 397.

for the manufacture of the hoe-shanks, and therefore not within the statute. SHIPLEY, J., in the course of the opinion delivered by him, said: "A contract for the manufacture of an article differs from a contract of sale, in this: the person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind purchased from another, and not made for him. *It is the peculiar skill and labor of the other party, combined with the material, for which he contracted, and to which he is entitled.* This rule was reiterated and reaffirmed in a later case.¹ In that case the defendants verbally contracted to take all the wood the plaintiffs should cut and put on the line of their road during the season, at the same price they had paid him before for wood, or more, if better. The court held that the contract was within the statute, saying: "The fact that the article contracted for does not exist at the time of the contract, but is to be made or manufactured, will not necessarily take the case out of the statute. *It must also appear that the particular person who is to manufacture it, or the mode and manner or material, enter into and make a part of the contract.*"² A test, in some cases, is whether the person contracting to take the article is bound to receive one which may be bought or procured by the other party after the contract. If he is, then it is a case of sale." In a later case,³ it was held that a contract to manufacture an article *out of a particular lot of timber already cut for the purpose, and belonging to the manufacturer*, was not within the statute. Under this rule, it will be observed that three elements are embraced: first, *the skill or labor of the vendor*;⁴ second, *the mode or method of manufacture*;⁵ and third, *the materials*,⁶ either one of which may be sufficient, when shown to be an element of the contract, to take it out of the statute.

SEC. 301. **Rule in Massachusetts, New Jersey, and Wisconsin.**—In Massachusetts and the other States named in the head-line, *a mere contract to manufacture an article and fur-*

¹ Edwards v. Grand Trunk R. R. Co., 48 Me. 379; S. C. 54 id. 105.

² Hight v. Ripley, 19 Me. 137; Fickett v. Swift, 41 id. 68.

³ Crockett v. Scribner, 64 Me. 447.

⁴ Hight v. Ripley, *ante*; Edwards v. Grand Trunk R. R. Co., *ante*.

⁵ Abbott v. Gilman, 38 Me. 260.

⁶ Crockett v. Scribner, *ante*.

nish materials, such as are usually manufactured by the vendor,¹ is treated as a sale of a chattel, rather than as a contract for work and labor; but where a special order is given for the manufacture of an article, to be made from materials furnished by the manufacturer according to directions given, or a model selected by the purchaser, and not for the general market, the contract is treated as one for labor and materials, and not of sale, and therefore not within the statute.² The cases coming under the first head are illustrated by *Gardner v. Joy*,³ in which the plaintiff verbally contracted with the defendant to manufacture and deliver to him, at a future day, one hundred boxes of candles at twenty-one cents a pound. The contract was held to be one of sale, and within the statute. In *Lamb v. Crafts*⁴ a similar doctrine was held as to a verbal contract to furnish at a future day a certain quantity of prepared tallow, the business of the seller being to gather tallow in the rough and prepare it for the market. In a later case,⁵ the same rule was applied to a contract to saw certain logs into plank of various dimensions under the plaintiff's directions, CHAPMAN, C. J., saying: "We think this was a contract to sell and deliver the bending stuff and plank, and not a contract for labor in manufacturing the articles."

The rule itself is illustrated by *Mixer v. Howarth*,⁶ which has been referred to in a previous section, in which the defendant selected from the plaintiff's stock the body of a carriage which was nearly completed, and selected the lining for it, and which he agreed to take at a certain price when finished, and which the plaintiff agreed to have finished in a fortnight. The plaintiff finished the carriage accordingly, and notified the defendant thereof, and requested him to take it away, which he refused to do. The court held that the contract was not within the statute, SHAW, C. J., saying: "It is very clear, we think, that by the contract no property

¹ *Lamb v. Crafts*, 12 Met. (Mass.) 356; *Gardner v. Joy*, 9 id. 177; *Waterman v. Meigs*, 4 Cush. (Mass.) 497; *Clark v. Nichols*, 107 Mass. 547.

² *Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112; *Mixer v. Howarth*, 21 Pick. (Mass.) 207; *Finney v. Apgar*, 31 N. J. L. 270; *Meincke v. Falk*, 55 Wis. 427; 42 Am. Rep. 722.

³ *Gardner v. Joy*, 9 Met. (Mass.) 177.

⁴ *Lamb v. Crafts*, 12 Met. (Mass.) 356.

⁵ *Clark v. Nichols*, 107 Mass. 547.

⁶ *Mixer v. Howarth*, 21 Pick. (Mass.) 205.

passed to the defendant. The carriage contemplated to be sold by the plaintiff to the defendant did not then exist. It was to be constructed from materials partly wrought indeed, but not put together. It was therefore essentially an agreement by the defendant with the plaintiff to build a carriage for him, and on his part to take it when finished, and pay for it, at an agreed or at the reasonable value. This is a valid contract, and made on a good consideration, and therefore binding on the defendant. But it was not a contract of sale within the meaning of the statute of frauds, and therefore need not be proved by a note in writing; when the contract is a contract of sale, *either of an article then existing, or of articles which the vendor usually has for sale in the course of his business*, the statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately. *But where it is an agreement with a workman to put material together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article to be completed in futuro, it is not a sale until an actual or constructive delivery and acceptance, and the remedy for not accepting is on the agreement.*"¹ In *Goddard v. Binney*² the plaintiff and defendant entered into a verbal contract by which the plaintiff was to build a buggy for the defendant, and deliver it at a certain time. The defendant gave directions as to the style and finish of the buggy, and it was built in conformity with his directions and marked with his monogram. When the buggy was completed, the plaintiff sent the defendant a bill therefor, and he retained the bill and promised to see the plaintiff about it. The buggy was destroyed by fire while in the plaintiff's possession, and in an action for its price, the court held that the contract was not one of sale within the statute, and that the property in the buggy had passed to the defendant. AMES, J., said: "The carriage was not only built for the defendant, but in conformity, in some respects, with his directions, and at his request was marked with his initials. *It was neither intended nor adapted for the general market.*"³ In *New Jer-*

¹ See *Spencer v. Cone*, 1 Met. (Mass.) 283.

² *Goddard v. Binney*, 115 Mass. 450.

³ See also *May v. Ward*, 134 Mass. 84.

sey,¹ the same rule is adopted, and in the case last cited, the court states the rule to be that "where a contract is made for an article not existing *in solido*, and when such article is to be made according to order and as a thing distinguished from the general business of the maker, then such contract is in substance and effect not for a sale, but for work and material." And in Wisconsin,² the court, after a very full and able review of the authorities, adopts this rule. In that case the defendant, through his agent, ordered from the plaintiff, who was a carriage maker, a carriage to be manufactured by the plaintiff according to the description given and model selected by such agent, the carriage to be completed about May 1, 1879, and the cost not to exceed \$900. The carriage was completed according to the model selected, and ready for delivery at the time stated. The jury found specially the facts as stated *supra*, also that, in giving such order, Louis Falk (the defendant's agent) intended to procure a carriage of the plaintiff's manufacture, and his skill, labor, and workmanship on it were the special inducements for giving the order, and that without such order such carriage would not have been manufactured by the plaintiff and kept by him for sale as a part of his general stock. The court held that the contract was not within the statute.³

SEC. 302. The "Essence Rule." — In the other States, so far as the question has been decided, the rule seems to be that *where the work, labor, and skill to be bestowed upon an article is of the essence of the contract*, that is, the inducement

¹ Finney v. Apgar, 31 N. J. L. 270.

² Meincke v. Falk, 55 Wis. 427; 42 Am. Rep. 722.

³ The doctrine of this case, under the special verdict, is much better sustained than that applied in Goddard v. Binney, 115 Mass. 450. In that case there was nothing beyond the mere circumstance that the buggy was marked with the defendant's initials (which of itself was a trivial matter, and could be readily changed at slight expense) to show that the buggy was not in all respects such as the plaintiff was in the habit of making, so that in order to arrive at their judgment under the rule, the court

must have regarded the circumstance that the buggy was marked with the defendant's initials as sufficient to take the case out of the statute, or must have held that the simple fact that the buggy was made in pursuance of a special order was sufficient for that purpose, and in either view we are inclined to regard the doctrine as applied in that case not sustainable. But in Meincke v. Falk, *ante*, the special verdict covered not only every requirement of the rule usually called the Massachusetts rule, but also the Maine rule, and is in all respects consistent with both, whereas the former case is consistent with neither.

thereto, the contract is one for work and labor, and not of sale, and not within the statute,¹ whether the article is or is not such as is usually manufactured by the vendor, or kept by him in stock. But, under this rule, as under all the others referred to, *the contract must be for the manufacture of an article by the vendor, or those in his employ, or under his supervision*; and a contract for an article *to be manufactured by another than the seller* is a contract of sale, and within the statute.² It will be observed that this is *substantially* the rule in all the States, and that whatever may be said by the courts, the only ground upon which this class of contracts can, with any show of reason, be excepted from the operation of the statute is, that they are essentially contracts for the labor and skill of the seller in making the article, rather than for an article of the *kind* contracted for. That is, that *the labor and skill of the seller, combined with the materials* is the principal consideration which the purchaser had in view.³ The point of distinction is, that in the States where this rule prevails, the circumstance that the article is not *in esse*, but is *to be thereafter manufactured by the seller*, is conclusive upon the question;⁴ while in others⁵ something more is re-

¹ *Gorham v. Fisher*, 30 Vt. 428; *Ellison v. Brigham*, 38 id. 64; *Phipps v. McFarlane*, 3 Minn. 109; *Bird v. Muhlinbrink*, 1 Rich. (S. C.) L. 199; *Suter v. Pullin*, 1 S. C. 273; *Cason v. Chesley*, 6 Ga. 554; *Eichelberger v. McCauley*, 5 H. & J. (Md.) 213; *Reutch v. Long*, 27 Md. 188; *Atwater v. Hough*, 29 Conn. 508; *Allen v. Jarvis*, 20 id. 38. In *Story on Sales*, § 260 c, it is said that, where the labor and service are the essential considerations, as in the case of the manufacture of a thing not *in esse*, the statute does not apply, but that where the labor and services are only incidental to a subject-matter *in esse*, the statute does apply. See also *Clay v. Yates*, *ante*. In Iowa, under the peculiar provisions of the statute, in all cases where the article sold is not at the time owned by the vendor, and ready for delivery, and labor, skill, or money is necessary to be expended in producing or procuring the same,

the statute has no application. *Brown v. Allen*, 35 Iowa, 306; *Patridge v. Wilsey*, 8 id. 459.

² *Millar v. Fitzgibbons*, 9 Daly (N. Y. C. P.) 505; *Cason v. Chesley*, 6 Ga. 554; *Hight v. Ripley*, 19 Me. 137; *Edwards v. Grand Trunk R. R. Co.*, 48 Me. 379.

³ *Pitkin v. Noyes*, 48 N. H. 94; *Edwards v. Grand Trunk R. R. Co.*, 48 Me. 379; *Fickett v. Swift*, 41 id. 68; *Flint v. Corbitt*, 6 Daly (N. Y. C. P.) 429; *Deal v. Maxwell*, 51 N. Y. 652; *Parsons v. Loucks*, 48 id. 17; *Cooke v. Millard*, 65 N. Y. 352; *O'Neil v. N. Y. Mining Co.*, 3 Nev. 141.

⁴ *Millard v. Cooke*, 65 N. Y. 352; *Deal v. Maxwell*, *ante*; *Gorham v. Fisher*, *ante*; *Suter v. Pullin*, 1 S. C. 273; *Phipps v. McFarlane*, 3 Minn. 109; *Atwater v. Hough*, *ante*.

⁵ *Mixar v. Howorth*, *ante*; *Goddard v. Binney*, *ante*; *Apgar v. Finney*, *ante*; *Meincke v. Falk*, *ante*.

quired to warrant this irrebuttable presumption; to wit, *that the article is to be, in some of its features, of a character not manufactured or kept by the seller as a part of his general stock. That is, it must be a contract for the production of an article which, when completed, as it then exists, would not have been manufactured in that form, except for the special order given by the purchaser, and is not adapted to the seller's general trade,*¹ and the rule applies as well where the article is in part manufactured, but is finished according to special directions given by the purchaser, as where the article is to be wholly made.² To attempt to ascertain the principles upon which these rules rest would be a useless task, as they are all of them without any apparent foundation in reason, and merely expedients for evading the statute. Indeed, the courts do not, in any of the cases, attempt to give any reason for the rule, beyond the circumstance that a similar doctrine had been held in some English case. In *Eichelberger v. McCauley*,³ the court simply say that the rule has been too long settled to be changed. In *Spencer v. Cone*,⁴ the contract was for ten stave machines, at \$150, to be made by the plaintiff, and paid for by the defendant on delivery. The opinion is *per curiam*, and simply "the agreement was essentially a contract for work and labor and materials, and not a contract of sale"; and so through all the cases the court seems satisfied to let the doctrine go upon the ground of precedent, without attempting to give any reason therefor, and often with an intimation that they do not regard the rule favorably.⁵ In *Cason v. Chesley*,⁶ the court seem to proceed upon the most reasonable ground, confining the application of the rule to that class of cases where the article to be produced is of such a character as not to be marketable, as a portrait, and articles of that character, for which there is no sale; and in such cases there is some propriety in saying, as NESBITT, J., does, in that case, that such contracts are for work and labor, and that *the work, labor, and skill* of the person employed is the prime consideration. In such cases, the value of the article is limited to the immediate friends of the person whose portrait is painted, and even

¹ *Meincke v. Falk*, *ante*.

² *Mixer v. Howorth*, *ante*.

³ *Eichelberger v. McCauley*, 5 H. & J. (Md.) 213.

⁴ *Spencer v. Cone*, 1 Met. (Mass.) 283.

⁵ *Cooke v. Millard*, *ante*.

⁶ *Cason v. Chesley*, 6 Ga. 554.

to them is dependent upon the skill of the painter. Generally, there is no value whatever in the article produced beyond the persons named, and to them the value is intrinsic; and if the rule was narrowed down to this extent, and held only to apply to cases where the article produced had no marketable value, but was specially adapted for use by the person ordering it, it might with some reason be said that the contract was one for the work, labor, and skill of the seller, rather than of sale. But no such restriction is imposed, and in the case referred to, the statements of the court are mere *dicta*, as the only pretence for taking the case out of the statute was, that the cotton was to be gathered by the seller, and prepared for market, a service which would have been performed, although no contract for its sale had been made. But the court suggested a rule, as stated *supra*, which has a fair support in reason, and is quite similar to that adopted in *Lee v. Griffin*, although it would not have been applied to defeat a recovery under the facts of that case, but would defeat a recovery in most of the cases which are now excepted from the operation of the statute. When the courts say that a contract for a chattel, to be thereafter manufactured, is a contract *for the work, labor, and skill of the seller*, and not a contract of sale, the statement is nothing more nor less than a legal fiction, and justifiable upon no other ground than that it opens up a method of avoiding the operation of the statute as to a class of contracts which are clearly within the mischiefs sought to be avoided by it, and are included in its letter and spirit. I do not say this with any expectation that it will produce any change in the doctrine, because it is evident that the inconsistency of the doctrine has often suggested itself to the courts;¹ but, being hampered by precedents, they do not feel justified in changing it; but my purpose is merely to suggest legislative action, with a view to relieve the courts from the inconsistent and groundless rules which have grown up under this clause of the statute.

¹ See *Cooke v. Millard*, 63 N. Y. 859; 22 Am. Rep. 619, where the rule in *Lee v. Griffin* is recognized as the true rule, but the court does not adopt it because the rule in that State has been so long settled the other way as to require legislation to that end. *Eichelberger v. McCauley*, *ante*.

SEC. 303. **Contracts to Procure and Deliver.**—If a person engages an article from a person, which is to be afterwards manufactured by some person other than the seller, the contract, as we have seen, is treated as one of sale. But the question as to whether a contract to *procure* and deliver certain articles is a contract of sale or not, is one which has been variously decided, and the solution of which must largely depend upon the language of the contract itself. In *Cobold v. Caxton*,¹ the master of a vessel agreed to carry certain corn belonging to the plaintiff to a certain port, and then go to another, and procure and fetch back a cargo of coal, and deliver it to the plaintiff at the first port, at a certain sum per chaldron. The court held that this was not a contract of sale, but simply a contract to procure and deliver the coals. “It is clear,” said GIFFORD, C. J., “that if no coals could be found at the port specified, the plaintiff could not have maintained an action against the defendant for goods bargained and sold, or for the breach of the contract in not delivering them.” In a New York case,² the plaintiff agreed to procure and deliver to the defendant a certain quantity of hop roots, at a certain price per bushel, and it was held to be a contract for the sale of goods, etc. So, in a later case,³ a contract to *supply* the plaintiff with milk for one year was held not to be within the statute. But in an earlier case,⁴ a contract for cider *to be obtained by the seller from farmers, and refined before delivery*, was held to be a contract of sale. In cases of this character, if the contract contemplates the performance of certain services by the seller *in procuring* the article, for which he is to be paid in such profits as he can make by procuring the article at a less price, the contract is fairly one for work and labor, rather than of sale, and an action for work and labor and money paid would lie, notwithstanding the statute.⁵

SEC. 304. **When Property vests in the Vendee.**—In cases of this character, the contract being held to be for work,

¹ *Cobold v. Caxton*, 8 Moo. 460.

⁴ *Seymour v. Davis*, 2 Sandf. (N. Y.)

² *Webster v. Zeilley*, 52 Barb. 239. (N. Y.) 482.

⁵ See *Bird v. Muhlenbrink*, 1 Rich.

³ *Baumgarten v. Fowler*, 19 Law Rep. (N. Y.) 38.

(S. C.) L. 199; *Crockett v. Scribner*, 64 Me. 447; *Atwater v. Hough*, 29 Conn. 508.

labor, and materials, neither acceptance nor receipt on the part of the vendee is necessary to vest the property in him;¹ but when the article is finished, and the vendee is notified thereof, or some equivalent act is done, the seller is entitled to the price, and may sue for and recover it, although the article has not in fact been delivered to the vendee,² even though no price is specified, or time fixed for its completion,³ and the seller's lien thereon for the price has not been waived,⁴ or even though *after* such notice the article is destroyed by fire or other casualty, so that delivery becomes impossible.⁵ In such cases the only question is, had the seller completed the work when the loss occurred?⁶ In the case last cited, the plaintiff had printed some books for the defendant, which were destroyed by fire while they were in the printer's possession, and the question was submitted to the jury to find whether the printer had completed the work before the fire occurred; and they having found that he had not, the defendant had the verdict. In *Hunter v. Murray*,⁷ the plaintiff made some circus tents for the defendant, and completed them in all respects according to the order, and while they were in transit to the defendant, they were destroyed by fire. The tents were sent with a bill of lading, which required payment to be made for the tents before delivery to the defendant. The court held that the plaintiff was entitled to recover the value of the tents of the defendant.⁸ But until

¹ *Goddard v. Binney*, 115 Mass. 450; *Higgins v. Murray*, 4 Hun (N. Y.) 565; *Muckey v. Howenstine*, 3 N. Y. Superior Ct. 28.

² *Crookshank v. Burrill*, 18 John. (N. Y.) 58; *Mixer v. Howorth*, 21 Pick. (Mass.) 205; *Forsyth v. Dickson*, Grant (Penn.) Cas. 26; *Schneider v. Westerman*, 25 Ill. 514; *Comfort v. Kierstead*, 26 Barb. (N. Y.) 472; *Pettingill v. Merrill*, 47 Me. 109; *West Jersey &c. R. R. Co. v. Trenton &c. R. R. Co.*, 22 N. J. L. 517.

³ *Mixer v. Howorth*, *ante*; *Crookshank v. Burrell*, *ante*.

⁴ *Hunter v. Murray*, 4 Hun (N. Y.) 565.

⁵ *Goddard v. Binney*, *ante*; *Adlard v. Booth*, 7 C. & P. 108; *Hunter v. Murray*, *ante*.

⁶ *Adlard v. Booth*, *ante*.

⁷ *Hunter v. Murray*, *ante*.

⁸ DANIELS, J., said: "The agreement for the manufacture of the tent not being within the statute of frauds, it was valid and binding on the parties although no note or memorandum was made of it in writing, and consequently bound the defendant to receive and pay for the tent. When it was completed and he had notice of that fact, the plaintiff's right accrued for the recovery of the price, and from that time the property was at the risk of the defendant. That resulted from the fact that the contract was valid and had been fully performed by the plaintiff. What he afterward retained was simply a lien for the price, which was not incon-

notice of completion is given, the property and the consequent risk remains in the maker,¹ except possibly where a time for its completion is specially agreed upon, and it is completed accordingly.

sistent with its recovery by action. And all that he did by shipping it, subject to the payment of the price, was to retain and preserve that lien as his security upon the property. By the fair import of the agreement, delivery and payment were to be simultaneous acts, and that was all which the bill of lading secured. The defendant could have his property by making that payment. And the plaintiff had the right to maintain his possession until such payment should be made, as long as no credit was to be given by the agreement.

At common law, a mere agreement to sell specified articles of personal property at once, and without delivery of actual possession, vested the title in the vendee, and the right to the price in the vendor; but the former could not take the goods without either payment or tender of the price. This principle is quite analogous to the one which governs the rights and liabilities of the parties under a contract for the manufacture of a specified article. As soon as the article has been completed and notice given to the other party of that fact, the latter becomes obligated to take it and pay the price for it. If he

does not do so, a right of action accrues to the manufacturer for the recovery of the amount due to him. And that right cannot be lost by sending it according to the direction of the person for whom it has been made, merely by subjecting it to the payment which the manufacturer may insist shall be made before the property passes beyond his control.

The shipment in the manner it was made, was no more than a continuance of the previous relations existing between the parties. The plaintiff held the possession of the property as the bailee of the defendant, to be delivered over to him whenever the price was paid. And in securing the preservation of that right, while he complied with the defendant's directions to send it to him, he did nothing more than he was entitled to insist upon. *The property has been subject to the defendant's risk from the time he had notice of its completion*, and that was not transferred to the plaintiff by shipping it, as he did conformably to the defendant's directions and his own lien for the price of it." See also *Goddard v. Binney*, *ante*.

¹ *Baker v. Bourcicault*, 1 Daly (N. Y. C. P.) 23.

CHAPTER XII.

ACCEPTANCE AND RECEIPT.

SECTION.

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- 340. Delivery to Carrier may be Delivery to Vendee.
- 341. Executory Contract Partly Executed.

SECTION 305. **Acceptance and Receipt Must be Shown.**—The statute 29, Car. 2, provides that no contract for the sale of goods, etc., shall be allowed to be good, unless the buyer *shall accept part of the goods so sold, and actually receive the same*, or etc., and this is the language generally used in the statute of the several States of this country. Thus it will be seen that *acceptance without receipt* or *receipt without acceptance* is not sufficient, but, where this is the ground upon which a contract of sale is to be taken out of the statute, *both* must be shown to exist. That is, neither an acceptance without receipt of the goods, nor a receipt without an acceptance thereof, will satisfy the statute.¹ MR. BLACKBURN, in his work on Sales,² says: "If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with unless the two things concur: the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without any acceptance, so may there be an acceptance without any receipt."³ In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them.

¹ Blackburn on Sales, 22, 23. But in Indiana the statute makes a *receipt* of the property sufficient; so also in Mississippi. In California, Dakota, Montana, Nevada, and Utah the statute makes either an acceptance or receipt of a part of the goods sufficient. In Iowa the contract is inoperative unless a part of the property is delivered or a part of the price paid. In all the other States acceptance and receipt is required. The fact that the property has been *delivered* is not enough, but an *acceptance and receipt by the purchaser* must be shown. Gibbs v. Benjamin, 45 Vt. 124; Hewes v.

Jordan, 39 Md. 472; Maxwell v. Brown, 39 Me. 101; Edward v. Grand Trunk R. R. Co., 54 Me. 111; Denny v. Williams, 5 Allen (Mass.) 3; Johnson v. Cuttle, 105 Mass. 449; Prescott v. Locke, 51 N. H. 94; Boardman v. Spooner, 13 Allen (Mass.) 357; Remick v. Sandford, 120 Mass. 309; Dole v. Stimpson, 21 Pick. (Mass.) 384; see Ross v. Welch, 11 Gray (Mass.) 235; Safford v. McDonough, 120 Mass. 211.

² Blackburn on Sales, 22.

³ FOSTER, J., in Prescott v. Locke, 51 N. H. 94.

And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he *has* accepted them.¹ The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts.

The receipt of part of the goods is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not; it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order. It follows from this that a receipt of goods by a carrier or on board ship, though a sufficient *delivery* to the purchaser, *is not an acceptance by him* so as to bind the contract, for the carrier, if he be an agent to receive, is clearly not one to accept the goods.²

On the whole the cases are pretty consistent with these suggestions, and with each other, as to what forms an acceptance within the statute, though not as to the strength of the proof required to establish it. On the question of what constitutes an actual receipt there is some difficulty in reconciling the cases, which will be considered hereafter."

¹ REDFIELD, J., in *Gibbs v. Benjamin*, 45 Vt. 124; *Hill v. Heller*, 27 Hun (N. Y.) 416; *Knight v. Mann*, 118 Mass. 143.

² *Rodgers v. Jones*, 129 Mass. 420; *Atherton v. Newhall*, 123 Mass. 141; *Rodgers v. Phillips*, 40 N. Y. 519; *Caulkins v. Hellman*, 47 N. Y. 449; *Frostburgh Mining Co. v. N. E. Glass Co.*, 9 Cush. (Mass.) 115. But when there has been an *acceptance by the vendee*, a delivery to a carrier desig-

nated by him is a *receipt* by him. *Cross v. O'Donnell*, 44 N. Y. 661; 4 Am. Rep. 721; *Spencer v. Hale*, 30 Vt. 314; *Outwater v. Dodge*, 6 Wend. (N. Y.) 397; *Maxwell v. Brown*, 39 Me. 98; *People v. Haynes*, 14 Wend. (N. Y.) 546; *Glen v. Whitaker*, 51 Barb. (N. Y.) 451; *Hanson v. Armistage*, 5 B. & Ald. 557; *Morton v. Tibbets*, 15 Q. B. 441; *Coats v. Chaplin*, 3 B. & C. 483; *Acebal v. Levi*, 10 Bing. 376.

SEC. 306. **Acceptance may be before Receipt.**—It is not necessary that the acceptance of the goods should follow or even be contemporaneous with the receipt of them,¹ and an

¹ It is sufficient if they take place within a reasonable time of each other. *Van Woert v. Albany &c. R. R. Co.*, 67 N. Y. 538; *McKnight v. Dunlop*, 5 id. 537; *Vincent v. Germond*, 11 John. (N. Y.) 283; *Sprague v. Blake*, 20 Wend. (N. Y.) 61; *Salc v. Darrah*, 2 Hilt. (N. Y. C. P.) 184; *Chapin v. Potter*, 1 id. 366. In *Buckingham v. Osborn*, 44 Conn. 133, *PARKE, C. J.*, says: "Where a contract of sale of personal property is inoperative under the statute of frauds for want of delivery, a tender made afterwards and an unconditional acceptance have the same effect between the parties as if the delivery had been made at the time of the sale." *Bush v. Holmes*, 53 Me. 417; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Danforth v. Walker*, 37 Vt. 239; *Richardson v. Squires*, 37 id. 640; *Amson v. Dreber*, 35 Wis. 615; *Pinkham v. Mattox*, 53 N. H. 604; *McCarthy v. Knapp*, 14 Minn. 127. In *Hewes v. Jordan*, 39 Md. 484, *ALVEY, J.*, says: "The act of acceptance is not confined to any particular order of time in reference to the actual receipt of the goods. On the contrary, acceptance may precede, as in cases where the vendee has inspected and approved the specific goods purchased, as well as be contemporaneous with or subsequent to the actual receipt of the goods." *Davis v. Moore*, 13 Me. 424; *Thompson v. Alger*, 12 Met. (Mass.) 435; *Damon v. Osborn*, 1 Pick. (Mass.) 480; *Morse v. Chisholm*, 7 U. C. C. P. 131.

In *Marsh v. Hyde*, 3 Gray (Mass.) 331, *BIGELOW, J.*, in commenting upon the time when acceptance might be made, said: "There is nothing in the statute which fixes or limits the time within which a purchaser is to accept and receive part of the goods sold, or give something in earnest to bind the bargain, or in part payment. It would fully satisfy its terms if the delivery or part payment were made in pursu-

ance of a contract previously entered into. . . . The great purpose of the enactments, commonly known as the statute of frauds, is to guard against the commission of perjury in the proof of certain contracts. This is effected by providing that mere parol proof of such contracts shall be insufficient to establish them in a court of justice. In regard to contracts for sales of goods, one mode of proof which the statute adopts to secure this object is the delivery of part of the goods sold. But this provision does not effectually prevent the commission of perjury; it only renders it less probable, by rendering proof in support of the contract more difficult. So in regard to other provisions of the same statute; perjury is not entirely prevented by them; the handwriting of the party to be charged, or the agency of the person acting in his behalf, may still be proved by the testimony of witnesses who swear falsely. Absolute prevention of perjury is not possible. In carrying this great purpose of the statute into practical operation, it can add no security against the danger of perjury, that the act, proof of which is necessary to render a contract operative, is not contemporaneous with the verbal agreement. A memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth. So proof of the delivery of goods, in pursuance of an agreement for their sale previously made, will be as efficacious to secure parties against false swearing as if the delivery had accompanied the verbal contract. It is the fact of delivery under and in pursuance of an agreement of sale, not the time when the delivery is made, that the statute renders essential to the

acceptance prior to their receipt will be sufficient where it applies to the specific articles received, and nothing remains to be done except to deliver the articles. This question was raised in an English case,¹ in which the defendant verbally agreed to buy some sheep which he selected from the plaintiff's flock, and directed them to be sent to a field of his, which was accordingly done. Two days afterwards he sent his man to remove the sheep from the field to his farm, which was some miles distant, and on their arrival he counted them over and said, "It is all right." The court considered that it was not necessary to decide whether there could be an acceptance before receipt, but held that there was evidence for the jury of acceptance by the defendant of the sheep. But in a later English case,² it appeared that the defendant went with one of the plaintiffs to the cellar of the firm, where he was shown a lot of 156 firkins of butter, six of which he opened and inspected. Afterwards, on the same day, the defendant agreed to buy *that specific lot*. The plaintiffs, by the directions of the defendant's agent, forwarded the butter by carrier to an address given. *It was held that there was nothing in the statute to imply an intention that an acceptance prior to the receipt would not suffice.* BLACKBURN, J., in delivering the judg-

proof of a valid contract. It is to be borne in mind that, in all cases where there is no memorandum or note in writing of the bargain, the verbal agreement of the parties must be proved. The statute does not prohibit verbal contracts. On the contrary, it presupposes that the terms of the contract rest in parol proof, and only requires, in addition to the proof of such verbal agreement, evidence of a delivery or part payment under it. It does not, therefore, change the nature of the evidence to be offered in support of the contract. It merely renders it necessary for the party claiming under it to show an additional fact in order to make it 'good and valid.' . . . In all cases like the present, a single inquiry operates as a test by which to ascertain whether a contract is binding upon the parties under the statute of frauds. It is whether the delivery

and acceptance, whenever they took place, were in pursuance of a previous agreement. If the verbal contract is proved, and a delivery in pursuance of it is shown, the requisites of the statute are fulfilled." Townsend v. Hargraves, 118 Mass. 336; also, Sale v. Darragh, 2 Hilt. (N. Y. C. P.) 184; Chapin v. Potter, 1 Hilt. (N. Y. C. P.) 366; Walker v. Nussey, 16 Mees. & W. 302; Field v. Runk, 22 N. J. L. 525; McKnight v. Dunlop, 5 N. Y. 537; Davis v. Moore, 13 Me. 424; Sprague v. Blake, 20 Wend. (N. Y.) 61; Buckingham v. Osborne, 44 Conn. 133. See Whitwell v. Wyer, 11 Mass. 6; Damon v. Osborne, 1 Pick. (Mass.) 476.

¹ Saunders v. Topp, 4 Exchq. 390; Hewes v. Jordan, 39 Md. 472; 17 Am. Rep. 478.

² Cusack v. Robinson, 1 B. & S. 209.

ment of the court, distinguished the case from *Nicholson v. Bower*,¹ where 141 quarters of wheat, sent by railway, addressed to the vendees, arrived at their destination, and were there warehoused by the company under circumstances that might have been held to put an end to the unpaid vendors' rights, saying: "*The contract was not originally a sale of specific wheat, and the vendees had never agreed to take those particular quarters of wheat; on the contrary, it was shown to be usual, before accepting them warehoused, to compare a sample of the wheat with the sample by which it was sold; and it appeared that the vendees, knowing they were in embarrassed circumstances, purposely abstained from accepting the goods.*"² But in order that an acceptance prior to the receipt of the goods shall be good, *the goods must be ascertained and identified*, and it is not enough that there is a contract for unascertained goods to answer a particular description. *The vendee must have had an opportunity to examine all the goods, so that no right of rejection remains.*³ WILLES, J., in the case

¹ *Nicholson v. Bower*, 1 E. & E. 172.

² See *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 481, where the doctrine of this case was affirmed.

³ *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 481; *Knight v. Mann*, 118 Mass. 143; *Lloyd v. Wright*, 25 Ga. 215. In *Heermance v. Taylor*, 14 Hun (N. Y.) 149, an action was brought to recover the agreed price of a quantity of butter alleged to have been sold by the plaintiff to the defendant. The price of the butter exceeded fifty dollars, and the contract was not reduced to writing. At the close of the evidence the court dismissed the complaint on the ground that there was no proof of the acceptance of the butter by the defendant. The plaintiff and the defendant went into the cellar of the store in the city of New York, where several firkins of butter were bored into and examined by the parties, after which the defendant said he would take, at the price named (which was twenty-three cents per pound), twenty firkins out of the lot of forty from which the firkins examined had been taken, and directed

them to be sent as above stated. The firkins actually examined, and enough more to make up twenty, were taken from the lot of forty and delivered to the carman, who delivered them to the boat of the People's Line. The People's Line delivered them to the carman in Albany, who carried them to the defendant's store. They were received and placed in the defendant's cellar in a pile by themselves. The defendant was still absent in the city of New York, and returned home two or three days thereafter; and on the morning following his return, having an application for the purchase of butter, took his customer down to the cellar and showed him this lot, and bored into one of the firkins; but on examination said, "This will not suit," and went to another lot of butter in the cellar, from which he made a sale, and then and within half an hour thereafter shipped the butter back to the plaintiff at New York, notifying him in substance that he should not accept it because it was not the butter he had purchased. The court at General Term said: "It is well settled by authority that a mere delivery

first cited in the last note, says: "It may be that in the case of unascertained property to answer a particular description, no acceptance can properly be said to take place before the purchaser has had an opportunity of rejection.¹ In such a case the offer to purchase is subject not only to the assent or dissent of the seller, but also to the condition that the property to be delivered to him shall answer the particular description. A right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance, so as irrevocably to vest the property in the buyer, can take place before he has exercised or waived that right.² In order to constitute such a final and complete acceptance, the assent of the buyer should follow and not precede that of the seller. But where the contract is for a specific ascertained chattel, the reasoning is altogether different. Equally where the offer to sell and deliver has been first made by the seller and afterwards assented to by the buyer, and where the offer to buy and

is not sufficient to take the case out of the statute of frauds. The delivery, therefore, to the carman, and to the carrier, and by the carrier to the carman at Albany, and by him at the store of the defendant, do not in themselves amount to the acceptance required by law. In *Stone v. Browning*, 51 N. Y. 211, when first before the Court of Appeals, it was held that 'It is not enough that the goods were delivered to the purchasers; they must also have accepted them. A delivery of property, to satisfy the requirement of the statute of frauds, must be a delivery by the vendor with the intent of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with the intention of taking possession as owner.' That case was again before the Court of Appeals, and a new trial was granted, although the jury had found as a question of fact that there had been an acceptance. It was held that 'it was necessary that the defendant should have made the examination and pronounced the goods satisfactory, or that they should have dealt with them, or done some unequivocal act, showing that they

intended to accept them unconditionally as their own property,' in order to supply the place of a written contract. Performance by plaintiffs of their part of the contract was not enough. *Stone v. Browning*, 51 N. Y. 211; *Caulkins v. Hellman*, 47 id. 449. Evidence that the goods were as represented, and corresponded with the samples, was not material upon the question of acceptance. It was immaterial whether the defendant's refusal to take the goods was reasonable or not." It will be observed that this case differs from *Cusack v. Robinson* in the circumstance that the specific property had not been identified.

¹ In *Shepherd v. Pressley*, 32 N. H. 55, *BELL, J.*, says: "There is no acceptance unless the purchaser has exercised his option to receive the goods sold or not, or has done something to deprive him of this option." See also *Clark v. Tucker*, 2 Sandf. (N. Y.) 157; *Gilman v. Hill*, 36 N. H. 311; *Belt v. Marriott*, 9 Gill. (Md.) 331; *Messer v. Woodman*, 22 N. H. 181; *Gorham v. Fisher*, 30 Vt. 428.

² *Cusack v. Robinson*, 1 B. & S. 299.

accept has been first made by the buyer and afterwards assented to by the seller, the contract is complete by the consent of both parties, and it is a contract the expression of which testifies that the seller has agreed to sell and the buyer to buy and accept the chattel; and, indeed, it has been expressly decided that in the latter case the statute of frauds may be satisfied by an acceptance preceding the delivery." In *Kershaw v. Ogden*,¹ the defendants purchased four *specific* stacks of cotton waste at a certain sum per pound, and agreed to send their own packer, sacks, and cart to remove it. The packer and eighty-one sacks were sent, and he, with the aid of the plaintiff's men, packed the four stacks into the sacks sent. Two days afterwards, twenty-one of the sacks were weighed and sent to the defendant's premises, and were returned the same day by the defendant, who objected to the quality. The rest of the sacks were not weighed. The cart, loaded with the waste returned, was left at the plaintiff's warehouse, *and he put the waste into the warehouse to prevent its spoiling*. In an action for not accepting, and for goods bargained and sold, and goods sold and delivered, that the plaintiff was entitled to recover, POLLOCK, C. J., saying: "The property in the four stacks (under the facts found) became the property of the buyers, and the plaintiff became entitled to an action for the price in an action for goods bargained and sold."² The rule that *there can be no acceptance and actual receipt of goods unless the vendee has an opportunity of judging whether the goods correspond with the order*, is illustrated by an English case³ in which the plaintiff agreed to purchase bones of a particular kind, *to be separated from a heap of various bones* of oxen, cows, and other inferior bones, and gave to the plaintiff a note addressed to a wharfinger, to receive and ship the bones. The plaintiff sent fifty bags of the bones to the wharf, which the wharfinger received, but the defendant was not aware that they had been sent until the next day, when the invoice was received. The defendant then examined the bones, and refused to accept them on the ground that they

¹ *Kershaw v. Ogden*, 3 H. & C. 717.

² The plaintiffs in this case were excused from weighing the balance of the sacks by the refusal of the defendants to receive *any*, and the return

of those weighed, and upon this ground the case is distinguishable from *Simmons v. Swift*, 5 B. & C. 857.

³ *Hunt v. Hecht*, 8 Exchq. 814.

were not what he bargained for. In an action for goods sold and delivered, it was objected on the part of the defendant that there was no evidence of an acceptance and receipt, and MARTIN, B., being of that opinion, non-suited the plaintiff, and upon a hearing in Exchequer the non-suit was sustained. POLLOCK, C. B., said: "I am of opinion that there was no evidence of an acceptance and receipt to satisfy the requisites of the statute. All that the defendant agreed to buy was a quantity of bones of a particular description, to be separated from others in the heap. He afterwards sent to the plaintiff a note addressed to a wharfinger, authorizing the latter to receive and ship the bones; but when the defendant saw them at the wharf, he found that they did not correspond with his order, and refused to accept them. Therefore, although there was a receipt of the goods by a person who had authority from the defendant to receive them, there was no acceptance. A person cannot accept a commodity which is not in a condition to be accepted, by reason of its requiring to be separated from a larger bulk. If the contract be for the purchase of a certain quantity of flour or wheat, part of a larger quantity, there can be no acceptance until it is measured and set apart. It seems to me that the requisites of the statute have not been complied with, and the rule must be discharged." ALDERSON, B., said: "I am of the same opinion. If a person agrees to buy a quantity of goods to be taken from the bulk, he does not purchase the particular part bargained for until it is separated from the rest; and he cannot be said to accept that which he knows nothing of, otherwise it would make him the acceptor of whatever the vendor chose to send him, whereas he has a right to see whether in his judgment the goods sent correspond with the order. The statute requires an acceptance and actual receipt of the goods; here there has been a delivery, but no acceptance." PLATT, B., said: "I am of the same opinion. Until a separation took place, the thing bargained for was incapable of being accepted." MARTIN, B., said: "The question is, whether the defendant has accepted and actually received the goods bargained for. The contract was to buy such bones as were ordinary merchantable bones. It appears that there were various sorts of bones intermixed

in a heap, and that there was no purchase of the bulk, but of a certain article to be selected from it. The defendant was only bound to accept merchantable bones; and an order is given to a wharfinger to receive those bones. No doubt in one sense the goods were received by the defendant, because they were received by a wharfinger directed by him to receive them. But the question is, whether there has been an acceptance to satisfy the statute. There are various authorities to show that, for the purpose of an acceptance within the statute, the vendee must have had the opportunity of exercising his judgment with respect to the article sent. *Morton v. Tibbett* has been cited as an authority to the contrary; but, in reality, that case decides no more than this, that where the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same. The court indeed there say, that there may be an acceptance and receipt within the statute, although the vendee has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. But, in my opinion, *an acceptance, to satisfy the statute, must be something more than a mere receipt; it means some act done after the vendee has exercised, or had the means of exercising, his right of rejection.*"

In a carefully considered American case¹ this doctrine is well illustrated. In that case, the defendant went to the plaintiff's store to purchase some rough calf-skins. The plaintiff had a large quantity of them in stock, and the defendant, after examining thirty or forty skins, entered into a verbal agreement for the purchase of six hundred and thirty-nine of them, at a certain price per pound, which he directed the plaintiff to count out, weigh, and set apart for him, *but did not himself afterwards see*. The sale was on time, and the defendant was to send for the skins and take them away. In the defendant's absence the plaintiff counted out and set apart the number of skins, *corresponding in quality and value to those seen by the defendant*, and, according to a usage of

¹ *Knight v. Mann*, 118 Mass. 143; S. C., 120 id. 219.

the trade, selected one in twenty as "trials," the weight of which, before and after exposure to the air, determined the percentage of shrinkage to be deducted from the gross weights, and thus fixed the number of pounds to be paid for by the defendant. The defendant afterwards called at the plaintiff's store, and asked if the skins he had bought were ready, to which the plaintiff replied, "Yes, *all except weighing the trials*"; and the defendant said he would send for them immediately. The plaintiff weighed the trials and placed all the skins in the doorway of his store, ready to be taken away by the defendant, who returned later in the day for a bill of the skins, which was given him, and he was then told that they were all ready for him. The plaintiff did all that was required of him by the contract. The skins were not sent for, and were destroyed by fire the following night. It was held, reversing the judgment below, that there was not an acceptance within the statute, and that the court below was not warranted in finding that the plaintiffs held the skins as bailee for the defendant, *ENDICOTT, J.*, very clearly stating the grounds upon which the reversal was based. He said: "In this case, *the contract was not for the purchase of a specific, ascertained chattel, which the buyer inspected and examined at the time of the agreement, but for skins to be selected by the seller from a larger number of similar skins lying in bales, and to be set aside, and sent for by the buyer. In such case there can be no acceptance before the goods are delivered, and the buyer has had an opportunity to examine them.*"¹ In a New York case,² the defendant went into the plaintiffs' store and selected four chandeliers, and agreed to pay for them on delivery. The chandeliers were delivered, but not paid for, the defendant at

¹ He cited in support of this proposition *Cusack v. Robinson*, 1 B. & S. 299; *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 480; *Coombs v. Bristol & Exeter Railway*, 3 H. & N. 510. See also supporting the proposition that if there is anything remaining to be done to identify the goods, or the quantity, or price, the title does not vest in the purchaser until such things are done. *Hudson v. Wier*, 22 Ala. 294; *Lester v. McDowell*, 18 Penn. St. 91; *Andrews v. Dietrich*, 14 Wend. (N. Y.) 31; *Davis v.*

Hill, 3 N. H. 382; *Gilman v. Hill*, 36 N. H. 311; *Fuller v. Bean*, 34 id. 290; *Rapely v. Mackie*, 6 Cow. (N. Y.) 250; *Beller v. Black*, 19 Ark. 566; *Cunningham v. Ashbrook*, 20 Mo. 553; *Moffat v. Green*, 9 Ind. 198; *Martin v. Hurlburt*, 9 Minn. 142; *Stone v. Peacock*, 35 Me. 385; *Haudlette v. Tallman*, 14 Me. 400; *Stone v. Peacock*, 35 id. 285; *Riddle v. Varnum*, 20 Pick. (Mass.) 280; *Davone v. Finnell*, 2 Ired. (N. C.) L. 36.

² *United States Reflector Co. v. Rushton*, 7 Daly (N. Y. C. P.) 410.

the time making no objection. The court held that acceptance must be presumed. DALY, C. J., said: "If a man goes into a store and selects a particular article of household furniture, at a certain price, which he agrees to pay for on delivery, and the proof is that *that particular article* was delivered, it is, in the absence of any objection on his part, to be assumed that there was both a delivery and acceptance of the article, within the meaning of the statute." *If the article contracted for is not complete, although the vendee has inspected and approved it, and even has furnished some of the materials for it, yet, his right of rejection still remaining, his acts do not operate as an acceptance, although they would have had that effect if the article had been complete.* Thus, in an English case,¹ in an action for goods sold and delivered, it was proved that the defendant ordered a wagon to be made for him by the plaintiff, and during the progress of the work *furnished the iron-work* and sent it to the plaintiff, and sent a man to help the plaintiff in fitting the iron to the wagon, and afterwards bought a tilt and sent it to the plaintiff to be put on the wagon. It was insisted by the plaintiff that the defendant had thereby exercised such dominion over the goods sold as amounted to an acceptance. The plaintiff was non-suited, and the non-suit was sustained, upon the ground that the acts of the defendant had not been done *after the wagon was finished, and capable of delivery*, but merely while it was in progress; so that it still remained in the plaintiff's yard for further work till it was finished. "If," said TINDAL, C. J., "*the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such contract on the part of the defendant might have amounted to an acceptance.*"² In all cases *where anything remains to be done to the property by the vendor before it is ready for delivery*, the title does not pass;³

¹ *Maberly v. Sheppard*, 10 Bing. 99.

² See *Wegg v. Drake*, 16 U. C. Q. B. 252. In *Halterline v. Rice*, 62 Barb. (N. Y.) 593, it was held that the purchase of an article *before it is completed, and a payment of the price, does not pass the title until delivery.*

³ *Evans v. Harris*, 19 Barb. (N. Y.) 416; *McDowell v. Hewett*, 15 John. (N. Y.) 349; *Johnson v. Hunt*, 11

Wend. (N. Y.) 135; *Russell v. Nicoll*, 3 Wend. (N. Y.) 112. A sale of goods "to arrive," even though paid for, does not pass the title until they actually arrive: *Russell v. Nicoll, ante*; *Fay v. Smith*, 3 Daly (N. Y. C. P.) 186. But if the contract is otherwise executed, the fact that the vendor is to deliver the property at a certain place does not prevent the title passing. *Terry v. Wheeler*, 25 N. Y. 520.

and this is the case where the article is complete, but has not been identified, being a part of a number of similar articles, to be selected by the vendor;¹ or where something remains to be done by the parties for the purpose of ascertaining the quantity or price.² *But if the goods are identified, and are sold at a designated price each, and nothing remains to be done except to ascertain the exact number, so as to ascertain the total value, it has been held that this circumstance does not prevent the title from passing.*³

SEC. 307. Acceptance after Action Brought.—In an English case,⁴ it was held that an acceptance of the whole or a part of goods under a contract void under the statute, would be operative to take the contract out of the statute, although occurring *after* action brought. But this doctrine was exploded by a later case.⁵ In that case, the defendant ordered goods of H, the *del credere* agent of the plaintiff, at a fixed price, to be paid for on delivery, and, on receiving notice that the goods had arrived at H's warehouse, directed a boy whom he saw there to put a certain mark on them. A dispute about the price having occurred, the defendant refused to receive the goods, and an action was commenced against the defendant for the price, *after which*, the defendant, at H's request, wrote in H's ledger at the bottom of a page containing the statement of the goods in question, and headed with the plaintiff's name, the words, "Received the above," which he signed. The court held that this afforded no evidence to

And if there is a valid sale of a part of grain in bulk, as 1,000 bushels out of a mass, the title passes without separation, because in such a case no choice can be exercised, and the vendee could derive no possible benefit from the exercise of his choice. *Russell v. Carrington*, 42 N. Y. 118. But see *Gardiner v. Snyder*, 7 N. Y. 357, where it was held that a warehouseman's receipt for a quantity of flour does not pass the title until it is actually separated from the mass.

¹ *Rapelye v. Mackie*, 6 Cow. (N. Y.) 250.

² *Stephens v. Sauter*, 49 N. Y. 35; *Gibbs v. Benjamin*, *ante*; and this has been held to apply even in the case of

a judicial sale. *Stevens v. Houghtaling*, 10 Barb. (N. Y.) 95.

³ *Groat v. Gile*, 51 N. Y. 431; *Bradley v. Wheeler*, 44 id. 495; *Tyler v. Strong*, 21 Barb. (N. Y.) 198. In *Iron Cliff's Co. v. Buhl*, 42 Mich. 86, a quantity of ore was sold to the plaintiff and paid for. It was, at the time of sale, piled in a mass larger than that contracted for, and nothing remained to be done except for them to take the quantity purchased. The court held that the title passed, and that the ore was delivered to them.

⁴ *Fricke v. Tomlinson*, 1 M. & G. 722.

⁵ *Bill v. Bament*, 9 M. & W. 36.

go to the jury to establish an acceptance to satisfy the statute. PARKE, B., said: "I concur in thinking that there was no evidence to go to the jury to satisfy the statute of frauds. With regard to the point which has been made by Mr. Martin, that a memorandum in writing after action brought is sufficient, it is certainly quite a new point, but *I am clearly of opinion that it is untenable*. There must, in order to sustain the action, be a *good contract* in existence at the time of action brought; and to make it a good contract under the statute, there must be one of the three requisites therein mentioned. *I think, therefore, that a written memorandum, or part payment, after action brought, is not sufficient to satisfy the statute*. Then, to take the case out of the seventeenth section, there must be both *delivery* and *acceptance*; and the question is, whether they have been proved in the present case. I think they have not. I agree that there was evidence for the jury of acceptance, or rather of intended acceptance. The direction to mark the goods was evidence to go to the jury *quo animo* the defendant took possession of them; so, also, the receipt was some evidence of an acceptance. But there must also be a *delivery*; and to constitute that, the possession must have been parted with by the owner, so as to deprive him of the right of lien. Harvey might have agreed to hold the goods as the warehouseman of the defendant, so as to deprive himself of the right to refuse to deliver them without payment of the price; but of that there was no proof. There was no evidence of actual marking of the goods, or that the order to mark was assented to by Harvey. I am of opinion, therefore, that there was no sufficient proof of acceptance to satisfy the statute."¹ But an acceptance made of goods after the time has expired when they were to have been delivered, is operative to validate the contract,² as such acceptance operates as a waiver of such objection.³

SEC. 308. **Test of Acceptance.**—In order to constitute an acceptance under the statute, *there must be a delivery of the*

¹ See remarks of COLT, J., in *Townsend v. Hargreaves*, 118 Mass. 336.

² *Marsh v. Hyde*, 3 Gray (Mass.) 331; *Knight v. Mann*, 118 Mass. 145.

³ *Bock v. Healy*, 8 Daly (N. Y. C. P.) 156.

goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, with an intention of taking possession as owner, by virtue of a contract of sale, which intention is to be gathered from his outward acts.¹ Something more than mere words is necessary. There must be some act of the parties amounting to a transfer of the possession, and an acceptance thereof by the buyer; and the case of cumbrous articles is not an exception to this rule. Thus, A and B bargained respecting the sale, by A to B, of a quantity of lumber, piled apart from other lumber, on a dock in view of the parties at the time of the bargain, and which had before that time been measured and inspected. The parties having agreed as to the price, A said to B, "The lumber is yours." B then told A to get the inspector's bill, and take it to one C, who would pay the amount. This was done the next day, but payment was refused. The price was over fifty dollars. In an action by A against B to recover the price, it was held that there was no delivery and acceptance of the lumber, within the meaning of the statute of frauds, and that the sale was therefore void.²

The doctrine of the New York case³ does not preclude evidence of what was said by the parties, but requires that there should be some act of the vendee, in connection therewith, which evinces a purpose to accept the goods, thus carrying out the purpose and intent of the statute by requiring evidence of some-

¹ *Rodgers v. Jones*, 129 Mass. 420; *Agnew's Statute of Frauds*, 193; *Dole v. Stimpson*, 21 Pick. (Mass.) 384; *Knight v. Mann*, 118 Mass. 143; *Remick v. Sanford*, 120 id. 316; *Safford v. McDonough*, 120 id. 290; *Marsh v. Rouse*, 44 N. Y. 643; *Gray v. Davis*, 10 id. 285; *Brand v. Focht*, 3 Keyes (N. Y.) 409; *Stone v. Browning*, 51 N. Y. 211; *Hewes v. Jordan*, 39 Md. 479; 17 Am. Rep. 578; *Jones v. Mechanics Bank*, 29 Md. 293; *Shepherd v. Pressey*, 32 N. H. 49.

² *Shindler v. Houston*, 1 N. Y. 261; *Moore v. Bixby*, 4 Hun (N. Y.) 802; *Good v. Curtis*, 31 How. Pr. (N. Y.) 4; *Caulkins v. Hellman*, 47 N. Y. 449; *Ham v. Van Orden*, 4 Hun (N. Y.) 709; *Rodgers v. Phillips*, 40 N. Y. 509. In *Edwards v. Grand Trunk*

Railway, 54 Me. 105, the court says that there must be some act of the parties which amounts to a transfer of possession, and an actual receipt by the vendee depriving the seller of his lien for the price, to constitute an acceptance. In *Shepherd v. Pressey*, 34 N. H. 57, *BELL, J.*, says: "Mere words constituting a part of the original contract do not constitute an acceptance," and this is so as to mere words afterwards used, looking to the future, to acts afterwards to be done by the purchaser towards carrying out the contract: id.; *Gorham v. Fisher*, 30 Vt. 428; *Clark v. Tucker*, 2 Sandf. (N. Y.) 157; *Gilman v. Hill*, 36 N. H. 311; *Dole v. Stimpson*, 21 Pick. (Mass.) 384.

³ *Shindler v. Houston*, ante.

thing more than mere words to give validity to the contract; and this is the doctrine generally held by the courts. In the case of ponderous articles, not susceptible of manual delivery, slight acts, in connection with words evincing an intention to accept the property, will be sufficient. Thus, in a Connecticut case,¹ the subject of sale was ninety-three tons of iron, lying by itself. The parties met at the place where the iron was, and agreed upon the price and mode of payment; *they then stepped up to the iron, and the vendee said, "I deliver you this iron at that price"*; and the vendee then stepped up and claimed the iron. And the court held that this amounted to an actual delivery by the vendor, and an actual acceptance by the vendee. Here it will be noticed that the *words of the parties were affirmed by their acts*, which, although slight, were decisive of the vendee's intention, particularly when coupled with the circumstance that he soon afterwards removed the ore.² The statute is silent as to the delivery of the goods sold, which is the act of the seller,³ consequently *no act of the vendor alone is sufficient to take the contract out of the statute*;⁴ but *there must also be an actual acceptance and receipt by the purchaser, by some act which not only transfers the possession, but which, in fact or in law, operates to vest the title to the goods in him*.⁵ In other words, *he must accept and receive the goods with the intention of taking possession as owner*.⁶ Thus, where the defendant purchased

¹ Calkins v. Lockwood, 17 Conn. 155.

² See Green v. Merriam, 28 Vt. 301; Wylie v. Kelley, 41 Barb. (N. Y.) 594; Garfield v. Paris, 96 U. S. 557; Bass v. Walsh, 39 Mo. 192.

³ FOSTER, J., in Boardman v. Spooner, 13 Allen (Mass.) 357.

⁴ Shepherd v. Pressey, 32 N. H. 49; Prescott v. Locke, 51 id. 94; Gibbs v. Benjamin, 45 Vt. 122; Johnson v. Cuttle, 105 Mass. 449; Bowens v. Anderson, 49 Ga. 143; Hawley v. Keeler, 53 N. Y. 114; and the mere intention of the vendor to vest the title in the vendee does not operate to do so. The Francis, 8 Cranch (U. S.) 359; Rider v. Kelley, 32 Vt. 268.

⁵ Maxwell v. Brown, 39 Me. 101; Brewster v. Taylor, 63 N. Y. 587; Denny v. Williams, 5 Allen (Mass.) 3;

Brabin v. Hyde, 35 N. Y. 515. Neither acceptance or receipt alone will be sufficient, but *both* must be shown. The words of the statute are "accept and receive." Caulkins v. Hellman, 47 N. Y. 449; Ham v. Van Orden, 4 Hun (N. Y.) 709. But they need not concur in point of time. Cross v. O'Donnell, 44 N. Y. 661. An agreement to accept does not amount to an acceptance: Brabin v. Hyde, 32 N. Y. 519; Brandt v. Focht, 3 Keyes (N. Y.) 409. In Castle v. Sworder, 6 Exchq. 831, COCKBURN, C. J., said that he doubted whether there was much distinction between an acceptance and a receipt, but it seems the courts think otherwise.

⁶ Shindler v. Houston, *ante*; Caulkins v. Hellman, *ante*; Dooley v. Eilbert, 47 Mich. 615.

some earrings at an auction, and they were immediately delivered to him, and he received them without making any objection, *but after they had been in his hands a few minutes* he stated that he had been mistaken in the price, and refused to keep them, the court set aside a verdict for the plaintiff and granted a new trial,¹ the court observing: "To satisfy the statute there must be a delivery of the goods by the vendor, with the intention of vesting the right of possession in the vendee; *and there must be an actual acceptance by the latter, with an intention of taking to the possession.*"² But where the vendee of several hogsheads of sugar, upon receiving notice from the carrier of their arrival, took samples from them, and for his own convenience desired the carrier to let them remain in his warehouse until he should receive further directions, and before they were removed he became bankrupt, it was held that the transaction was at an end as soon as the samples were taken from the hogsheads, as that was a complete act of ownership, and that the vendor was not entitled to stop the goods.³ In this case it will be observed that the vendee not only drew samples from the bulk, but assumed dominion over the goods, and made the carrier bailee of the goods for him. But where the defendant gave a written order for ten firkins of butter, which were to be sent to him by a particular carrier, and the plaintiff sent by that carrier twelve firkins instead of ten, and the defendant refused to receive more than ten firkins, and as the carrier could not deliver less than the whole number sent, he refused to take the butter at all, but, however, drew a sample from one of the firkins, it was held that there had been no acceptance,⁴ because in such a case the act could not be regarded as one of ownership, or as done with a view to taking possession of a part of the bulk.

SEC. 309. Acceptance of Sample Amounts to Acceptance of the Goods, When.—*When a sample accepted by the vendee*

¹ Phillips v. Bistolli, 2 B. & C. 511.

² See also Bowes v. Pontifex, 3 F. & F. 739; Cunliffe v. Harrison, 12 W. R. 748; Smith v. Hudson, 6 B. & S. 431.

³ Foster v. Frampton, 6 B. & C. 107; Heinekey v. Earle, 8 E. & E.

428; Nicholson v. Bower, 1 E. & E. 172; Gardner v. Grout, 2 C. B. N. S. 340; Klinitz v. Surry, 5 Esp. 267; Talver v. West, Holt. 178.

⁴ Gorman v. Boddy, 2 C. & K. 145; Cunliffe v. Harrison, 6 Exchq. 903; Bacon v. Eccles, 42 Wis. 227.

*forms a part of the bulk of the goods, and was taken by him to make up the whole amount, it amounts to an acceptance of the goods themselves.*¹ Thus, in *Hinde v. Whitehouse*, *ante*, which is the leading case on this point, sugar was sold by samples drawn from the bulk, and after the sale *the samples were delivered to, and accepted by the purchaser, to make up the quantity purchased*; and it was held that such acceptance was sufficient to take the sale out of the statute,² LORD ELLENBOROUGH saying, "*Inasmuch as the half-pound sample out of each hogshead, in this case, is by the terms and conditions of sale so far treated as part of the entire bulk to be delivered that it is considered in the original weighing as constituting a part of the bulk actually weighed out to the buyer, and to be allowed for specifically if he should choose to have the commodity reweighed, I cannot but consider it as a part of the goods sold under the terms of the sale, accepted, and actually received as such by the buyer*; and although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent; also, in pursuance of the purposes of the parties as expressed in the condition of sale, namely, as a part delivery of the thing itself, as soon as, *in virtue of the bargain, the buyer should be entitled to retain, and should retain it accordingly.*" In a later English case,³ the defendant agreed to buy one hundred quarters of wheat, "not to weigh less than nine and a half stone neat imperial measure, to be made up eighteen stone neat," from the plaintiff, and sent his servant for *three sacks of the wheat*, which were accordingly delivered; on that occasion these sacks weighed eighteen stone neat, but the weight was not then tested according to the imperial measure, nor had it received a final dressing, which it is usual for wheat to receive before it is delivered to the buyer. *The buyer did not return the sacks*; and it was held that there was only one contract between the parties, that the defendant had received

¹ *Hinde v. Whitehouse*, 7 East, 558; *Atwood v. Lucas*, 53 Me. 508; *Davis v. Eastman*, 1 Allen (Mass.) 422; *Danforth v. Walker*, 40 Vt. 257; *Bush v. Holmes*, 53 Me. 417. The statute makes a receipt of a part of the goods sufficient, consequently if a part of them is received, however small

in amount, it is sufficient. *Garfield v. Paris*, 96 U. S. 557; *Smith v. Milliken*, 7 Lans. (N. Y.) 326.

² *Klantz v. Surry*, 5 Esp. 207; *Talver v. West*, Holt, 178.

³ *Gallairt v. Roberts*, 19 L. J. Exchq. 410.

the three sacks, *which were a portion of the bulk*, and that this was a part acceptance within the statute. In another case,¹ the contract was for certain sacks and bags. Four days after the sale, the plaintiff, who was the buyer, went to the defendant's warehouse and asked for samples of the goods, which were given him by the defendant's foreman, and *which he promised to pay for when the bulk — which was all there — was taken away. The samples so given to the plaintiff were, by the defendant's order, weighed, and entered in his order book.* It was held that under this state of facts the plaintiff had received a part of the bulk, and that there was a sufficient acceptance.

SEC. 310. **When Receipt of Sample Is not an Acceptance.** — *If the sample delivered is not a part of the bulk, but is merely a collateral thing, a specimen of what the seller is endeavoring to dispose of, then the acceptance of it is not sufficient to take the case out of the statute,*² and the question as to whether the sample was accepted and received as a part of the bulk or as a mere specimen of the goods, not to be accounted for in the final settlement, is for the jury.³ In an English case,⁴ the plaintiff showed the defendant samples of wine, which the latter agreed to buy; and after the bargain was completed, the buyer asked to have the samples handed over to him, and wrote upon the labels the price agreed upon. An action having been brought against him for not accepting the wine, the taking of the samples was relied upon by the plaintiff as a part acceptance to take the case out of the statute. But WIGHTMAN, J., directed a non-suit. In *Gardner v. Grout*,⁵ this case was distinguished, COCKBURN, C. J., saying: "That is a very different case from this. There, the buyer never saw the bulk, *the things handed to him, really*

¹ *Gardner v. Grout*, 2 C. B. N. S. 340. But it must appear that the acceptance and receipt of a *part* of the bulk was in recognition of the contract sought to be enforced. *Ather-ton v. Newhall*, 123 Mass. 141.

² *Carver v. Lane*, 4 E. D. S. (N. Y. C. P.) 168; *Klitz v. Surry*, 5 Esp. 267; *Talver v. West*, Holt, 178; *Cooper v. Elston*, 7 T. R. 14; *Moore v. Love*, 57 Miss. 565.

³ *Dawes v. Eastman*, 1 Allen (Mass.) 422; *Atwood v. Lucas*, 58 Me. 508; *Bush v. Holmes*, 53 Me. 417; *Danforth v. Walker*, 40 Vt. 257; *Pratt v. Chase*, 40 Me. 269.

⁴ *Simonds v. Fisher*, cited in *Gardner v. Grout*, 2 C. B. N. S. 342.

⁵ *Gardner v. Grout*, 2 C. B. N. S. 349.

were mere samples. *But here, the plaintiff receives part of the very things which he had already bought.*" Where goods are sold by sample, and subsequently are received by the vendee, proof that the goods received were equal to the sample does not establish an acceptance.¹

SEC. 311. Constructive Acceptance and Receipt; Whether is, or not, Question for Jury.—It is well settled that there may be a constructive acceptance of either the whole or a part of the goods sold under a verbal contract, which will be sufficient to take the case out of the statute, and that the question as to whether the facts proved amount to a constructive delivery or not, is one wholly within the province of the jury.² LORD DENMAN, C. J., in a leading case³ upon this head, said, in substance, that the evidence of the acceptance in such cases must be unequivocal, but that the question whether it is so or not, under all the circumstances of the case, is ordinarily one of fact for the jury, and not a matter of law for the court; or, in the language of COLERIDGE, J.,⁴ "it is a

¹ Remick v. Sandford, 120 Mass. 309.

² Simpson v. Krumdick, 28 Minn. 352; Pinkham v. Mattox, 53 N. H. 605; Frostbury Mining Co. v. N. E. Glass Co., 9 Cush. (Mass.) 118; Edan v. Dudfield, 1 Q. B. 306.

³ Edan v. Dudfield, *ante*.

⁴ Tibbett v. Morton, 15 Q. B. 442; Parker v. Wallis, 5 E. & E. 21; Clark v. Wright, 11 Irish, C. L. 402; Marshall v. Green, 1 C. P. Div. 41; Healey v. Tenant, 13 Irish, C. L. 394; Houdlette v. Tallman, 14 Me. 400; Nicholls v. Plume, 1 C. & P. 272; Simmonds v. Humble, 13 C. B. N. S. 258. In Baines v. Jevons, 7 C. & P. 288, it appeared that the defendant had bought of the plaintiff a fire-engine, at the price of £25; and to prove the acceptance of it by the defendant, a witness was called, who stated that the defendant took him into a yard where the fire-engine stood, to show it to him; and that, on his asking the defendant what he meant to do with it, as no one would want it, the defendant replied, that the parish of Dudley would want an engine, as

well as two other persons, whom he named. It was also proved, that, on another person asking the defendant what he meant to do with it, he replied, "I know what I am going to do with it"; and it further appeared, that on Mr. Neal asking if the plaintiff would sell the engine, the defendant said, "Never mind that, I have a concern in that engine." ALDERSON, B., in summing up, said: "The question here is, whether the defendant has accepted this fire-engine? We find that the defendant takes a person to look at it, and says who is likely to want it. You will say whether that is not a dealing with it as his own; and when another witness asks him what he is going to do with it, the defendant does not say that it is not his; but he replies, 'I know what I am going to do with it.' And in his observations to Mr. Neal, he speaks as if it were his own. You will consider whether this convinces you that the defendant treated this fire-engine as his own, and dealt with it as such; for, if so, the plaintiff is entitled to a verdict." See also Saunders v. Topp,

question for the jury, whether, under all the circumstances, the acts which the buyer does or forbears to do, amount to an acceptance.”¹ But when the facts are not disputed, the question whether or not they amount to an acceptance, is for the court.² So too it is the province of the court to decide upon the *competency* of the evidence, and to withhold it from the jury when its legal effect, although tending to do so, is not sufficient to establish an acceptance;³ and, as an acceptance is required to be established *by some clear and unequivocal act of the purchaser*, it follows that, even though there might be *some* evidence tending to show it, yet if it is on the whole insufficient, the court would be at liberty, and are bound to set aside a verdict finding an acceptance therefrom.⁴

4 Exchq. 390; VANDERBURGH, J., in Taylor v. Mueller, 30 Minn. 343; 44 Am. Rep. 203.

¹ Bushel v. Wheeler, 15 Q. B. 442. Houghtating v. Ball, 19 Mo. 84; Wylie v. Kelly, 41 Barb. (N. Y.) 594; Williams v. Evans, 39 Mo. 201; Lillywhite v. Devereux, 15 M. & W. 285; Hunt v. Hecht, 8 Exchq. 814; Chaplin v. Rogers, 1 East, 192; Edan v. Dudfield, 1 Q. B. 302. In Garfield v. Paris, 96 U. S. 557, A contracted by parol in New York, for the purchase of a large quantity of spirituous liquor of B, who, by the agreement, was to furnish certain labels. B delivered them, pursuant to instruction, to A in New York, and shipped the liquor to A in Michigan, where he resided. A, when sued for the price of the liquor, no part of which had been paid, insisted that the contract was not completed until the delivery of the liquor in Michigan, and he relied upon the prohibitory liquor law of that State which declares that all such contracts are null and void. The jury found that the labels added to the value of the liquor, and formed part of the price, and that A accepted them in New York as a part of the goods sold. It was held that, the finding of the jury upon the question of acceptance being final and conclusive, the contract was executed in New York, and was by the laws thereof valid.

² Wartman v. Breed, 117 Mass. 18; Rappalye v. Adey, 65 Barb. (N. Y.) 589; Bailey v. Ogden, 3 John. (N. Y.) 339; Borrowscale v. Bosworth, 99 Mass. 381; Sawyer v. Nichols, 40 Me. 212.

³ BELL, J., in Shepherd v. Pressey, 32 N. H. 56; Howard v. Borden, 13 Allen (Mass.) 299. In Houdlette v. Tallman, 13 Me. 400, the court held that where the law can pronounce on a state of facts relative to a sale of goods, that there is not a delivery and acceptance, it is a question of law to be decided by the court; but where there may be uncertainty and difficulty in determining the true interest of the parties respecting the delivery and acceptance, from the facts proved, the question of acceptance is to be passed upon by the jury. “Where the undisputed facts,” says VANDERBURGH, J., in Taylor v. Mueller, 30 Minn. 343; 44 Am. Rep. 203, “are insufficient, as in this case, to warrant such a finding, the question would not be submitted to the jury.” Stone v. Browning, 68 N. Y. 598; Ham v. Van Orden, 4 Hun (N. Y.) 709; Denny v. Williams, 5 Allen (Mass.) 1; Norman v. Phillips, 14 M. & W. 277; Bushel v. Wheeler, 15 Q. B. 442.

⁴ Denny v. Williams, 5 Allen (Mass.) 1. In Holmes v. Hoskins, 9 Exchq. 152, the defendant verbally agreed to

SEC. 312. Must be Acts of Acceptance.—An acceptance cannot be found *from the mere words of the vendee*,¹ *but there must be some act in reference to the property, or dealing therewith, which he would only have authority to do as owner*,² or the vendee must have exercised such dominion over the property *as owner* as would deprive the seller of his lien for the price.³

purchase of the plaintiff some cattle then in his field. After the bargain was completed, the defendant felt in his pocket for his check-book, in order to pay for the cattle, but finding he had not got it, he told the plaintiff to come to his house in the evening for the money. It was agreed that the cattle should remain in the plaintiff's field a few days, and that the defendant should feed them with the plaintiff's hay, which was accordingly done. The defendant, upon being afterward asked for the money, said he had offered too much for the cattle, and would not have them. It was held that there was no evidence of an acceptance, and that the plaintiff was properly non-suited. It was insisted by the plaintiff's counsel that there was *some* evidence of an acceptance, upon which POLLOCK, C. B., said: "Assuming that there is a *scintilla* of evidence, that is not enough. The general rule is, that where the evidence is so slight that, supposing the jury found one way, the court would set aside the verdict; if in such case the judge directs a new suit, the court will not interfere." See also Taylor v. Mueller, 30 Minn. 343; 44 Am. Rep. 199.

¹ Denny v. Williams, *ante*; Haward v. Borden, *ante*; POLLOCK, C. B., in Holmes v. Hoskins, 9 Exchq. 754.

² In Shindler v. Houston, 1 N. Y. 261, it is said that the acts of part payment, of delivery and acceptance, mentioned in the statute, are *something over and beyond the agreement*, of which they are a past performance, and which they assume as already existing. In Rogers v. Phillips, 40 N. Y. 519, it is said that *acceptance*, requires "that the vendee should act, and that his act should be of such a nature as

to indicate that he received and accepted the goods delivered as his property." Ham v. Van Orden, 4 Hun (N. Y.) 709; Moore v. Bixby, 4 id. 802; Good v. Curtiss, 31 How. Pr. (N. Y.) 4. In Hallenback v. Cochran, 20 Hun (N. Y.) 416, H and C, when near two stacks of H's hay, and in sight of one, orally contracted for a sale of the hay, C agreeing to pay H \$190 therefor, and \$10 more if he should do well with it. H then said to C: "The hay is yours;" and C said: "Yes." Afterwards H called on C for payment for "that hay," and C promised to see B and obtain money with which to make the payment. The day following, C beckoned H to him, and handed him \$25, saying he had not seen B, and adding, "If hay does not do better than it is doing now, I don't know but I shall have a pretty tough bargain." It was held, 1. That there was no delivery or acceptance to take the case out of the statute of frauds. 2. That the payment was not made at the time of the oral contract, and did not render it valid. But as to the last proposition, it must be remembered that the peculiar doctrine in this respect in New York is due to the fact that the statute only gives efficacy to part payment where it is made *at the time* the contract is entered into. As to the rule that there may be a symbolical delivery when the goods are ponderous, and a constructive acceptance, it will be observed that no *act* of the parties at the time was done which would make the rule applicable in this case.

³ Benjamin on Sales, § 145 (4th Am. Edn. Bennetts); ERLE, J., in Parker v. Wallis, 5 E. & B. 21; Shindler v. Houston, 1 N. Y. 261. In

Therefore, it must be shown that the acts of the vendor and vendee have concurred, that is, that the vendor has delivered the property, and that the vendee by some decisive act, has accepted it, and waived all right of objection thereto.¹ ALVEY, J., very clearly states the rule² as follows. He said: "From

Caulkins v. Hellman, 47 N. Y. 449, the court say: "Even the receipt of goods without an acceptance is not sufficient. Some act or conduct on the part of the vendee or his authorized agent manifesting an intention to accept the goods in part performance of the contract, and to appropriate them, is required." *Phillips v. Ocmulgee Mills*, 55 Ga. 633.

¹ PARKE, B., in *Holmes v. Haskins*, 9 Exchq. 755. In *Castle v. Sworder*, 6 Exchq. 832, WELSBY, in the course of his argument, said: "It is a good test whether there has been a receipt of the goods, whether the seller's right of lien remains," to which COCKBURN, C. J., said: "That is another way of putting the question, whether he has parted with the possession."

² ALVEY, J., in *Hewes v. Jordan*, 39 Md. 472. In this case the defendants purchased of the plaintiff, verbally, 3148 pounds of butter grease at eight cents a pound under a representation of the plaintiff that it was all right and free from dirt and salt. On the day of the sale the defendants gave a written order directing the plaintiff to deliver the grease to their drayman, upon which the grease was delivered to the drayman and taken to the store of the defendants, who, upon examination, immediately notified the plaintiff that the grease was not as represented, and that they declined to accept the same, and tendered the grease to him. The court held that the grease was not accepted by the defendants so as to take the case out of the statute. BRAWELL, B., in *Coombs v. Bristol & Exeter Railway Co.*, 3 H. & N. 517, says, "*the party must have done something to waive his right to reject the goods.*" In *Phillips v. Bistolli*, 2 B. & C. 513, the court

held that, "in order to satisfy the statute there must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter with an intention of taking possession as owner." In *Smith v. Roots*, 9 C. & P. 405, it appeared that the defendant, being about to paper his house, called at the plaintiff's premises, and was shown some paper, and the party who showed it him, wrote on the back of the pattern piece the following words as a memorandum of the terms agreed upon: "The paper 2s. 8d., at 1s. 4d. per piece to put up." The plaintiffs only claimed the 2s. 8d. for the paper itself, which had been delivered at the defendant's premises, but not put up. MAULE, J., told the jury that there were two questions for their consideration: First, was there in fact an order given by the defendant for the goods in question? Secondly, if such order was given, then *was there an acceptance by him of the goods with an intent to take them as owner?* The jury found for the defendant. In *Clarke v. Marriatt*, 9 Gill (Md.) 331, the court held, adopting the rule laid down by STARKIE, in the 2d Vol. p. 490, of his work on Evidence, that in order to satisfy the statute, there must be a delivery of the goods with intent to vest the right of possession in the vendee, and *there must be an actual acceptance by the latter with intent to take possession as owner.* See also *Jones v. Mechanics' Bank*, 29 Md. 293, where this rule is re-adopted; also *Hewes v. Jordan*, *ante*. This rule, of course, contemplates that the vendee's right to reject the goods under the contract is gone. That he has so dealt with them as to waive this right, and that the property in the goods

the plain meaning of the terms of the statute itself, independent of all authority, the concurrence of two distinct acts on the part of the vendee would seem to be required; he must accept, and he must actually receive part of the goods, in order to render the contract binding on him. *There may be an actual receipt without any acceptance, and there may be an acceptance without any receipt.* But if both these acts concur with the intention of the parties that the vendee shall take possession of the goods under the contract as owner, then the latter must be taken as having made a final election to accept the goods, or such part of them as he may have actually received, as his property, and, at the same time, assent to their being such as will gratify the contract; and acceptance and receipt being thus complete, to bind the contract, the vendee cannot afterward withdraw his acceptance and reject the goods, except it be on the ground of fraud." "So long, however," says BLACKBURN, J., in his work on Sales, "as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he *ought* to accept, but whether he *has* accepted them. *The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts.*" Where goods are delivered subject to examination, the receipt thereof by the vendor is not an acceptance which will take the case out of the operation of the statute. To constitute an acceptance giving validity to the contract, it is requisite that the purchaser shall have made the examination and pronounced it satisfactory, or shall have dealt with the goods, or done some unequivocal act evincing his intent to accept them unconditionally as his own, and the fact that the goods are as represented by the vendor, and that the contract on his part has been fully performed, does not affect the question of acceptance. Although the refusal to accept be unreasonable, without an acceptance the con-

has vested in him, and that his only deficiency in quantity, is upon the remedy, for any defect in quality, or contract.

tract is not validated. By reposing upon a contract void under the statute, the vendor exposes himself to the risk of an unjust refusal.¹

SEC. 313. Acts of Ownership by Vendee, Evidence of Acceptance; When, Unpacking Goods, etc., are.—“The receipt of part of the goods is the taking possession of them. *When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them.*”² Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not.”³ The delivery, therefore, of the goods to the intended purchaser, and the unpacking of them by him, although it may to a certain extent injure the goods, are not sufficient, *if it appears that he has taken them and had them in his possession for no greater time than was reasonably necessary to enable him to examine their quantity and quality, and to declare his approval or disapproval of them.*⁴ *Nor does the fact that the buyer has used*

¹ *Stone v. Browning*, 68 N. Y. 598. The rule is that taking possession of goods for examination, followed by a refusal to accept them communicated within a reasonable time, is not an acceptance within the statute. *Bacon v. Eccles*, 43 Wis. 227. Where goods are sold by sample, proof that they are *equal* to the sample, and went into the possession of the vendee, is not sufficient to show acceptance. *Remick v. Sandford*, 120 Mass. 309.

² *Damon v. Osborn*, 1 Pick. (Mass.) 476. But according to this case an acceptance and delivery of *part after* the time stipulated, will not take the contract out of the statute as to the remainder, unless the vendee then expressly agrees to take the remainder.

³ BLACKBURN ON SALES, 22.

⁴ In *Curtis v. Pugh*, 10 Ad. & El. 111, the defendant ordered of the plaintiff, orally, three hogsheads of Scotch glue, which was to be of the description called “Cox’s best.” The plaintiff, on Oct. 31, sent two hogsheads (which were all he was able to supply at the time) to a wharf in London, from which the defendant

removed them to his own warehouse, and there unpacked the whole of the glue and put it into twenty bags. On examination, the defendant considered the glue inferior in quality to “Cox’s best glue”; and this was communicated to the plaintiff’s agent on Nov. 1. The plaintiff’s brother, on his behalf, inspected the glue on Monday, Nov. 3, and admitted that some part of the glue (but not an unusual proportion) was of inferior quality; and, on the plaintiff’s part, he offered to make an allowance in the price, but refused to take the glue back, because it had been unpacked and put into bags; and he stated in evidence that it was quite unnecessary to do more than take a cake or two out for the purpose of examining the contents of the hogsheads. The defendant repacked the whole, and sent it back to the plaintiff, who declined to receive it. It was stated in evidence, that glue, if taken out of the barrels in which it is packed, cannot be replaced there in the same condition. Upon the argument, it was insisted by CROWDER, JON

more of the goods than was necessary for ascertaining whether they are fit for his use, amount to an acceptance.¹ The question in all such cases is, whether the acts done by the buyer were done for the purpose of examining the goods, to ascertain whether they corresponded in quantity and quality with those ordered, or whether they were acts of ownership, which would be wrongful if he had not accepted; and the question of acceptance or not, where the facts are in dispute, is for the jury, and it is error for the court to non-suit the

behalf of the plaintiff, that the plaintiff had done more than was necessary for a fair examination, and thereby altered the condition of the goods, and therefore had in effect accepted them. *Phillips v. Bistolli*, 2 B. & C. 511, was cited as showing that it is a question for the jury whether there was a delivery or not. LORD DENMAN, C. J., said: "There must be both a delivery and an acceptance proved. Here the evidence showed a rejection. I thought at the trial that if there had been any unnecessary alteration in the state of the thing while in the defendant's hands, he must be taken to have accepted it. But in that I think I went too far." PATTESON, J., said: "A confusion sometimes arises in applying the statute of frauds to the case of goods sold and delivered. If the purchaser actually takes the goods into his possession, that is an acceptance independent of the statute. But there may be an acceptance sufficient to satisfy the statute, which may yet not support an action for goods sold and delivered." CROWDER continued: "The plaintiff here does not rely on an acceptance of part. The whole quantity of goods is put into his hands; and he is to explain why he does not pay for them." PATTESON, J.: "If he had looked them over and selected them long before, and, when they came to his warehouse, had refused to have them, that would not be a case of goods sold and delivered." WIGHTMAN, J.: "When do you say the delivery here was complete?" CROWDER: "On the 31st of October. A party must not have an unlimited

time to decide whether he will accept goods or not; and here the defendant had so dealt with them that they could not be restored in the state in which they were sent." PATTESON, J.: "Was not it for the jury to say whether the acts of the defendant were done with the intention of taking the goods?" LORD DENMAN, C. J.: "The strongest way of putting the case, for you, would have been that his conduct amounted to a provisional acceptance if the glue should prove to be 'Cox's best glue.'" CROWDER: "After taking the whole out and putting into bags, it was too late to insist on that proviso." WIGHTMAN, J.: "According to you the defendant was bound, whether the glue turned out to be 'Cox's best' or not." COLERIDGE, J.: "*If the party examines the goods, bona fide, with a view of ascertaining the quality, but so carelessly as to do them great harm, can you say that that amounts to an acceptance, whatever be the result of the examination?*" WIGHTMAN, J.: "*Elliott v. Thomas*, 3 M. & W. 170, was cited in moving." That case, as to the point decided, is rather in favor of the plaintiff here than of the defendant. If the purchaser takes goods professedly for the purpose of examination, and keeps them a month, can it be said that he does not accept them? WIGHTMAN, J.: "*If the time were quite unreasonable, the plaintiff might perhaps treat the detention as an acceptance.*" See also *Lucy v. Moufflet*, 5 H. & N. 229.

¹ ALDERSON, B., in *Elliott v. Thomas*, 3 M. & W. 174.

plaintiff where there is *any* evidence from which an acceptance might be found. This rule is well illustrated by *Parker v. Wallis*,¹ in which the facts were that the defendant received some turnip seed under a verbal contract of sale, but at once sent word to the plaintiff that it was "out of condition"; which the plaintiff denied, and refused to receive it back. The defendant then took the seed out of the bags, and spread it out thin, alleging that it was hot and mouldy, claiming that the plaintiff had given him authority to do so. The plaintiff denied both these facts. The plaintiff was nonsuited by WIGHTMAN, J., with leave to enter a verdict for £140, the price of the seed, if the evidence was deemed sufficient to show an acceptance and actual receipt of any part of the goods. The court made the rule absolute for a new trial, but refused to enter a verdict for the plaintiff for the price of the seed, upon the ground that the act of taking the seed out of the bags was susceptible of various constructions. It might have been because the seed was hot, or because the plaintiff authorized it. But that as the evidence stood when the nonsuit was entered, these were not the facts. There remained a third construction, namely, that spreading out the seed was an act of ownership, a *wrongful* act, if the defendant had not accepted as owner, and that *this* was a question for the jury. The court, LORD CAMPBELL, C. J., ERLE and CROMPTON, JJ., WIGHTMAN, J., dissenting, thought that, although the evidence was too slight to warrant entering up a verdict for the price, under the rule, yet regarded it as sufficient to go the jury upon the question whether the seed was spread out thin by the defendant, as an act of acceptance, or because it was out of condition, or by the plaintiff's authority. In this case, it will be observed that the act of spreading out the seed was done *after* the defendant had notified the plaintiff of his refusal to accept, so that, unless done in pursuance of authority from the plaintiff, the act was wrongful, and afforded evidence from which the jury might find that the defendant had waived his objections and accepted the seed. *Having declared his disapproval of the goods*, by dealing with them afterwards, as owner, he must be treated as having reconsidered his rejection of the goods, unless authorized to

¹ *Parker v. Wallis*, 5 E. & B. 21.

so deal with them by the buyer, or necessarily done to save them from deterioration or damage. In *Kent v. Huskinson*,¹ the subject of the action was a bale of sponge sent by the plaintiff, a wholesale dealer in that article, residing in London, to the defendant; a retail dealer residing in Staffordshire. A short time before the sponge was sent by the plaintiff, he had been at the place where the defendant resided, and received from him a *verbal* order, under which he had acted in sending the sponge, and the price charged was 11s. per pound. Soon after the sponge had been sent, the defendant wrote the following letter to the plaintiff: "After receiving a letter from your house in town, stating that the bale of sponge was sent by your direction, I called in a friend or two who are competent judges of the article, and asked them to say, according to the present price of sponge, what it was worth; the answer was, not more than 6s. per pound: I have therefore returned it to you by the same conveyance it was forwarded by to this place. In future, I will select what sponge I may want, personally; otherwise will appoint some confidential friend for that purpose." The plaintiff's son being at the defendant's house soon after the sponge was returned, was told by him that he had resolved not to keep the article, because it was not so good as was expected. It was objected for the defendant, that as this was a contract for the sale of goods of more than £10 value, the case fell within the seventeenth section of the statute of frauds, and LORD ALVANLEY, who tried the cause, was of that opinion; and, upon a motion to set aside this non-suit, declared that he still continued of opinion, that the evidence did not take the case out of the statute; for how was any judgment to be formed as to the nature of the contract between the parties: possibly the order was for the best, possibly for the second best sponge, or for sponge of some peculiar quality; all which circumstances are left in a state of uncertainty. It was this very uncertainty, and the frauds to which it might lead, that the statute was meant to guard against. The only affirmance of any contract to be collected from the evidence, was an affirmance of some sort of order for some sort of sponge, and it appeared, that the moment the article reached

¹ *Kent v. Huskinson*, 3 B. & P. 233.

the defendant, and was examined, he sent it back to the plaintiff, saying that it was not that sort of sponge which he wanted and had ordered. The defendant's letter, therefore, LORD ALVANLEY said, could not be construed into an acceptance; and CHAMBRE, J., said that certainly there was no acceptance of the goods by the defendant, unless a refusal could be considered as amounting to an acceptance.

*There must be an acceptance which completely affirms the contract.*¹

SEC. 314. **Need not be Express Acceptance.**—But, as we have previously stated, this acceptance need not be express, *but may arise constructively out of the acts of the vendee*, especially where the goods are ponderous and incapable of being handed over one to another, but it may be done by that which is tantamount, such as *the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other indicia of property, or the performance of some act of ownership by the vendee*; ² for the larger the bulk, the more impracticable it is that there should be a manual receipt; something there must be in the nature of constructive receipt, as there is constructive delivery.³ And therefore the question as to whether there has been acceptance or not is one of “fact for the jury, not matter of law for the judge.”⁴ The acceptance required by the statute must be very clear and unequivocal; and it is a question for the jury whether, under all the circumstances, the acts which the buyer does, or forbears to do, are an acceptance or otherwise.⁵

SEC. 315. **Instances of Constructive Acceptance and Receipt.**—*The acceptance and retention of a bill of lading by the consignee may be equivalent to an actual acceptance of the goods, if he exercises dominion and ownership over it, or deals with it so as to transfer the right of property in the goods to a third party.*⁶ So, if after

¹ Chaplin v. Rogers, 1 East, 194, per LORD KENYON, C. J.

² Packard v. Dunsmore, 11 Cush. (Mass.) 282; Gray v. Davis, 10 N. Y. 285.

³ Bushel v. Wheeler, 15 Q. B. 442, per WILLIAMS, J.; see also Marshall v. Green, L. R. 1 C. P. D. 35.

⁴ Edan v. Dudfield, 1 Q. B. 306, 307, per DENMAN, C. J.

⁵ Morton v. Tibbett, 15 Q. B. 441;

14 Jur. 609; 19 L. J. Q. B. 382, per LORD CAMPBELL citing Bushel v. Wheeler, ib. 442 n.; and see Parker v. Wallis, 5 E. & B. 21; Nicholle v. Plume, 1 C. & P. 272; Simmonds v. Humble, 13 C. B. (N. S.) 258.

⁶ Meredith v. Meigh, 2 E. & B. 364; 22 L. J. Q. B. 401; Currie v. Anderson, 2 E. & E. 592; 29 L. J. Q. B. 87. See Quintard v. Bacon, 99 Mass. 185; Frostburgh Mining Co. v.

*goods have arrived the vendee does any act to the goods, of wrong if he is not owner of the goods, and of right if he is owner, the doing of that act is evidence that he has accepted them;*¹ as, for instance, if he sells or attempts to sell the goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alters the nature of the property.² Thus, in *Chaplin v. Rogers*,³ the par-

¹ *Parker v. Wallis*, 5 E. & B. 28, per ERLE, J.

² *Lillywhite v. Devereux*, 15 M. & W. 291, per ALDERSON, B. In *Blinkinsop v. Clayton*, 7 Taunt. 597, the defendant bought a horse and took a third person to the vendor's stable, where the horse then was, and offered it to him. Held, an acceptance. See

also *Chapman v. Morton*, 11 M. & W. 534; *Harnor v. Groves*, 15 C. B. 667. See also *Baines v. Jevons*, 7 C. & P. 288, the facts of which are given, ante.

³ *Chaplin v. Rogers*, 1 East, 192. The acceptance in this case was sustained because the defendant had re-sold a part of the hay.

N. E. Glass Co., 9 Cush. (Mass.) 118, where the retention of the bill of lading by the vendee was held under the circumstances not to amount to an acceptance. To satisfy the statute there must be both a *delivery* to and *acceptance* by the buyer of the goods. In *Bill v. Bament*, 9 M. & W. 36, the defendant ordered goods of the plaintiff's agent, and went to the agent's warehouse, where the goods were deposited, and directed a mark to be placed upon them; but having subsequently refused to receive the goods, and an action having been commenced against him, he wrote in the agent's ledger, at the bottom of a page containing the statement of the goods, and headed with the plaintiff's name, the words "Received the above," which he signed. The court held, that this was no evidence of a delivery and acceptance. PARKE, B., there says, after observing that the written receipt was *some* evidence of an acceptance, "But there must also be a *delivery*; and to constitute that, the possession must have been parted with by the owner, so as to deprive him of the right of lien." In *Hanson v. Armitage*, 5 B. & Ald. 557, the evidence was, that a party resident in the country had been in the habit of buying goods of a London merchant, whose habit it was to deliver them to a wharfinger in London, to be forwarded to the buyer by the first ship.

It was held that the receipt of such goods by the wharfinger was not an acceptance by the buyer, sufficient to satisfy the statute of frauds; and ABBOTT, C. J., in giving judgment, referred to *Howe v. Palmer*, 3 B. & Ald. 321, where it was held that there could be no actual acceptance, so long as the buyer retained the right to object to either the quantum or the quality of the goods. And in *Bentall v. Burn*, 3 B. & Cr. 423, it was held, that a vendee's acceptance of a delivery order of the London Dock Company was not an acceptance of the goods themselves, within the statute of frauds. See also *Zwinger v. Samuda*, 7 Taunt. 265. In *Farina v. Home*, 16 M. & W. 119, goods were shipped by the plaintiff from abroad to this country, on the verbal order of the defendant, at a price exceeding £10. They were sent to a shipping agent of the plaintiffs in London, who received them and warehoused them with a wharfinger, informing the defendant of their arrival. The wharfinger handed to the shipping agent a delivery-warrant, whereby the goods were made deliverable to him or his assignees by endorsement, on payment of rent and charges. The agent endorsed and delivered this warrant to the defendant, who kept it for several months, and, notwithstanding repeated applications, did not pay the price of or

ties being together in the farm-yard of the plaintiff, negotiations took place between them for the purchase of a stack of hay standing therein, and after some doubts expressed by the buyer, as to the quality of the hay, it was sold to him at the price of 2s. 6d. per hundred pounds. About two months after this transaction, a farmer agreed with the buyer for the purchase of part of the hay, which was still standing untouched in the farm-yard of the original owner. L was told by the first purchaser to go and see what condition the hay was in, as he had only agreed for it in case it was good. L having examined it reported it to be in a good state, and agreed to give the first purchaser 3s. 6d. per hundred pounds, being told by him that he had agreed to give 3s. 6d. per hundred pounds to the original owner. *L brought away thirty-six hundred weight of the hay, in virtue of this sub-contract; but this act of the second purchaser was without the knowledge and against the direction of the first.* The original seller brought an action against the first purchaser for goods sold and delivered. Two grounds were made for the defendant on the trial; first, actual fraud in the sale; and secondly, the non-compliance with the statute of frauds. The judge left it to the jury to decide, whether the sale was fraudulent, and *whether, under the circumstances, there had been a sufficient acceptance by the defendant.* And they found for the plaintiff upon both points, and gave him damages to the value of the hay, at the price agreed for. A rule *nisi* was obtained for setting aside this verdict, and for a new trial, on the grounds that the judge had left that as a question of fact to the jury, which he himself ought to have decided as an objection in point of law, arising on the statute of frauds, and because the evidence did not warrant the verdict; but the rule was discharged; LORD KENYON, C. J., observing, that *it was proper to leave the question specifically to the jury, whether or not there was an acceptance of the hay by the defendant; and that they had found that there was,* which had put an end to any question of law. That he did not mean to disturb the settled construction of the statute; that in order

charges upon the goods, nor return they would remain for the present in the warrant, but said he had sent it to his solicitor, and that he intended to resist payment, for that he had never ordered the goods; and that bond. Held, that there was no such delivery to and acceptance by the defendant of the goods, as to satisfy the statute.

to take a contract for the sale of goods of this value out of it, there must either be a part-delivery of the thing, or a part-payment of the consideration, or the agreement must be reduced to writing, in the manner therein specified; but he was not satisfied in that case, that the jury had not done rightly in finding a delivery, and that the goods being ponderous and incapable of being passed over to the buyer, an actual delivery was not necessary, but that a delivery and acceptance might be found from the circumstance that the buyer had subsequently dealt with the property as though it was in his actual possession, to wit, by selling a part of it.¹ But such resale or attempt to sell does not of itself *necessarily* constitute an acceptance, but is evidence thereof from which, in connection with the circumstances, the jury may find an acceptance.² The question in all these cases must be submitted to the jury as one of fact, to find *whether there was a delivery by the vendor and an actual acceptance and receipt by the vendee, intended by both parties to have the effect of transferring the right of possession from the one to the other.*³

SEC. 316. Using Goods as Owner.—*If the buyer takes the goods into his possession, and uses them as owner, the fact that it is understood that they will again be returned to the possession of the seller, does not prevent such act from amounting to an acceptance and receipt of the property.* Thus, in an English case,⁴ the defendant agreed to purchase a carriage from the plaintiff, at the same time desiring that certain alterations might be made in it. The alterations were made, and the defendant used it, in order that, as he was going to take

¹ See *Marshall v. Green*, L. R. 1 C. P. D. 35, where BRETT, J., said: "If the sub-sale stood alone, I should have doubted whether it would have been evidence of an actual receipt; but here he did something to the things themselves. I should be inclined to say that where there is no actual removal of the things sold, the question depends on the proposition, that where there has been, during the existence of the verbal contract, for however short a time, an actual possession of the thing sold, and something has been done to the things themselves by the buyer, which would only properly be done by

an absolute owner, there is evidence to go to the jury of an actual receipt of the thing.

² *Morton v. Tibbetts*, 15 Q. B. 428; *Johnson v. Cuttle*, 105 Mass. 407; *Frostburgh Mining Co. v. N. E. Glass Co.*, 9 Cush. (Mass.) 118; *Taylor v. Mueller*, 30 Minn. 343; 44 Am. Rep. 203.

³ *Phillips v. Bistolli*, 2 B. & C. 5142; *Taylor on Evidence*, Sec. 753; *Caulkins v. Hellman*, 47 N. Y.; *ALVEY, J.*, in *Hewes v. Jordan*, 39 Md. 472.

⁴ *Beaumont v. Brengari*, 5 C. B. 301.

it abroad, it might pass the custom-house as a second-hand carriage. He then returned it to the custody of the plaintiff. It was held that there was evidence of a specific bargain for the particular carriage; that the defendant assumed to be the owner; that the plaintiff kept the carriage as agent for the defendant, and that there had been a sufficient acceptance.¹ But the rule is otherwise where the goods are not ready for delivery, and the buyer never actually takes them out of the custody or possession of the seller. Thus, where the defendant employed the plaintiff to construct a wagon, and while the vehicle was in the plaintiff's yard unfinished, procured a third person to fix on the iron-work and a tilt, it was held that there had not been any acceptance, though it might have been otherwise, if the work had been done after the wagon was finished.² Where A contracted with B to purchase of him the trunks of certain oak trees, then felled and lying at Hadnock, about twenty miles from Chepstow, the course of dealing being for A's agent to select and mark those portions which he intended to purchase, and for B to sever the tops and sidings, and float the trunks down the river Wye to A's wharf at Chepstow, and there deliver them, and after a portion of the timber had been so delivered, and the whole paid for, B became bankrupt, whereupon A sent his men to B's premises at Hadnock, and severed and carried away the marked portion of certain trees, it was held that no property in the trees, or any portion of the trees, which had not been delivered by B, passed to A by the contract, and that there was no delivery or acceptance to satisfy the statute, and consequently the assignees of B were entitled to recover the value in trover.³

SEC. 317. *Morton v. Tibbetts*.—In an English case,⁴ the defendant purchased wheat of the plaintiff by sample, and directed that the bulk should be delivered on the next morning to the carrier named by himself, who was to carry it to the market-town of W., and the defendant himself took the sample away with him. On the next morning the bulk was

¹ And see *Wright v. Percival*, 8 L. & W. 155; *Lucy v. Mouffet*, 5 H. & J. (N. S.) Q. B. 258.

² *Maberley v. Sheppard*, 10 Bing. 100; and see *Laidler v. Burlinson*, 2 M. & W. 615; *Jordan v. Norton*, 4 M.

³ *Acraman v. Morrill*, 8 C. B. 449; *Smith v. Surman*, 9 B. & C. 561.

⁴ *Morton v. Tibbetts*, 15 Q. B. 428.

delivered to the carrier, *and the defendant resold it at W. on that day by the sample.* The carrier conveyed the wheat by order of the defendant, *who had never seen it,* to the sub-vendor, who rejected it as not corresponding with the sample; and the defendant, on notice thereof, repudiated his contract with the plaintiff on the same ground. And on this state of facts it was held by the court of Queen's Bench, *that there was evidence to warrant the jury in finding an "acceptance and actual receipt" of the wheat by the defendant,* so as to gratify the statute of frauds. This case established the doctrine that there may be an acceptance and receipt without an examination of the property by the buyer, and a *waiver* by him of the right of rejection, because it does not correspond in quality or quantity with the goods called for under the contract. In other words, *that when the parties have done that which effectually transfers the property in the goods, and the right of dominion over them, to the vendee, he having neglected to examine the goods, is treated as having waived his right of rejecting them, because they do not answer the requirements of the contract, and is left to his remedy upon the contract itself.*¹ If this decision is sustainable at all, it is upon the ground that, as the defendant had taken upon himself to exercise dominion over the wheat, and dealt with it in a manner wholly inconsistent with the right of property being in the vendor, those facts of themselves furnished evidence to justify the jury in finding that the defendant had waived his right to reject the same, and accepted the wheat, *and actually received the same.* LORD CAMPBELL, however, in the course of his very elaborate judgment, maintained that the case did not really require to be maintained, that the acceptance contemplated by the statute is, in all cases, to precede, or at any rate to be contemporaneous with the actual receipt of the goods, and not a subsequent act; *that there may be an acceptance and receipt within the statute, without the purchaser having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract;* and that the acceptance to let in parol evidence of the

¹ That this right may be waived, see *Mason v. Whitbeck Co.*, 35 Wis. 164, in which it was held that where by a contract of sale of both by the plaintiff to the defendant, the plaintiff was to deposit them at a certain place,

and the defendant was not to be liable for the price until they were counted by C, and upon their deposit there they were accepted without count or inspection, he became liable for the price.

contract is a different acceptance from that which affords conclusive evidence of the contract having been fulfilled. Says ALVEY, J.,¹ in commenting upon the doctrine of this case: "Now, it may be readily conceded that the question whether there has been, in any particular case, such *acceptance and actual receipt* of a part of the goods as will bind the contract, may be quite different and distinct from that as to whether the contract has been fulfilled in respect to quantity and quality of the *residue* of the goods, where the vendee has had no opportunity of examining the goods that may be offered in fulfilment of the contract; and where he has done nothing to preclude himself from the exercise of the right to object that they do not correspond with those actually received by him. The effect of the acceptance and actual receipt of part of the goods, however small, is to prove the contract of sale, and it is not inconsistent with this that the vendee should have the right, with respect to the *residue* of the goods when offered in fulfilment of the contract, to object that they are not such in quantity and quality as the contract requires; and in such case the question in dispute can only be determined by the aid of parol evidence. But in all cases where the goods bargained for have been accepted and *actually received* by the vendee, he is thereby precluded, in the absence of fraud, from objecting that they do not correspond with the contract. Any other construction would certainly tend to let in all the evils that were intended to be excluded by the particular provision of the statute; and hence the proposition maintained by LORD CAMPBELL in *Morton v. Tibbett*, that there may be an acceptance and receipt within the statute, without the purchaser having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract, has found but partial favor with the judges of Westminster Hall. Some of those judges have openly expressed their dissent from it, and while it may be taken as the established construction of the statute by the Queen's Bench, it has failed to receive the sanction of the Court of Exchequer."² The doctrine of *Morton v. Tibbett*, *ante*, was

¹ In *Hewes v. Jordan*, *ante*.

Coombs v. Bristol & Exeter R. Co., 3

² *Hunt v. Hecht*, 8 Exch. 814; H. & N. 510. But in these cases the

fully sustained by a later English case,¹ decided by the Court of Appeals. In that case, the plaintiff verbally agreed to sell barley to the defendant, the same to be well dressed and equal to sample. In the defendant's absence his foreman received the barley, which was delivered in several instalments, examined it, and gave a receipt for each instalment, with the words, "Not equal to sample." The defendant afterwards personally examined the barley, and rejected it on the ground that it was not properly dressed and not equal to sample. In an action for goods sold and delivered, the jury found, in answer to questions left to them by POLLOCK, B., at the trial: 1st, that there was an acceptance by the defendant of part of the barley; and, 2dly, that the barley was equal to sample and properly dressed. Upon the argument of a rule for a new trial, obtained on the ground of misdirection, and that the verdict was against the weight of evidence, it was argued for the defendant that there was misdirection on the part of the judge in holding that there was any evidence to go to the jury of acceptance under the statute of frauds, upon the ground, apparently, that the defendant's foreman, having given a receipt with the words, "Not equal to sample," upon it, could not be held to have accepted it within the meaning of the statute, and that the question, therefore, whether it was equal to sample or not, never arose, because there was no valid contract between the parties. The authority of *Morton v. Tibbett* was attacked, but all the lords justices (BRAMWELL, BRETT, and COTTON) referred with approval to the principle there laid down, and held that there was evidence for the jury of an acceptance sufficient to satisfy the statute. That being so, the question whether the barley was equal to sample or not was clearly one for the jury to decide, and they had answered it in favor of the plaintiff. LORD JUSTICE BRETT refers in these terms to the acceptance necessary under the statute: "There must be an acceptance and an actual receipt; *no absolute acceptance, but an acceptance which could not have been made, except on admission of the con-*

criticism was wholly unnecessary, as in those cases there was no act of the buyer which amounted to an acceptance, or which would have warranted the jury in finding one.

¹ *Kibble v. Gough*, 38 L. P. N. S. 204. See also *Currie v. Anderson*, 2 B. & E. 592; *Meredith v. Meigh*, 2 E. & B. 364; *Grimoldby v. Walls*, D. R. 10 C. P. 391.

tract, and that the goods were sent under it. I am of opinion there was a sufficient acceptance under the statute of frauds, although there was (still) a power of rejection." And then, after reviewing the cases, and referring with approval to *Morton v. Tibbett*, he adds: "The goods then were sold *by valid contract*, actually delivered and received, and after this the vendee objects to them. *If they had not been equal to the sample, I say that it was not even then too late to object*; but they were equal to sample and they were (properly) dressed." And COTTON, L. J., says: "All that is wanted is a receipt, and such an acceptance of the goods as shows that it *has regard to the contract*; but the contract may yet be left open to objection." In *Rickard v. Moore*,¹ decided in the same year (1878), the plaintiff verbally sold by sample to the defendant six bales of wool. The goods were sent off by the plaintiff, and delivered at a railway station, and were received there and taken home by the defendant, who then unpacked the wool, and wrote the same day to the plaintiff that two bales were inferior to sample, asking what was to be done in the matter. Plaintiff replied, denying that the bales were not equal to sample. The defendant was away from home when this letter arrived. Four days afterwards he returned home, and after reading the plaintiff's letter, sent the goods back to the railway station, and telegraphed to the plaintiff rejecting them. During these four days the defendant admitted that he had offered the goods for sale in the market, stating, however, that he had not accepted them, and that he would have to make other arrangements before he could sell. In an action for goods sold and delivered, the defendant set up in his plea that there was no acceptance and receipt, and secondly, that the goods were not equal to the sample, and that upon that ground he had properly rejected them. The jury found that two of the bales were not equal to the sample, and HAWKINS, J., thereupon ordered a verdict to be rendered for the defendant. Upon appeal, the case was distinguished from *Kibble v. Gough*, *ante*, upon the ground that in that case the jury had found an acceptance in fact. BRAMWELL, L. J., based his judgment upon the ground that whether there was an acceptance or not, *the defendant*

¹ 38 L. T. N. S. 841.

had done nothing to waive his right to reject the goods, because not equal to the sample, and the jury had found that they were not equal to the sample. Although *Morton v. Tibbett* was not referred to by the court, it is evident that the court recognized the distinction expressed therein between a *conditional* acceptance and absolute one sufficient to take the case out of the statute. As has previously been stated, the rule is, that in order to constitute an acceptance which will satisfy the statute, the defendant's right of rejection because the goods do not correspond in quantity or quality with those called for by the contract must be gone,¹ and we insist that the doctrine of the principal case does not conflict with this proposition, because the acts of the buyer were such as to show a waiver of this right. It is immaterial what judges may have said in commenting upon the doctrine of this case. The fact still remains that the jury found that *the defendant not only accepted, but had also actually received the wheat*, and this being the case, the statute was satisfied, and the only remedy left to the buyer was upon the contract itself, *because by those acts, the contract became valid in law, precisely the same as though it had been in writing*, and the rights and remedies of the parties were the same. The doctrine of this case, as we have seen, has been attacked in the Court of Exchequer;² nor in the broad sense in which it is usually cited, is it adopted by the courts in this country,³ but the actual doctrine of the case, that there may be a waiver of the right to examine the goods, and that *there was evidence to show both an acceptance and receipt of the wheat*, can hardly be questioned.

SEC. 318. **Taylor v. Mueller.**—In a recent Minnesota case,⁴ the parties entered into a verbal agreement of sale, by sample, of two carloads of barley, which the plaintiff was to deliver. The grain had been consigned to the plaintiff, and at the time of the sale was in the cars, and was deposited by him in an elevator, in his own name and on

¹ *Remick v. Sandford*, 120 Mass. 309; *Currie v. Anderson*, 2 E. & E. 592; *Simpson v. Crumdict*, 28 Minn. 352. *v. Crumdict*, 28 Minn. 352; *Edwards v. Grand Trunk Railway*, 54 Me. 111; *Maxwell v. Brown*, 39 id. 98; *Shepherd v. Pressey*, 32 N. H. 55.

² *Ante*, p. 590.

³ *Remick v. Sandford*, 120 Mass. 309; *Hewes v. Jordan*, *ante*; *Simpson* ⁴ *Taylor v. Mueller*, 30 Minn. 343; 44 Am. Rep. 199.

his own account. The barley remained in the elevator for a period of about two months, when the defendant requested that it be sent to the station on the railroad where they usually received their freight, which was accordingly done, the defendants having furnished the manager of the elevator a delivery order, and upon an examination of the barley, they found it unfit for their use, and immediately rejected it, and notified the plaintiffs of the fact. The jury found upon the facts submitted to them, that the defendants had not accepted or received the barley, and the court having refused to instruct the jury that the acts of the defendant constituted sufficient evidence of an acceptance and receipt of the grain, the ruling was sustained upon appeal, VANDERBURGH, J., in a carefully considered opinion, saying: "Whether there was sufficient evidence of such acceptance as to warrant or support a verdict in plaintiff's favor is the principal question for our consideration. Defendants had a short time previously ordered and received at Second Street two other carloads of barley, bought in the same way. The evidence relied on as tending to prove such acceptance appears in the testimony of the manager of the elevator, a witness in plaintiff's behalf, and is as follows: "The circumstances under which I shipped the last two cars are as follows: The defendants ordered it by telephone, same as before, and gave me the number of the cars. I told them I had no order to deliver the grain to them; that I had already delivered them two cars, and that I must insist upon having a written order before delivering any more; and they got me one; that is the order upon which I sent out the last two cars, and which gave me authority to send them all out; 2,460 was one of the cars for which I had no order. So I got this order for all of them. . . . They were ordered to Second Street. There is where they get at them with teams." The order was a direction to the manager to deliver to defendants the two cars previously ordered and sent, and the two cars then delivered and referred to by the witness. Except as above, and save as to previous requests by defendants of plaintiff to send the barley down to Second Street, where they insisted upon having it delivered, there is no evidence of an acceptance by defendants. The evidence shows that the barley

was examined by defendants the next morning after it was ordered from the elevator. Delivery, according to the terms of a written contract, passes the title, but delivery under a contract invalid by the statute of frauds is at the vendor's risk. No act of the vendor alone is sufficient.¹ While the grain remained in the elevator, in the name of the plaintiff, there had been neither delivery nor acceptance. The mere issuance of the delivery order did not constitute an actual delivery of the grain. It was merely a written authority to receive the possession.² The manager requested the order to cover past deliveries and this also, and it was accordingly issued. It would hardly be claimed that the defendants were precluded from rejecting the former two car-loads at Second Street, if found inferior to sample. Nor would it be reasonable, under the circumstances, to construe their omission to examine this grain at the elevator into a waiver or conclusive acceptance. Defendants might have gone and inspected the grain before it was put in the elevator. Doubtless they might have examined it in the elevator also; but manifestly, if, as the jury have found, it was to be delivered at Second Street, this was not contemplated by the parties in making the contract for the delivery of grain at that place to correspond with the sample. Dealing with the property as owner, as by a sale, pledge, or otherwise, or detention of the property, or its control beyond a reasonable time for inspection and rejection, is evidence of an acceptance. This is not, we think, shown to be the case here, upon a fair construction of the evidence. A constructive receipt by the carrier at the elevator, upon plaintiff's order, though upon defendant's request to send it to Second Street, followed as it was by a seasonable inspection and rejection, because not equal to the sample, falls short of an acceptance.³ To constitute an acceptance, within the meaning of the statute, there must have been some act on the part of the defendants showing their intention to accept and appropriate the grain unconditionally as owners.⁴ Now, in this case, whether it be claimed that the

¹ *Stone v. Browning*, 68 N. Y. 598. 449, 455; 7 Am. Rep. 461; *Knight v.*

² *Tanner v. Scovell*, 14 M. & W. Mann, 120 Mass. 219.
28; *Benjamin on Sales* (3d Am. ed.), §§ 776, 806, 815.

⁴ *Simpson v. Crumdict*, 28 Minn. 352, 355; *Stone v. Browning*, *supra*.

³ *Caulkins v. Hellman*, 47 N. Y.

manager of the elevator delivered the grain to the defendants, through the carrier, at Second Street, and he says "the order was his authority for sending the cars out," or that he delivered it to the carrier for the defendants, in either case the defendants had not so far received the actual possession of the grain as to constitute an acceptance of the goods as satisfying the contract.¹ It is well settled that delivery to a carrier, not selected or designated by the buyer, does not constitute an acceptance within the statute.² If the buyer does not accept in person, he must do so through an authorized agent.³ Nor is it material that the buyer has agreed or directed that it should be sent by carrier.⁴ As they did not order or control the cars, and did not remove or disturb the grain, it was sufficient to give notice of their refusal to accept it, leaving it in the custody of the carrier on the transfer track.⁵ The distinction between a mere delivery or receipt, and an acceptance, is not to be lost sight of; and where the goods are sold by sample, the fact must be considered as an element in the case in determining whether the buyer has taken actual or constructive possession as owner, so as to indicate an acceptance thereby; and the burden of proof rests on the vendor to show the intent on the buyer's part to take possession as owner.⁶ If the plaintiff intended to deliver the grain at the elevator, it is manifest the defendants did not intend to accept and receive it there. And as soon as they discovered that he had not delivered what they agreed to buy, they refused to accept it. There was no understanding that the barley was to be inspected at the elevator. Considering the manifest understanding of the defendants as to the proper place of delivery, and the usual course of dealing between the parties, it was not unreasonable for them to request, nor for the plaintiff to send these cars in the usual way, out on a transfer track in the same city. They had a right to rely, as they unquestionably did, upon plaintiff's agreement that the bulk would cor-

¹ Blackburn on Sales, 22-3.

v. Cuttle, 105 Mass. 447; 7 Am. Rep.

² *Caulkins v. Hellman*, 47 N. Y. 449, 454; 7 Am. Rep. 461.

545.

³ *Allard v. Greasert*, 61 N. Y. 1, 6.

⁵ *Grimoldby v. Wells*, L. R. 10 C. P. 391; *Caulkins v. Hellman*, 47 N. Y. 449, 455, 456; 7 Am. Rep. 461.

⁴ *Norman v. Phillips*, 14 M. & W. 277; *Frostburg Mining Co. v. N. E. Glass Co.*, 9 Cush. 115, 120; *Johnson*

⁶ *Remick v. Sandford*, 120 Mass. 309, 316.

respond with the sample. No complaint is made of defendants' *laches* in not promptly rejecting and notifying the plaintiff after they discovered the condition of the grain. Ordinarily, it is considered a question for the jury, whether the acts or conduct of the buyer amount to an acceptance. But where the undisputed facts are insufficient, as in this case, to warrant such a finding, the question would not be submitted to the jury.¹ Here, we think, the defendants, in good faith, were seeking a delivery of the grain purchased by them, and their act in procuring the delivery order, under the circumstances, in ignorance of its condition, had reference solely to its delivery, and was not a decisive and unequivocal act of acceptance thereof as owner. In *Morton v. Tibbett*,² relied on by the plaintiff's counsel, *the defendant himself sent a carrier for the grain purchased by sample, and previous to its arrival resold it by the same sample, before he had inspected it*; and it was held that its receipt by the carrier was not an acceptance, but that his resale of it was evidence of an acceptance."³

SEC. 319. Marking Goods in Name of Vendee. — *The marking of goods with the name of a purchaser with his consent, will, if the other terms of the bargain have been settled, amount to an acceptance of the goods, although the goods remain in the possession of the vendor.* But there must also be a delivery, and to constitute that the possession must have been parted with by the vendor, so as to deprive him of his right of lien.⁴ In *Anderson v. Scot*,⁵ the plaintiff went into the defendant's cellar and selected several pipes of wine, for which he agreed

¹ *Stone v. Browning*, 68 N. Y. 598, 601-2; *Ham v. Van Orden*, 4 Hun (N. Y.) 709; *Shepherd v. Pressey*, 32 N. H. 49, 56-7.

² 15 Q. B. 428.

³ *Frostburg Mining Co. v. N. E. Glass Co.*, 9 Cush. 115, 120; *Johnson v. Cuttle*, *supra*.

⁴ *Dyer v. Libby*, 61 Me. 45; *Rapley v. Adey*, 65 Barb. (N. Y.) 589; *Hodgson v. Le Bret*, 1 Camp. 233; *Balday v. Parker*, 2 B. & C. 37; 3 D. & R. 220; *Proctor v. Jones*, 2 C. & P. 532; *Boulter v. Arnott*, 1 Cr. & M. 333; *Bill v. Bament*, 9 M. & W. 36;

Walden v. Murdock, 23 Cal. 540; *Kealey v. Tennant*, 13 Ir. C. L. Rep. 394; *Byasse v. Reese*, 4 Met. (Ky.) 372; *Dyer v. Libby*, 61 Me. 45.

⁵ 1 Camp. 235. Where goods have been weighed in the presence of the vendee, and placed by themselves in the vendor's warehouse, marked with the vendee's name, and to be delivered when sent for, it was held to be such an acceptance as would take the sale out of the Massachusetts statute of frauds. *Exp. Safford*, 2 Low. (U. S. C. C.) 463; 15 Bankr. Reg. 564.

to pay a certain price: the spills or pegs by which the wine is tested were then cut off; plaintiff's initials were marked on the casks by defendant's clerk in his presence, and the plaintiff took the gauge numbers. LORD ELLENBOROUGH held that upon these facts there had been an incipient though not perfected delivery. This case, however, has been disapproved of.¹ In *Proctor v. Jones*,² it was held that the marking by the vendor of casks of wine lying in the docks with the initials of the purchaser, at his request, and in his presence, *the terms of payment not having been settled at the time*, and consequently the contract not being complete, was not an acceptance under the statute.

SEC. 320. Acceptance of One of Several Articles, Acceptance of All, if Contract Entire. — *Where several articles are bought at the same time, and the contract is proved to be entire, the acceptance of some of them is an acceptance of the whole.* Thus, where the plaintiff sold to the defendant twenty hogsheads of sugar out of a larger quantity which he had in bulk, and filled four hogsheads and delivered them to the purchaser, who accepted them, and afterwards filled sixteen other hogsheads, and requested the defendant to take them away, which he promised to do, it was held that the property in the sixteen hogsheads thereby passed to the defendant, and that his acceptance of the *four* was a part acceptance of the twenty.³ So where the plaintiff and defendant went in one day to several places distant a few miles from each other, where they agreed for the purchase and sale of several lots of timber, and at the last a memorandum of the whole transaction was made and signed by the plaintiff, and *part* of the timber was accepted by the defendant, but he refused to take the rest, it was held that the whole formed one joint contract, and that there had been a sufficient acceptance.⁴ So where the defendant verbally gave a joint order for thirty-five bundles of common steel at 34*s.* a bundle, and for five bundles of cast steel at 48*s.* a bundle, of a specified thickness, and the

¹ 4 Exch. 390; 18 L. J. Exch. 374. See *Saunders v. Topp*, *ante*.

² 2 C. & P. 532.

³ *Rhodes v. Thwaites*, 9 D. & R. 293; *Balday v. Parker*, 2 B. & C. 37;

Scott v. Eastern Counties Railway Co., 13 M. & W. 38. *Field v. Runk*, 22 N. J. L. 525.

⁴ *Bigg v. Wheeling*, 14 C. B. 195.

common steel was accepted, and the question was whether the acceptance of the common steel operated also as an acceptance of the cast steel, it was held that it did,¹ PARKE, B., saying: "The first question in this case is, . . . whether there was a sufficient part acceptance of the goods ordered to take the case out of the statute of frauds. There was a *joint order* for common steel and cast steel: the effect of such joint order, unless explained, would be to make it one entire contract, since we must assume that one article would not have been furnished at one stipulated price, unless the other had been agreed to be paid for at the other price. There was no explanation in this case, and therefore it must be taken to be a joint contract. Then one of the articles, the common steel, was certainly accepted; and the question is, whether that acceptance is sufficient to take the case out of the statute as to the cast steel also; and I am clearly of opinion that it is. The object of the statute was to prevent perjury in proving by parol a contract which was never made in fact; but none of its provisions effectually exclude perjury; they only tend to diminish the probability of its being committed. There may be perjury in swearing to the handwriting of the party charged, or in proving the agency of the party signing on his behalf: neither does the acceptance of the goods or the giving of earnest operate as a certain prevention of perjury. Looking, then, at the words of the statute, *and assuming that there is but one contract, I am of opinion that there was an acceptance of part of the goods sold, within the words and also within the principle of the statute.* I should have been of this opinion, supposing that there were no decided case on the subject. Several cases have, however, been referred to on the part of the defendant, for the purpose of proving that this was not a sufficient part acceptance. In *Thompson v. Maceroni*,² the court held that the acceptance of a small part of goods to the value of £144, made to order, was not sufficient to enable the seller to recover against the buyer for the price of the whole, as for goods *sold and delivered*. The court there say, in effect, that there was no proof of actual *delivery*, nor such proof of actual

¹ *Elliott v. Thomas*, 3 M. & W. 176.

² *Thompson v. Maceroni*, 3 B. & C. 1.

acceptance as to take the case out of the statute of frauds, *i.e.*, the defendant had not accepted the whole, so as that a count for goods sold and delivered could be maintained for the whole. That case seems to me to have turned entirely on the form of the action; the plaintiff could not succeed unless there was a delivery of the whole, or at least an actual acceptance and receipt of the whole, so as to be equivalent to a delivery. In *Hodgson v. Le Bret*,¹ LORD ELLENBOROUGH formed his opinion apparently on the ground of there having been separate contracts; but that case is greatly shaken by *Baldey v. Parker*,² which shows that the contract in *Hodgson v. Le Bret* ought to have been considered as a joint one, and that the act of the purchaser's writing her name on the goods was no acceptance. *Hodgson v. Le Bret*, therefore, is no binding authority. No other case was cited in argument which bears upon the point; and that of *Price v. Lea*,³ referred to by my brother ALDERSON, is rather an authority the other way. HOLROYD, J., there says: 'There was not then one entire contract for both the articles, so as to make the acceptance of one the acceptance of the whole.' The inference, therefore, is (I do not say it is conclusive), that if the contract had been entire, the acceptance of part would have been deemed sufficient to take the case out of the statute as to the whole. I am of opinion, therefore, that there was in this case a sufficient acceptance of part to bring the case within the exception of this section of the statute of frauds; and that the defendants may be made responsible upon this joint contract for two articles, by the receipt of one; *provided both the articles were furnished according to that contract, and were such as ought to have been delivered pursuant to it.* That was to be proved by the plaintiff, and he did give evidence of it for the consideration of the jury." Where a vendee has accepted a *part* of the goods under a contract of sale, he cannot refuse to accept the residue upon the ground that *those accepted* were of inferior quality, but if, when the residue of the goods are tendered, they prove to be of inferior quality, he may reject them, otherwise he must receive them.⁴

¹ *Hodgson v. Le Bret*, 1 Camp. 233. *Scott v. Eastern Co. Railway Co.*, 12

² *Baldey v. Parker*, 2 B. & C. 37. *M. & W.* 33.

³ *Price v. Lea*, 1 B. & C. 156; ⁴ *Cohen v. Platt*, 69 N. Y. 348.

SEC. 321. **When Contract is not Entire.** — *But if the contract is not entire, or if goods are sent in excess of the order, the acceptance of part will not be an acceptance of all.* Thus, where the traveller of A and Co. in London, having called upon B in the country for orders, B gave an absolute order for a quantity of cream of tartar, and offered to take a quantity of lac dye at a certain price, and the traveller said the price was too low, but that he would write to his principals, and if B did not hear from them in one or two days, he might consider that his offer was accepted, and A and Co. never wrote to B, but sent all the goods, it was held that there was not one entire contract for both the articles, and therefore that the acceptance of one was not equivalent to the acceptance of the whole.¹ So where a purchaser ordered four dozen of wine, and the vendor sent him eight dozen, and the purchaser kept thirteen bottles and returned the rest, it was held that there was no part acceptance, but a new contract as to the wine kept, and the purchaser was only liable upon that.² In a Massachusetts case;³ the defendant ordered a cargo of coal of three hundred and seventy-five tons. The vendor shipped to him *three hundred and ninety-two* tons. The court held that the defendant was not bound to receive the substituted cargo.⁴

SEC. 322. **Goods not Made.** — Where an order is given for goods, some of which are ready made at the time of the contract, and the rest are to be manufactured according to order, and the goods which are ready made are afterwards delivered and paid for, *the acceptance of them is a part acceptance of the whole to satisfy the statute*, as the contract is entire. Thus, where certain lamps were ordered by the defendants, all of which were of a well-known and ordinary description, with the exception of a triangular lamp, which was very peculiar, and the ordinary lamps were delivered and paid for, but the triangular lamp was not finished for two years, and when delivered the defendants refused to receive or pay for it, it

¹ Price v. Lea, 1 B. & C. 156.

² Hart v. Mills, 15 M. & W. 85; and see Cunliffe v. Harrison, 6 Ex. 903; Gorman v. Boddy, 2 C. & K. 145; Levy v. Green, 8 E. & B. 575; Dixon v. Fletcher, 3 M. & W. 145; Borrow-

man v. Free, L. R. 4 Q. B. 500; Tarling v. O'Riandorn, L. R. Ir. 82.

³ Rounnel v. Wingate, 103 Mass. 327.

⁴ Hill v. Heller, 27 Hun (N. Y.) 416.

was held that there was but one contract, and that the acceptance of some of the goods was enough to take the case out of the statute.¹ ALDERSON, B., saying: "The articles bargained to be made are treated for this purpose as goods actually made, although they are not in existence at the time of the agreement." In a Colorado case,² this rule was applied in the case of a verbal contract for the sale of lumber, and it may be said to be well established in our courts, and to be in strict conformity with the letter and spirit of the statutes.³

SEC. 323. Goods Sold by Principal as if Agent.—Where a principal enters into a contract for the sale of goods, in which he describes himself as an agent, and the buyer accepts and pays the price of a portion of the goods, he cannot, after notice that the alleged agent was himself the real principal in the transaction, refuse to accept the residue of the goods; and the principal may sue in his own name for the non-acceptance of and non-payment for the residue.⁴

SEC. 324. Mixed Contract.—A contract for the sale of goods, for a sum equal to that named therein, is not the less within the statute of frauds, because it also embraces something to which the statute does not extend, as an exchange.⁵ Thus, where it was agreed by parol between the plaintiff and defendant that the plaintiff should sell the defendant a mare and foal, and should keep them until a certain day at his own expense, and that the plaintiff should also for a given time keep and feed a mare and foal belonging to the defendant, and that in consideration of all this the defendant should fetch away the plaintiff's mare and foal on the day named, and pay him £30, it was held that this, so far as it related to the sale of the plaintiff's mare and foal, was a contract within the seventeenth section of the statute, and void for want of writing.⁶

¹ *Scott v. Eastern Counties Railway Co.*, 12 M. & W. 33.

² *Sloan Saw Mill &c. Co. v. Gutthall*, 3 Cal. 8.

³ *Gault v. Brown*, 48 N. H. 183; *Phelps v. Cutter*, 4 Gray (Mass.) 137; *Knight v. Dunlop*, 5 N. Y. 537; *Marsh v. Hyde*, 3 Gray (Mass.) 331; *Ross v.*

Welsh, 11 id. 235; *Gilman v. Hill*, 36 N. H. 311.

⁴ *Rayner v. Grote*, 15 M. & W. 359.

⁵ *Bach v. Owen*, 5 T. R. 409.

⁶ *Harman v. Reeve*, 18 C. B. 586; 25 L. J. C. P. 257; see also *Benj. on Sales*, 2d ed. 108.

SEC. 325. Vendee Must Have an Opportunity of Judging Whether Goods Correspond with Order.—*There can be no acceptance and actual receipt of goods, unless the vendee has had an opportunity of judging whether the goods sent correspond with the order,¹ or the buyer must have done something which amounts to a waiver of this right.²* Therefore, where the defendant agreed to purchase of the plaintiff bones of a particular kind, to be separated from a heap of various bones, and gave the plaintiff a note addressed to a wharfinger to receive and ship the bones; and the plaintiff accordingly sent to the wharf some bones, which, on inspection, the defendant refused to accept, on the ground that they were not what he bargained for; it was held that although there was a receipt, there was no acceptance to satisfy the statute, as the purchaser of goods to be separated from the bulk could not be said to have accepted them till they were separated, and MARTIN, B., said: "In my opinion, an acceptance, to satisfy the statute, must be something more than a mere receipt; it means some act done after the vendee has exercised, or had the means of exercising his right of rejection."³ In *Coombs v. The Bristol and Exeter Railway Company*,⁴ POLLOCK, C. B., said: "There is a decision in this court, *Norman v. Phillips*,⁵ that *in order to satisfy the statute of frauds, the consignee must have had the power to reject the goods*"; and BRAMWELL, B., said: "*There must be some affirmative act of acceptance to make the contract good*"; and referring to the judgment of LORD CAMPBELL in *Morton v. Tibbett*,⁶ that *there may be an acceptance and receipt of goods by a purchaser within the statute, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract, his lordship said: "I agree with that, but in such a case the party must have done something to waive his right to reject the goods."*⁷

SEC. 326. User or Experiments to Ascertain Quality.—*When the nature of the goods is such that their quality cannot be*

¹ *Smith v. Surman*, 9 B. & C. 561; *Norman v. Phillips*, 14 M. & W. 277. *son*, 6 B. & S. 431; 34 L. J. Q. B. 145; *Heilbutt v. Hickson*, L. R. 7 C. P. 438.

² BRAMWELL, B., in *Coombs v. Bristol &c. Railway Co.*, 3 H. & N. 517; *Morton v. Tibbetts*, ante. ⁴ 3 H. & N. 510; 27 L. J. Ex. 401. ⁵ 14 M. & W. 277.

³ *Hunt v. Hecht*, 8 Exch. 814; 22 L. J. Ex. 293; and see *Smith v. Hud-* ⁶ 15 Q. B. 441. ⁷ *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 481.

ascertained at once, the purchaser is entitled to keep them for a reasonable time, for the purpose of examination. And if a small quantity of the goods have been experimented upon for the purpose of testing their quality, that does not amount to an acceptance, and the purchaser will be entitled, if they are defective, to return them within a reasonable time.¹ *Even if the purchaser has used more of the goods than was absolutely needful to ascertain their quality, it appears that this will not necessarily amount to an acceptance.*² Where the plaintiff sold the defendant a hogshead of cider by sample, as good draught cider, and after the arrival of the cask the defendant on the 28th of May wrote to the plaintiff, "The cider differs from the sample, and the little I have sold has been complained of in every instance; should this continue, I shall be obliged to return it," and the plaintiff did not answer this letter till the 24th of June; and the defendant, in trying to sell the cider, used twenty gallons; but finding it unserviceable, refused to pay for the rest, which he returned to the plaintiff; and it was found as a fact that the twenty gallons were more than sufficient to enable the defendant to test the quality of the bulk; it was held that the omission of the plaintiff to answer the letter of the 28th of May was evidence from which a jury might presume that the plaintiff acquiesced in the further trial of the cider, and that the defendant had not so accepted the bulk as to be bound to pay for the whole.³

SEC. 327. Goods Need Not Be Returned. — *It is not necessary that there should be a return of the goods, either actual or constructive.*⁴ Thus, where goods were sold by sample, and the bulk was found by the purchaser, on inspection after delivery, not to be equal to sample, it was held that the purchaser might reject the goods *by giving notice to the vendor that he would not accept them*, and that they were at the vendor's risk; and that he was not bound to send back, or offer to send back, the goods to the vendor, or place them in neutral custody.⁵

¹ *Cunliffe v. Harrison*, 6 Exch. 903; 20 L. J. Ex. 325; *Heilbutt v. Hickson*, L. R. 7 C. P. 438.

² *Elliott v. Thomas*, 3 M. & W. 170; *Curtis v. Pugh*, 10 Q. B. 111; *Toulmin v. Hedley*, 2 Car. & K. 157.

³ *Lucy v. Mouflet*, 5 H. & N. 229; and see *Grimoldby v. Wells*, L. R. 10 C. P. 391.

⁴ *Lucy v. Mouflet*, 5 H. & N. 233.

⁵ *Grimoldby v. Wells*, L. R. 10 C. P. 391; *Taylor v. Mueller*, 30 Minn. 343.

SEC. 328. **Delay in Refusing may Amount to Acceptance.**—

It appears to be clear that *where goods are forwarded to a vendee, he is bound to notify his refusal, in case he objects to take the goods, to the vendor within a reasonable time*, otherwise he may be considered to have accepted them; whether or not the refusal was within a reasonable time is of course a question of fact for the jury.¹ In *Bushel v. Wheeler*² it appeared that the plaintiffs were the assignees of bankrupts who had carried on business as manufacturers of iron. The defendant had ordered of the bankrupts, before their bankruptcy, certain mill machinery, to be forwarded to him at Hereford by the Hereford sloop. The machinery was forwarded on the 23d of April. On the 25th of April a letter of advice with an invoice at three months' credit was sent to the defendant. The goods arrived at Hereford, and were there placed in the warehouse on the wharf of the owner of the sloop, and the defendant was informed of this immediately. On the 7th of October the goods were repudiated. The defendant proved that after the arrival of the goods at the warehouse he had seen them, and had informed the warehouseman that he, the defendant, did not intend to take them. ERSKINE, J., directed the jury to find a verdict for the defendant, reserving leave to move to enter a verdict for the plaintiff. It was held that the judge ought not to have told the jury that there was no acceptance, and a new trial was directed. LORD DENMAN, C. J., said that "such a lapse of time, connected with the other circumstances, might show an acceptance; whether there was an acceptance or not is a question of fact." WILLIAMS, J., said: "Something there must be in the nature of constructive receipt, as there is constructive delivery. It being, then, once established that there may be an actual receipt by acquiescence, wherever such a case is set up it becomes a question for the jury whether there is an actual receipt." And COLERIDGE, J., said: "In almost all cases it is a question for the jury whether particular instances of acting, or forbearing to act, amount to acceptance and actual receipt. Here goods are ordered by the vendee to be sent by

¹ *Coleman v. Gibson*, 1 Mood. & Blake, 2 C. & P. 514; *Downs v. Marsh*, Rob. 168; *Bowes v. Pontifex*, 3 F. & 29 Conn. 409; *Hirchborn v. Stewart*, F. 739; *Richardson v. Dunn*, 1 G. 49 Iowa 418.
& D. 417; 2 Q. B. 218; *Percival v.* ² 15 Q. B. 442, n.

a particular carrier, and in effect, to a particular warehouse; and that is done in a reasonable time. That comes to the same thing as if they had been ordered to be sent to the vendee's own house, and sent accordingly. In such a case the vendee would have had the right to look at the goods, and to return them if they did not correspond to order. But here the vendee takes no notice of the arrival, and makes no communication to the party to whom alone a communication was necessary."¹ In *Norman v. Phillips*² the defendant, a builder at Wallingford, gave the plaintiff, a timber merchant in London, a verbal order for timber, directing it to be sent to the Paddington Station of the Great Western Railway, to be forwarded to him at Wallingford, as had been the practice between the parties on previous dealings between them. The timber was accordingly sent, and arrived at the Wallingford Station on the 19th of April, and the defendant was informed by the railway clerk of its arrival, upon which he said he would not take it. An invoice was sent a few days after, which the defendant received and kept, without making any communication to the plaintiff himself until the 28th of May, when he informed the plaintiff that he declined taking the timber. It was held that although there might be a scintilla of evidence for the jury of an acceptance of the timber, yet that there was not sufficient to warrant them in finding that there was such an acceptance; and the court set aside a verdict found for the plaintiff as not warranted by the evidence.³ *But the dealings between the parties may be such as to prove that there has been an agreement that the vendee may delay exercising his right of rejection.* Thus in *Cunliffe v. Harrison*⁴ the action was for goods sold and delivered, to recover the price of ten hogsheads of claret. It appeared that the defendants having ordered some hogsheads of claret, the plaintiff in October sent them fifteen, whereupon the defendants by letter informed the plaintiff that they had requested that ten only should be shipped, and that they could take that number only on their

¹ And see *Morton v. Tibbett*, 15 Q. B. 428; 19 L. J. Q. B. 382; *Parker v. Wallis*, 5 E. & B. 21; *Smith v. Hudson*, 6 B. & S. 431; 34 L. J. Q. B. 145; in all of which it was considered that delay in rejecting amounts to some evidence of acceptance.

² 14 M. & W. 277.

³ And see *Nicholls v. Plume*, 1 C. & P. 272; *Gorman v. Boddy*, 2 C. & K. 145.

⁴ 6 Exch. 903.

proving satisfactory, and that they would hold the other five on the plaintiff's account. The plaintiff replied: "You will ascertain in the spring whether you have room for it." The defendants placed the wine in a bonded warehouse in their own names, and shortly afterwards tasted the wine and disapproved of it, and gave the plaintiff notice in April that they would not take any part of it. It was held that there was no acceptance, inasmuch as the defendants under the contract had the option of rejecting the wine in the spring, and they had availed themselves of that option. The same rules apply in cases where the acts of acceptance relied upon are the retention of the bill of lading or other *indicia* of ownership, and the vendee's dealing therewith.¹

SEC. 329. Purchaser Cannot after Acceptance Withdraw unless Fraud.—After the purchaser of goods has once accepted and received them, he cannot withdraw from his bargain except on the ground of fraud,² because the contract by such acts becomes as valid as though it had originally been in writing, and the rights, liabilities, and remedies of the parties become the same as they would be under a valid written contract,³ and the power of rescission, except for fraud, is gone. In a Connecticut case⁴ the court held that a party has no power to rescind a contract of purchase unless there is a provision in it, giving him the right to do so, and that if the property purchased does not answer the terms of the contract, *there being no fraud in the case*, his only remedy is by an action for a breach of the contract.

SEC. 330. Vendor's Consent to Acceptance Necessary.—In order to satisfy the statute there must be an acceptance and actual receipt of the goods, or part of them, with the consent of the vendor, and if before such acceptance the vendor rescinds the contract, the assignees of the buyer, in the case of his bankruptcy, cannot claim them, although they have been delivered to a carrier, consigned to the buyer. In *Smith v. Hudson*⁵ the defendant, on the 3d of November, 1863,

¹ *Quintard v. Bacon*, 99 Mass. 185; *Farina v. Howe*, *ante*.

² *Saunders v. Topp*, 4 Exch. 390; 18 L. J. Ex. 374; *Buckingham v. Osborne*, 44 Conn. 133; *Jackson v. Watts*, 1 McCord. (S. C.) L. 288.

³ *Marsh v. Hyde*, 3 Gray (Mass.) 333; *Townsend v. Hargreaves*, 118 Mass. 325; *Knight v. Mann*, 118 Mass. 145; *Atherton v. Newhall*, 123 id. 141.

⁴ *Buckingham v. Osborne*, *ante*.

⁵ 6 B. & S. 431; 34 L. J. Q. B. 145.

entered into a verbal contract with W to sell him barley by sample. The bulk was taken on the 7th of November by the defendant to a railway station, and left there with a delivery note. It is the custom of the trade for the buyer to compare the sample with the bulk as delivered, and if the examination is not satisfactory, to strike it, that is, either refuse to accept it, or allow it to remain as the property of the vendor; and it was in the power of W to strike the corn if it had not proved according to sample. On the 9th of November W was adjudicated a bankrupt, and on the 11th the defendant gave notice to the station-master not to deliver the corn to the bankrupt or his assignees, or any other person without his written consent. At the time of the notice the bankrupt had given no order or direction respecting the corn, nor had he examined it to see whether the bulk corresponded with the sample, nor had he given any notice to the defendant that he accepted or declined it. On the 1st of December the assignees of W claimed the corn; on the 5th the railway company, on an indemnity from the defendant, delivered it to him. It was held that there was no acceptance sufficient to satisfy the statute.¹

SEC. 331. Contract Disaffirmed by Vendor.—*If at the time when the purchaser of goods takes to them as owner the parol contract has been already disaffirmed by the vendor, there can be no acceptance.* Thus, where it was verbally agreed between the owner of goods and a person who was in possession of them as his tenant, that the tenant might, if he pleased, purchase them at the termination of his tenancy, but that he was not to take them till the money was paid, and at the expiration of the tenancy the buyer tendered the price, but it was refused by the vendor, who denied the validity of the bargain, and after this the vendee proceeded to take away the goods, and the vendor prevented him and took possession of them; it was held that there was no evidence to go to the jury of acceptance and receipt.²

SEC. 332. Acceptance by Agents. Rule in *Rodgers v. Jones*.—In order to bind a principal by the acceptance of an agent, of property sold to him, *it must appear that he*

¹ And see *Bolton v. Lancashire Railway Co.*, L. R. 1 C. P. 431.

² *Taylor v. Wakefield*, 6 E. & B. 765.

*had authority to accept, or that the principal has understandingly ratified his act in that respect.*¹ But authority to buy necessarily carries with it authority to accept.² Thus, in a New York case,³ it was held that an acceptance by a broker of stock which he was authorized to purchase by the principal, was operative to take the case out of the statute. But authority to receive does not necessarily import authority to accept,⁴ nor can this authority be dele-

¹ *Rodgers v. Jones*, 129 Mass. 420; *Caulkins v. Hellman*, 14 Hun (N. Y.) 330; *Aff'd*, 47 N. Y.; *Berkley v. R. & S. R. R. Co.*, 71 N. Y. 205. An acceptance by a clerk or a shop boy will not bind the principal. *Smith v. Mason*, Anth. N. P. (N. Y.) 225. But in all cases *authority to accept*, express or implied, must be shown: *Dyer v. Forrest*, 2 Abb. Pr. (N. Y.) 282; *Outwater v. Dodge*, 6 Wend. (N. Y.) 397; *Remick v. Sandford*, 120 Mass. 309; *Safford v. McDonough*, 120 id. 290; *Spencer v. Hale*, 30 Vt. 314; *Barney v. Brown*, 2 id. 374; *Frostburg Mining Co. v. N. E. Glass Co.*, 9 Cush. (Mass.) 115. In a New York case, it appeared that G and other directors of a fair association ordered goods to be sent by express for the use thereof; that they were sent addressed to G, on his agreement to be individually responsible; and that they were received by T without any objection on the part of G, and used by the association. It was held, to warrant a finding that T was authorized to accept the goods; that the acceptance was sanctioned by G, and that there was a valid delivery within the statute of frauds. *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Field v. Runk*, 22 N. J. L. 525; *Berkley v. R. & S. R. R. Co.*, 71 N. Y. 205; *Rogers v. Gould*, 4 Hun (N. Y.) 229.

² *Snow v. Warner*, 10 Met. (Mass.) 132.

³ *Rogers v. Gould*, 6 Hun (N. Y.) 229.

⁴ In *Jordan v. Norton*, 4 M. & W. 155, it appeared that after some negotiation between the plaintiff and defendant (who lived at the distance

of about thirty miles from each other) for the purchase by the defendant of the plaintiff's mare, she was sent on the 16th of October, 1837, at the defendant's request, to a public-house called the *World's End*, nearly half-way between their houses, for trial by the defendant. The defendant's son, in his presence, rode the mare, and the defendant then offered twenty guineas for her, which was refused by the plaintiff's servant who had her in charge, he having directions from the plaintiff not to take less than £22, and he took her back. The plaintiff, however, was afterwards willing to let the defendant have her for twenty guineas, and wrote to him to that effect. The defendant wrote in answer as follows:

"Uxbridge, October 17, 1837.

"Sir,—I will take the mare at twenty guineas, *of course warranted*; but as you say you have another horse that I shall buy, the same expense will bring the two up; therefore, as the mare lays out, turn her out my mare; and I will meet you at West Wycombe, Saturday or Monday, which day you like and pay you at once.—W. NORTON."

The mare was sent to Wycombe accordingly, but the defendant was not there; two appointments also which were subsequently made, one at the *World's End*, and the other at Wycombe, not having been kept by him, the plaintiff wrote to him on the subject, and received the following answer:

"Uxbridge, October 26, 1837.

"Sir,—Of course I mean to have the mare, and if you had read my

gated to another. Thus, in a Massachusetts case,¹ the defendant made an oral agreement with the plaintiff to

¹ *Rodgers v. Jones*, 129 Mass. 420.

note properly it would have saved you a great deal of trouble. I now say, my son will be at the World's End on Monday, the 30th instant, when he will take the mare and pay you. If you want to go elsewhere, send anybody with a receipt, and the money shall be paid; only say in the receipt *sound, and quiet in harness.*"

On the 27th of October, the plaintiff wrote in answer: "I will send the mare as desired; *she is warranted sound, and quiet in double harness*; I never put her in single harness, as I never wanted it." On the 30th the mare was sent to the World's End, according to the appointment; but the defendant's son not being there, the plaintiff's servant left her in the care of the landlord, with directions not to give her up to the defendant without payment of the price. After he had gone, the defendant's son came, took away the mare without paying for her, rode her home (a distance of eighteen miles) to the defendant's stable, where she was kept two days, and then sent back as being unsound, her legs being at that time swelled; but the plaintiff refusing to receive her, she was turned out of his yard, and it did not appear what had become of her.

The son, who was called as a witness for the defendant, said that his father had given him directions not to bring the mare away from the World's End without the warranty, and was angry with him for having done so. He also, as well as the person who took her back to the plaintiff's, spoke to her unsoundness at that time. This evidence was objected to by the plaintiff's counsel, but the learned judge held that it was receivable in mitigation of damages. In summing up, his lordship told the jury that the plaintiff was bound, in order to recover, to prove a delivery of the mare; but there could not,

under the circumstances of the case, be a complete delivery unless there had been an acceptance on the part of the defendant, whereby he had waived the conditions he had previously required, and which the plaintiff had not complied with, namely, the giving of a receipt, and of a warranty inserted in it: that the question whether there had been such acceptance would depend on whether the defendant had returned the mare within a reasonable time or not; and if they thought he had returned her within a reasonable time, that they should find for the defendant; if not, for the plaintiff. He also desired them to state their opinion whether the defendant's son had authority to take away the mare without a warranty. The jury found that the defendant had not accepted the mare, and that the son had no authority to take her away. The judge thereupon directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for the sum of £21, in case the court should think the direction to the jury, and the admission of evidence of unsoundness, to have been wrong.

Upon appeal the verdict was sustained, PARKE, B., saying: "The first question to be disposed of is whether there is any evidence of a complete contract in writing between the parties. If there was, then the only step necessary to be proved in order to entitle the plaintiff to recover in this action, was to prove the delivery of the mare, and it was not competent to the defendant to annex to it any conditions. It certainly appears that the mare was seen by the defendant, and ridden in his presence, and twenty guineas offered by him for her, prior to the first material letter to which I am about to advert; that is, on the 16th of October. Then, on the 17th, the defendant writes a letter to the plaintiff, which amounts to a proposal to

purchase of him a lot of skins at an agreed price per pound for *merchantable* skins, and directed one Koehler to see them put up and taken away, but directed him not to take them away before the following Friday or Saturday. Koehler only remained to see a part of the skins packed, telling the plaintiff: "There is no need of my staying here any longer. This is a good lot of skins. There is no chance for any question as to quality of skins, and you go ahead and put them up. . . . I know you well enough. I'll take the risk of your doing it all right. You go ahead and put up the skins." The plaintiffs did go ahead, and packed the skins ready for delivery on the next Saturday, and marked each bundle with the defendant's initials. Koehler had previously told them that he would

take the mare on new terms, one of which was not yet arranged between the parties. This letter amounts only to a proposal to give twenty guineas for the mare, provided she were warranted; but the terms of the warranty still remained to be agreed upon. If the parties do not agree upon a warranty which shall be satisfactory to both, there is no complete contract. We are to see, then, whether there was a warranty subsequently agreed on. Next comes the letter of the 26th of October. By that letter the defendant agrees to be bound by the contract, if the plaintiff will give a warranty of a particular description, viz., that the mare is quiet in harness; that is, *prima facie*, in all descriptions of harness. The plaintiff replies, that he will agree, not to the precise terms of the warranty asked for, but only that she is quiet in double harness. The correspondence, therefore, amounts altogether merely to this: that the defendant agrees to give twenty guineas for the mare, if there is a warranty of her being sound and quiet in harness generally, but to that the plaintiff has not assented. The parties never have contracted in writing *ad idem*.

We are then to ascertain, in the next place, whether this is supplied by the parol evidence, or by the acts or conduct of the parties. There is

nothing in the parol evidence to supply it; the question therefore is, first, whether the conduct of the defendant's son at the World's End amounts to an acceptance. It is contended that the defendant is bound by the son's acts on that occasion; but I think he is not, because the son had only a limited authority; and if a party contracts with another through his agent, he can take only such rights as the agent can give; and this is no hardship on the plaintiff, because he was distinctly informed that the son was authorized to receive the mare if a warranty were given that she was quiet in harness. Then the only remaining question is, whether she was in fact accepted by the defendant on the terms of the limited warranty proposed by the plaintiff. That question was left to the jury, and they found it in favor of the defendant. I agree, that if there was a complete contract in writing before, the direction of the learned judge would not have been quite correct; but the question being whether there was an acceptance in fact, the contract not being complete before, the direction was perfectly unexceptionable. The case comes therefore to this: there was no complete contract in writing by which both parties were bound, there was no sufficient delivery to the defendant, and there was no acceptance."

send his team around Saturday morning and take away the skins, but did not do so, and on Saturday night the skins were destroyed by fire. The court held that no sub-acceptance of the skins by the defendants had been shown as would satisfy the statute. In order to constitute an acceptance and receipt under the statute *it is not enough to show that the title has passed to the vendee, but it must also be shown that he has assumed the legal possession of them, either by taking them into the custody and control of himself or of his authorized agent, so as to terminate the vendor's possession of them and lien for the price.*¹ A person cannot act in the double capacity of agent for the vendor in selling and for the vendee in accepting the goods, as the law will not tolerate any man becoming both buyer and seller at the same time, of the same article, and this is so whether his action was attended by the utmost fairness or not.² Thus, in the case first cited in the last note an action was brought to recover of the defendant for twenty-three casks of wine, sold by the plaintiffs through their agent, Gordon, to the defendant by parol contract. The wine was sold in New York City, and by the terms of the contract was to be delivered at Blood's Station, and Gordon was engaged by the defendant to see to the shipping of the wine to him from Blood's Station to New York City. The wine

¹ GREY, C. J., in *Rodgers v. Jones*, 129 Mass. 422; *Atherton v. Newhall*, 123 id. 141; *Safford v. McDonough*, 120 id. 290.

² *Calkins v. Hellman*, *ante*; *N. Y. Cent'l Ins. Co. v. Nat. Protection Ins. Co.*, 14 N. Y. 85; *Claffin v. Farm &c. Bank*, 24 How. Pr. (N. Y.) 15. But this rule does not prevail as to the making of a memorandum of a contract under the statute, at least as to factors and brokers. Thus, in *Durrell v. Evans*, 1 H. & C. 174, the plaintiff, a hop-grower, having sent samples of his hops to his factor, the defendant went to the factor and offered to buy some at £16 16s. a cwt. After some negotiation between the defendant, the factor, and the plaintiff, the latter agreed to sell the hops at that price, and the factor wrote in his book, in the presence of the plaintiff and defendant, a memorandum of the bar-

gain in duplicate, one part of which he headed with the name of the defendant, and the other part with the name of the plaintiff. The defendant requested that the date might be altered, so that by the custom of the hop trade he would have a week's more time for payment. The plaintiff consented, and the alteration was made by the factor, who tore from his book the part of the memorandum headed with the name of the defendant and delivered it to him, and kept the counterfoil in his possession. It was held that there was evidence for the jury that the factor was the agent of both parties for the purpose of drawing a record of the contract binding on them; and that, if he were, the name of the defendant at the head of that part of the memorandum delivered to him was sufficient.

was sold by sample, and the defendant retained the sample at his place of business in New York. The wine was delivered at Blood's Station, and shipped by Gordon from thence to the defendant at New York, who refused to receive it. In action for the price of the wine the plaintiffs relied upon the defendant's arrangement with Gordon, and Gordon's acts thereunder, to establish an acceptance of the wine by the defendant. The court held that there was no evidence of an acceptance, as Gordon could not act as agent for the plaintiffs and the defendant both at the same time, relative to the same transaction.

SEC. 333. A Carrier of Goods has no Authority to Accept.—*A carrier of goods, although named by the vendee, has no authority to accept the goods; he is only an agent for the purpose of receiving and carrying.*¹ Neither a wharfinger, or any

¹ Delivery to a carrier does not operate to take a contract, invalid under the statute of frauds, out of the statute. The delivery of the goods to a carrier does not constitute an acceptance of them by the vendee, thereby validating the contract. Nor does the designation of a carrier in such void contract or order clothe him with power to make such acceptance for the vendee. The vendor, being chargeable in law with knowledge of the invalidity of such contract or order, who delivers the goods to the carrier upon it, takes the risk of their acceptance by the vendee on arrival. *Keiwert v. Meyer*, 62 Ind. 587; *Krudler v. Ellison*, 47 N. Y. 36; 7 Am. Rep. 402. Where the contract of purchase and sale is not valid, or complete by reason of the statute of frauds, the goods being over the value of £10, the title, still remains in the consignor, though the goods have been delivered to the carrier, and the contract still resting in parol, the action must be brought by the consignor. *Coombs v. The Br. & Ex. R. Co.*, 3 Hurl. & Nor. 510. But in this case all the judges, in delivering opinions, admitted the rule to be, that the consignee must have brought the action had the order been in writing, and the sale valid. The

question was whether the property passed to the vendee. If it did, he must sue.

In *Allard v. Greasert*, 61 N. Y. 1, it is expressly decided, that a delivery to a specified carrier does not constitute an acceptance by the vendee, and will not take the contract out of the statute. There being no valid contract at the time of the delivery, the carrier, in such case, has no power to bind the vendee by an acceptance of the goods; though it is held that a vendee may accept before delivery, as if a buyer examines and selects particular articles of goods, and afterward sends a legal, valid order for those selected articles. *Cross v. O'Donnell*, 44 N. Y. 661; 4 Am. Rep. 721.

In *Johnson v. Cuttle*, 105 Mass. 447; 7 Am. Rep. 545, the court uses this language: "Mere delivery is not sufficient; there must be unequivocal proof of an acceptance and receipt by him" (the buyer). "Such acceptance and receipt may indeed be through an authorized agent. But a common carrier (whether selected by the seller or by the buyer), to whom the goods are intrusted without express instructions to do anything but to carry and deliver them to the

other person authorized to receive and keep goods for a vendee, has any authority of acceptance, and if the vendee refuses to take the goods, the person to whom they have been intrusted holds them as agent for the vendor. Where the purchaser of goods ordered them to be forwarded to him in a particular manner, and desired a third person, who then had possession of them, to see them delivered, measured, and put up properly, and they were sent to another warehouse belonging to the vendor, when one of his clerks gave an invoice to the purchaser, who took it and requested a week longer to pay the money, and on the same day gave notice that he would not accept the goods, it was held that there had not been an acceptance.¹ The delivery of goods bought abroad, on board

buyer, is no more than an agent to carry and deliver the goods, and has no implied authority to do the acts required to constitute an acceptance and receipt on the part of the buyer and to take the case out of the statute of frauds. *Snow v. Warner*, 10 Metc. (Mass.) 132; *Frostburg Mining Co. v. New England Glass Co.*, 9 Cush. (Mass.) 115; *Boardman v. Spooner*, 13 Allen, 353; *Quintard v. Bacon*, 99 Mass. 185; *Norman v. Phillips*, 14 M. & W. 277; *Nicholson v. Bower*, 1 El. & El. 172; *Caulkins v. Hellman*, 47 N. Y. 449; *Hausman v. Nye*, 62 Ind. 485. There is no acceptance, although the goods have been delivered to a carrier designated by the vendee, so long as there remains in the vendee a right to object to the quantity or quality thereof, *Lloyd v. Wright*, 25 Ga. 215; and no act of the seller alone can be sufficient, *Shepherd v. Pressey*, 32 N. H. 49; *but there must be some act of both parties, which amounts to a transfer of possession, and an actual receipt of the goods which deprives the seller of his lien for the price.* *Edwards v. Gd. Trunk Railway Co.*, 54 Me. 105. And although an intention of the consignor of goods to vest the right of property in the consignee is clearly proved, still, *until the goods are received by the consignee*, or some evidence is given of his agreement to take them on his own account, the goods are at the risk

of the shipper, and if the shippers are enemies, they are good prize, if captured. *The Francis*, 8 Cranch (U. S.) 359. Goods are received and accepted by the purchaser, within the statute of frauds, when they are transported by the seller to the place of delivery appointed by the agent who contracted for them, and are there delivered to another agent of the purchaser, and are by him shipped to a port where the purchaser had given him general directions to ship goods of the same kind. *Snow v. Warner*, 10 Met. (Mass.) 132. Thus, under a contract for the purchase of railroad ties, to be counted, inspected, and accepted by the purchaser, the ties were delivered at the place agreed on, taken by the purchaser, loaded on cars, and sold; and it was held this was such an acceptance as rendered the purchaser liable on the contract. *White v. Hanchett*, 21 Wis. 415.

¹ *Astey v. Emery*, 4 M. & Sel. 262; *Johnson v. Cuttle*, 105 Mass. 447; *Frostburg Mining Co. v. N. E. Glass Co.*, 9 Cush. (Mass.) 115; *Denmead v. Glass Co.*, 30 Ga. 637; *Lloyd v. Wright*, 25 Ga. 212; *Boardman v. Spooner*, 13 Allen (Mass.) 353; *Shepherd v. Pressey*, 32 N. H. 49; *Hausman v. Nye*, 62 Ind. 485; *Allard v. Greasart*, 61 N. Y. 1; *Maxwell v. Brown*, 39 Me. 98; *Grimes v. Van Vechten*, 20 Mich. 410; *Jones v. Me-*

a ship chartered by the purchaser, is not a sufficient acceptance.¹ Nor does the delivery at a railway station named by the purchaser, in pursuance of a parol order by him, amount to evidence of acceptance.² While a carrier, *even though designated by the vendee*, has no authority to *accept* the goods,³ yet, under such circumstances, the *receipt* of the goods by the carrier, is a receipt by the vendee,⁴ and to this extent, the doctrine of some of the earlier cases holding that a delivery to a designated carrier concludes the bargain, are sustainable,⁵ but the doctrine of these cases to the effect that the carrier may *accept* the goods, as we have seen, is exploded.

SEC. 334. **Disputed Terms though Acceptance.**— *Where goods have been delivered by the vendor and accepted by the vendee, that is evidence of the existence of a contract between the parties.*⁶ There may, however, be terms of the contract which may be disputed, and these are questions of fact to be determined by the jury. Thus, where the plaintiffs sold a piano to the defendant, and delivered it to the defendant, who kept it, but refused to pay for it, alleging that it was delivered upon an agreement that it should remain as security for the payment of certain outstanding bills which he had discounted for the plaintiff, it was held that there was a sufficient acceptance within the statute, and that parol evidence was admissible to show the terms of the bargain.⁷

chanics Bank, 29 Md. 287; Snow v. Warner, 10 Met. (Mass.) 132; Spencer v. Hale, 30 Vt. 315; Rodgers v. Phillips, 40 N. Y. 519.

¹ Acebal v. Levy, 10 Bing. 367; 4 M. & Sc. 217; and see Hanson v. Armitage, 5 B. & Ald. 557; Johnson v. Dodgson, 2 M. & W. 656; Bushel v. Wheeler, 15 Q. B. 445; Norman v. Phillips, 14 M. & W. 277; Meredith v. Meigh, 2 E. & B. 364; 22 L. J. Q. B. 401 (overruling Hart v. Sattley, 3 Camp. 528); Hunt v. Hecht, 8 Exch. 814; Hart v. Bush, E. B. & E. 494; 27 L. J. Q. B. 271; Cusack v. Robinson, 1 B. & S. 299; 30 L. J. Q. B. 261; Stevens v. Stewart, 3 Cal. 140.

² Smith v. Hudson, 6 B. & S. 431; 34 L. J. Q. B. 145.

³ Johnson v. Cuttle, *ante*; Atherton v. Newhall, 123 id. 141; Nicholson v. Bower, 1 El. & E. 172.

⁴ Wilcox Silver Plate Co. v. Green, 72 N. Y. 18; Allard v. Greasart, 61 id. 1.

⁵ Hart v. Sattley, 3 Camp. 528; Dames v. Peck, 8 T. R. 330.

⁶ In Townsend v. Hargreaves, 118 Mass. 325, COLT, J., said: "An acceptance implies the existence of a completed contract, sufficient to pass the title, which is not to be confounded with that actual transfer of possession necessary to defeat the vendor's lien, or right of stoppage *in transitu*, or to show an actual receipt under the statute." Marsh v. Hyde, 3 Gray (Mass.) 33. It proves the existence of a contract of sale. Williams v. Burgess, 10 Ad. & El. 499; Atherton v. Newhall, 123 Mass. 141.

⁷ Tomkinson v. Staight, 17 C. B. 697; 25 L. J. C. P. 85. In this case, JARVIS, C. J., said: "My mind has wavered considerably during the dis-

SEC. 335. What is an Actual Receipt. Distinction between and "Acceptance." Test of Vendor's Lien.—The statute, it will be seen, requires that the goods shall be accepted *and* received, and it is important to remember that *acceptance and receipt are distinct matters*, for there may be a constructive acceptance of goods without receipt, and there may be an actual receipt of goods without acceptance.¹ The test for

cussion of this case. At one time I was inclined to think that there had been no acceptance under the statute; but after looking into the matter, I now think that there was, and that the rule, therefore, ought to be discharged. In order to satisfy the statute on a sale of goods for £10 or more, there must be a writing, or a part payment, or a delivery and acceptance of the goods sold. I think those words mean an acceptance of goods sold at a price of £10, or more. In this case there is no doubt that there was a delivery and an acceptance. It is just as if the defendant had said he accepted on six months' credit. The terms of the contract as to the time when the money is to be paid would then be the question in dispute, there being no doubt about the acceptance. The jury has found the acceptance, and the terms set up by the plaintiffs. This case really does not differ from the ordinary case where a man says to another, 'I have sold you goods for present payment,' and the other answers, 'You sold them on a month's credit, and you have brought your action too soon.' The fact that there is no case to be found in the books to support the defendant's view affords a strong argument to show that it is not in accordance with the meaning of the statute. I think, in this case, the defendant is precluded by the finding of the jury, and that, therefore, the rule ought to be discharged." WILLIAMS, J.: "I think there is no doubt there was a delivery and acceptance under the statute of frauds. No doubt the acceptance was accompanied by a denial by the defendant of one of the terms necessary to support this action, and for some time I felt

great difficulty in saying that any proof could be offered, in lieu of writing, which amounted, instead of a corroboration of the contract, to a denial of it. But, upon the whole, I am of opinion that nothing was intended in the statute, except that the defendant should have accepted in the quality of vendee. The legislature has thought that where there is a fact so consistent with the alleged contract of sale as acceptance, it would be quite safe to dispense with the necessity of a writing. The statute does not mean that the thing which is to dispense with the writing is to take the place of all the terms of the contract, but that the acceptance is to establish the broad fact of the relation of vendor and vendee. Here the relation of vendor and vendee was established, and that was sufficient to satisfy the statute." CROWDER, J.: "I think there was an acceptance within the statute of frauds. The jury having found the acceptance, there is no doubt there was a delivery and acceptance, and that enables the plaintiff to lay before the jury evidence of the terms of the contract. It seems to me, that all that was necessary under the statute was that there should have been a contract of sale, and that, under that contract, the vendee should have accepted; it being a question for the jury on the parol evidence, what were the precise nature and terms of the contract." *Danforth v. Walker*, 40 Vt. 257.

¹ See *Castle v. Sworder*, 6 H. & N. 833; *Marvin v. Wallace*, 6 E. & B. 726; 25 L. J. Q. B. 369; and *Smith v. Hudson*, 6 B. & S. 431; 34 L. J. Q. B. 145. When the purchaser or his assigns and the vendor come to an agree-

determining whether there has been an actual receipt by the vendee, that has been laid down in many cases, is to inquire

ment that the vendor shall cease to hold the goods as vendor, and shall hold them as an agent of the owner of the goods, his rights as vendor are gone; and though the cases now show that such an agreement between the vendor and the original purchaser himself must be proved by stronger evidence than one between him and a subvendee, it does not seem disputed that such an agreement may be made. At one time, the weight of authority was that such an agreement was to be readily presumed; now the weight of authority is, that such an agreement must be very distinctly proved, and that unless the vendor's lien on some part of the goods be gone there cannot be an *actual* receipt. In *Chaplin v. Rogers*, 1 East, 195 *a*, the plaintiff, by a verbal agreement, sold to the defendant for more than £10, a stack of hay, which he represented to be good. The hay remained in the plaintiff's stack-yard. The defendant seems to have expressed an opinion that the hay was bad, but some time after, one Loft, having agreed for the purchase of part of the hay from him at an advanced price, the defendant told him to go and see if it was good. Loft not only thought it good, but took away part without the knowledge or assent of the defendant. The part resold to Loft seems to have been for less than £10, in which case the bargain between him and the defendant may have been binding, so that the defendant could not have revoked the authority given to Loft by it, but the case does not seem to have turned on that. It was left to the jury to say, if there had been an acceptance, and they having found there was, the King's Bench would not disturb their verdict. The expressions used by LORD KENYON in delivering judgment show that he thought there might be an acceptance and actual receipt without a removal of the goods; and that the conduct of the defendant, in bar-

gaining about the resale, was an admission that the contract was good; but he winds up by saying, "as upon the whole justice has been done, the verdict ought to stand;" which almost means that the verdict was contrary to evidence. This case, therefore, does not decide much. In *Anderson v. Scott*, 1 Camp. 235, *n.*, decided in 1805, at *nisi prius*, the action was by the purchaser against the vendor for not delivering wine, according to a verbal agreement for the sale of it for a price exceeding £10. The spills had been cut in the presence of both parties, and the purchaser's initials were marked on the casks, which remained in the vendor's cellars. It was objected, that the bargain was void by the statute of frauds, but LORD ELLENBOROUGH held that the marking of the casks in the presence of all parties amounted to a delivery, and that though there had been an incipient delivery sufficient to take the case out of the statute of frauds, yet that delivery not having been perfected, the plaintiff had a right of action to recover damages for the non-completion of the contract. In *Hodgson v. Le Bret*, 1 Camp. 233, in 1808, the same judge ruled that the purchaser having written her name on some goods to denote that she had purchased them, though they remained in the vendor's shop, took the case out of the statute. PARKE, J., has observed, "that in the older cases the Court did not advert to the words of the statute, 9 B. & C. 577. Certainly, in *Anderson v. Scott*, LORD ELLENBOROUGH, if the words of the statute were present to his mind, must have thought that there might be an actual receipt without any delivery, which is not the popular meaning of the words. It appears from *Hurry v. Mangles*, 1 Camp. 452, that LORD ELLENBOROUGH considered the vendor's rights gone under circumstances but little stronger than those existing in *Hodgson v. Le*

whether the vendor has parted with the possession of the goods, and placed them under the control of the purchaser, so

Bret, and *Anderson v. Scott*. He seems to have thought that the circumstance of the purchaser exercising acts of ownership with the assent of the vendor, proved a complete agreement between them to consider the possession of the vendor as thenceforward that of a mere agent of the purchaser. In *Elmore v. Stone*, 1 Taunt. 458, in 1808, the common pleas acted upon this principle. In that case the defendant, the purchaser of horses under a verbal agreement from the plaintiff, a livery-stable keeper, had sent him word that he would have the horses, but that as he had neither servant or stables, the plaintiff must keep them at livery for him. The plaintiff assented, and moved the horses into another stable (which, however, seems material only as an indication of assent). The common pleas, after taking time to consider, held that the bargain was bound. MANSFIELD, C. J., in delivering the opinion of the court, said, "After the defendant had said that the horses must stand at livery, and the plaintiff had accepted the order, it made no difference whether they stood at livery in the vendor's stable, or whether they had been taken away and put in some other stable. The plaintiff possessed them from that time not as owner (vendor?) of the horses, but as any other livery-stable keeper might have them to keep. Under many events, it might appear hard if the plaintiff should not continue to have a lien upon the horses which were in his own possession, so long as the price remained unpaid; but it was for him to consider that before he made his agreement. After he had assented to keep the horses at livery, they would on the decease of the defendant have become general assets; and so if he had become bankrupt, they would have gone to his assignees. The plaintiff could not have retained them, though he had not received the

price." In *Blenkinsop v. Clayton*, 7 Taunt. 597, in 1817, after a verbal sale of a horse, the purchaser offered to resell it to a third party, but afterwards refused to go on with the bargain: the vendor brought an action for the price, and on proof of the facts above stated had a verdict subject to leave to move to enter a nonsuit, on the ground that there was nothing to satisfy the statute. The court of common pleas thought that there might be some evidence of a delivery, and therefore granted a new trial, not a nonsuit.

In all these cases there seems to have been ample evidence of an acceptance of the goods, but scanty evidence of any actual receipt, if by that is to be understood a taking of possession: indeed, in *Blenkinsop v. Clayton*, as reported, there seems to have been none. After the decision of that last case, the current of authority set the other way. In *Howe v. Palmer*, 3 B. & A. 321, in 1820, there was a verbal sale of 12 bushels of tares at £1 per bushel, the purchaser to send for them. The purchaser said he had seen the tares, and had no immediate use for them; he therefore requested that they might remain at the vendor's till seed time, to which the vendor assented. The vendor then went home, measured out 12 bushels, and set them aside for the purchaser. The King's Bench held that these facts did not amount to an acceptance and receipt. The case was distinguished by the court from *Elmore v. Stone* (1 Taunt. 458), but BAYLEY, J., expressed a doubt if that case was well decided.

In *Tempest v. Fitzgerald*, 3 B. & A. 680, in the same year, the facts were, that a horse was sold by parol for £45 ready money; after the sale, the purchaser mounted him and tried him, and made some changes in his harness; he then asked the vendor to keep him another week; the vendor

as to deprive himself of the right of lien; for so long as the vendor retains his right of lien there can be no receipt. In

said he would to oblige him. Before the week expired the horse died, and the question was who should bear the loss? The King's Bench decided that these acts could not amount to an acceptance and receipt, unless the purchaser had a right under the bargain to take away the horse. He could not take away the horse unless he paid the price, or the vendor waived his right of lien, which the facts did not show.

In *Carter v. Toussaint*, 5 B. & Ad. 855, A.D. 1822, the facts approached very nearly indeed to those in *Elmore v. Stone* (1 Taunt. 458). The defendant purchased by parol from the plaintiffs a horse for £30; the horse was by the defendant's consent and approval fired, and the plaintiffs agreed to keep him for twenty days without charge; at the end of the twenty days the plaintiffs sent the horse to grass at the defendant's request, but entered it in their own name, as the defendant wished to conceal his having bought it. The King's Bench held that the plaintiffs must be taken to have kept possession in their character of vendors until something showed an abandonment of their lien, and that so long as there was nothing to divest them of their possession in the character of vendors, there could be no receipt by the purchaser within the statute of frauds. The court made some attempt to distinguish the case from *Elmore v. Stone*, on the ground that in that case there was a change of stables; but that fact the common pleas had expressly declared to be immaterial. The two cases are agreed in this, that there could not be a receipt till the vendor's lien was divested, but they differ as to what is sufficient to divest the lien.

In *Baldey v. Parker*, 2 B. & C. 87, in 1823, the defendant bargained in the plaintiff's shop for goods above the value of £10: some of the articles were measured in his presence, some

he marked in pencil, some he assisted in cutting from a larger piece. The King's Bench decided that there was no evidence that the bargain was bound. The ground of their decision is concisely stated by Holroyd, J. "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." This case very closely resembles *Anderson v. Scott* (1 Camp. 235, n.), and *Hodgson v. Le Bret* (1 Camp. 233), in the facts. It seems that the difference between the decisions is rather on the practical application of the law than its nature; LORD ELLENBOROUGH seems to have thought that the vendors had abandoned their lien under circumstances which in *Baldey v. Parker* were held not to be any evidence of such abandonment.

In *Smith v. Surman*, 9 B. & C. 561, in 1829, the King's Bench of which LITTLEDALE, J., and PARKE, J., had become members, acted on the principle laid down in *Baldey v. Parker*. In *Maberly v. Shepherd*, 10 Bing. 99, in 1833, the plaintiff, under a verbal contract, was building a wagon for the defendant; the defendant furnished a tilt and iron-work, which he fixed on the wagon whilst it was building. The plaintiff brought an action for goods sold and delivered, and was nonsuited. The court of common pleas refused to set aside the nonsuit. It is difficult to see how any question on the statute of frauds could arise, as according to the report there was not the shadow of proof that the goods were delivered, and there was no count for goods bargained and sold, or for not accepting goods. But the report probably is in some respect inaccurate, for the court

Baldey v. Parker,¹ HOLROYD, J., said: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. *The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods so as to retain his lien, he*

did consider the question of whether the bargain was bound, and they decided it was not. "The plaintiff," said TINDAL, C. J., "retained his lien upon the wagon, and there was nothing in the facts that denoted any intention either to deliver or accept. The circumstances of the case certainly leave it open to doubt whether the statute has been complied with or not, but we think it the duty of the plaintiff to free the case from all doubt, and where any remains, that it is safer to adhere to the plain intelligible words of the statute, which point as clearly as words can to an actual delivery and an actual receiving of part or the whole of the goods sold."

In Bill v. Bament, 9 M. & W. 37, in 1841, the defendant having bargained for a quantity of brushes from the plaintiff, saw them at the warehouse of the plaintiff's agent, Harvey (by name), and directed a boy to alter the mark on them, and to send them to St. Catharine's Wharf. There was a signature obtained by a trick after action commenced to a receipt for the goods. The exchequer set aside a verdict which the plaintiff had obtained for goods sold and delivered and entered a nonsuit. PARKE, B., said, "To take the case out of the 17th section there must be both delivery and acceptance, and the question is, whether they have been proved in the present case. I think they have not; I agree that there was evidence for the jury of acceptance, or rather of intended acceptance. The direction to mark the goods was evidence to go to the jury *quo animo*, the defendant took possession of them, so also the receipt" (*i.e.* the receipt in writing, signed by the defendant) "was some evidence of an accept-

ance; but there must also be a delivery, and to constitute that, the possession must have been parted with by the owner, so as to deprive him of the right of lien; Harvey might have agreed to hold the goods as the warehouseman of the defendant, so as to deprive himself of the right to refuse to deliver them without payment of the price, but of that there was no proof." In Edan v. Dudfield, 1 Q. B. 306, in 1841, the case was reversed: the vendor sold the goods to his factor, who had the goods in his possession at the time of sale. The Queen's Bench held, that if the jury thought he had taken to them as purchaser, it was sufficient to satisfy the statute. In Marvin v. Wallis, 6 E. & B. 726, decided in 1856, after the delivery of a horse by the vendor, he borrowed it of the vendee and retained it as a borrowed horse. It was held that there had been an actual receipt by the vendee, that there had been a change of character in the vendor from that of owner to bailee and agent of the purchaser. This case was almost identical with that of Elmore v. Stone, *ante*, and is a complete reaffirmance of the doctrine of that case, and if Tempest v. Fitzgerald and Carter v. Toussaint, *ante*, could in any sense be said to touch upon the doctrine of Elmore v. Stone, the decision in Marvin v. Wallis restores it. See Queen v. Merriam, 28 Vt. 801; Vincent v. Germond, 11 John. (N. Y.) 283; Bulard v. Wait, 16 Gray (Mass.) 55; Ely v. Ormsbee, 12 Barb. (N. Y.) 570; Whipple v. Thayer, 16 Pick. (Mass.) 28; Tuxworth v. Moore, 9 id. 347; Olyphant v. Baker, 5 Den. (N. Y.) 379; Carter v. Willard, 19 Pick. (Mass.) 1; Appleton v. Bancroft, 10 Met. (Mass.) 286.

¹ 2 B. & C. 44; 3 D. & R. 220.

*prevents the vendee from accepting and receiving them as his own within the meaning of the statute."*¹ It may be said to be the rule according to the best considered cases, that *in order to constitute an acceptance and receipt sufficient to take a verbal contract of sale out of the statute, the title to the goods must vest in the vendee freed from the vendor's lien for the price, and of such an unequivocal character that the vendee's right to reject the goods, except for fraud, is gone.*² So, too, the goods must be received by the vendee, with the assent of the vendor, with the intention of vesting the title to, and control over, the goods in the vendee in pursuance of the contract.³

SEC. 336. Special Lien or Interest. — When it is said that in order to constitute an acceptance and receipt of goods there must be such an actual delivery as destroys the vendor's lien for that price, the rule must be understood as applying only to the general lien which the vendor has, so long as he retains possession, and has no application *where he has parted with the title, but has the right to resume the possession of the goods before they come into the actual possession of the vendee,*⁴ or

¹ *Marsh v. Rouse*, 44 N. Y. 643; *Bailey v. Ogden*, 3 John. (N. Y.) 399; *Russell v. Minor*, 22 Wend. (N. Y.) 659; *Brand v. Focht*, 3 Keyes (N. Y.) 409; *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98; *Safford v. McDonough*, 120 Mass. 290; *Rodgers v. Jones*, 129 Mass. 420; *Townsend v. Hargreaves*, 118 id. 325; *Mann v. Williams*, 37 Me. 555; *Green v. Merriam*, 28 Vt. 801; *Knight v. Mann*, 118 Mass. 143; *Janvrin v. Maxwell*, 35 Wis. 615; *Howe v. Palmer*, 3 B. & Ald. 321; *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Carter v. Toussaint*, 5 B. & Ald. 858; *Phillips v. Bistolli*, 2 B. & C. 514; *Hawes v. Watson*, 2 B. & C. 542; *Smith v. Surman*, 9 B. & C. 577; *Maberley v. Sheppard*, 10 Bing. 101; *Bill v. Bament*, 9 M. & W. 41; *Acraman v. Morrice*, 8 C. B. 449; *Morton v. Tibbett*, 15 Q. B. 428; 19 L. J. Q. B. 382; *Holmes v. Hoskins*, 9 Exch. 766; 23 L. T. 70; *Castle v. Swarder*, 6 H. & N. 833; 30 L. J. Ex. 310; *Cusack v. Robinson*, 1 B. & S. 308; 30 L. J. Q. B. 264.

² *Johnson v. Cuttle*, 105 Mass. 447;

Keiwert v. Meyers, 62 Ind. 587; 30 Am. Rep. 206; *Hausman v. Nye*, 62 Ind. 485; *Gibbs v. Benjamin*, 45 Vt. 130; *Kirby v. Johnson*, 22 Mo. 354; *Stone v. Browning*, 68 N. Y. 598; *Edwards v. Grand Trunk Railway Co.*, 54 Me. 105; *Hooker v. Knabe*, 26 Wis. 511; *Hewes v. Jordan*, 39 Md. 472; *Maxwell v. Brown*, 39 Me. 98; *Russell v. Minor*, 22 Wend. (N. Y.) 659; *Brand v. Focht*, 3 Keyes (N. Y.) 409; *Jackson v. Watts*, 1 McCord (S. C.) 288; *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98; *Young v. Blaisdell*, 60 Me. 272; *Shindler v. Houston*, 1 N. Y. 261; *Safford v. McDonough*, 120 Mass. 290; *Mechanics &c. Bank v. Farmers &c. Bank*, 60 N. Y. 40.

³ *Leven v. Smith*, 1 Den. (N. Y.) 571; *Baker v. Cuyler*, 12 Barb. (N. Y.) 667; *Davis v. Eastman*, 1 Allen (Mass.) 422; *Mechanics &c. Bank v. Farmers &c. Bank*, 60 N. Y. 46.

⁴ *EARL, C.*, in *Cross v. O'Donnell*, 44 N. Y. 661; 4 Am. Rep. 721; *Hodgson v. Lee*, 7 T. R. 436; see also *Pinkham v. Mattox*, 53 N. H. 600.

to cases where he has parted with the title, but still retains the possession as agent or baillie for the purchaser, together with a special interest in the goods arising either out of a usage of the business or created by the contract itself, which entitles him to retain them until the price is paid. Thus, in an English case,¹ wool was bought,

¹ *Dodsley v. Varley*, 12 Ad. & El. 632. In this case the judgment of the court was delivered by LORD DENMAN, who said: "It was contended that there was no contract completed by delivery and acceptance so as to satisfy the statute of frauds. The facts were, that the wool was bought while at the plaintiff's, the price was agreed on, but it would have to be weighed; it was then removed to the warehouse of a third person, where Bamford collected the wools which he purchased for the defendant from various persons, and to which place the defendant sent sheeting for the packing up of such wools. Then it was weighed together with the other wools, and packed, but was not paid for; it was the usual course for the wool to remain at this place till paid for. No wish was expressed to take the opinion of the jury on the fact of Bamford's agency, the defendant's counsel acquiescing in that of the judge, provided the circumstances would amount to it in point of law; we agree that they might; therefore all these must be taken to be the acts of the defendant. Then he has removed the plaintiff's wool to a place of deposit for his own wools; he has weighed it with his other purchases of wools; he has packed it in his own sheeting; everything is complete but the payment of the price. It was argued, that because by the course of dealing he was not to remove the wool to a distance before payment of the price, the property had not passed to him, or that the plaintiff retained such a lien upon it as was inconsistent with the notion of an actual delivery. We think that, upon this evidence, the place to which the wools were removed must be considered as the defendant's warehouse, and that he was in actual possession of it there as soon

as it was weighed and packed; that it was thenceforward at his risk, and if burnt must have been paid for by him. Consistently with this, however, the plaintiff had, not what is commonly called a lien determinable on the loss of possession, but a special interest sometimes but improperly called a lien growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment; but this lien is consistent, as we have stated, with the possession having passed to the buyer: so that there may have been a delivery to and actual receipt by him. This we think is the proper conclusion upon the present evidence, and there will be no rule."

It seems perfectly clear, that if Bamford was the defendant's agent, there was ample evidence of such an appropriation of the specific wools as would convert the agreement to sell into a bargain and sale, and (if the statute of frauds were out of the way) transfer the property and consequent risk to the defendant. The only question, therefore, in the case was, whether the facts showed such a receipt of the goods as is contemplated by the statute of frauds. The argument for the defendant seems to have been that the agreement by which the purchaser was not to remove the wool till paid for, showed that the acts done to the wool could not be done with the intention to give him possession. The court, however, seem to have thought that the facts showed an unequivocal delivery of the actual possession, and consequently that the agreement could only operate by giving such rights to

the price was agreed on, but it would have to be weighed; it was then removed to the warehouse of a third person, where the defendant's agent collected the wools which he purchased for the defendant from various persons, and to which place the defendant sent sheeting for the packing up of such wools. There it was weighed together with the other wools, and packed, but it was not paid for. It was the usual course for the wool to remain at this place till paid for. It was argued that because, by the course of dealing, the defendant was not to remove the wool to a distance before payment of the price, the property in it had not passed to the defendant, or that the plaintiff retained such a lien on it as was inconsistent with the notion of an actual delivery. It was held that the defendant was in actual possession of the wool as soon as it was weighed and packed, and that it was thenceforward at his risk; but that the plaintiff had, not what is commonly called a lien determinable on the loss of possession, *but a special interest, sometimes but improperly called a lien growing out of his original ownership, independent of his actual possession, and consistent with the property being in the defendant, and that he retained this in respect of the terms agreed on, that the goods should not be removed to their ultimate place of destina-*

the vendor as were consistent with an actual delivery of possession to the purchaser. In *Howes v. Ball*, 7 B. & C. 484, it was decided that an agreement of this kind did not confer on the vendor any right either of property or possession in the goods actually delivered, but at most operated as a personal license from the purchaser. Probably the Queen's Bench, in *Dodsley v. Varley*, would have come to the same decision if it had been material to determine what rights Dodsley had in the wool, but that being perfectly immaterial to the question then before the court, they did not consider that point. The judgment, therefore, in *Dodsley v. Varley* cannot be taken to show that the Queen's Bench thought that there might be an actual receipt of goods by the purchaser within the meaning of the statute of frauds without such a taking of possession by him as would completely determine

the vendor's rights in the part of the goods so received, and consequently the case does not affect the authority of *Baldey v. Parker* (2 B. & C. 37) and the other cases before quoted.

It may therefore be considered as settled, that the construction of the statute is that so concisely and clearly stated by HOLROYD, J., in *Baldey v. Parker*, 2 B. & C. 37, and repeated in almost the same terms by PARKE, B., in *Bill v. Bament*, 9 M. & W. 37, namely, that the facts which prove that part of the goods have been delivered and taken into the purchaser's control, so as to determine the vendor's possession of that part, prove that he has actually received them, and that nothing short of such a delivery and taking can amount to an actual receipt by the purchaser within the meaning of the statute of frauds. *Blackburn on Sales*, 15, 16.

*tion before payment.*¹ In a New Hampshire case,² even where the property was sold conditionally, that is, upon the condition that the title should remain in the vendor until it is paid for, it was held by the court that an acceptance and receipt of the property, in this case a sewing machine, upon these terms was sufficient to take the case out of the statute, and to enable the vendor to sue upon and recover the contract price.³

SEC. 337. Goods in Possession of Vendee at Time of Sale. —

When goods are already in the possession of the vendee at the time of sale, it is a question of fact for the jury whether he has so dealt with them since the sale as to show that he considered himself to be the owner. Thus, where goods of the plaintiff were in the defendant's hands for the purpose of being sold by the defendant for the plaintiff, and the defendant told the plaintiff that he would take them himself at a price then named, and the defendant sold them to a third party, and after that, in a written account current delivered to the plaintiff, debited himself with the price of the goods as "sold," not adding to it for whom, it was argued that statute could

¹ *Howes v. Ball*, 7 B. & C. 484; *Aldridge v. Johnson*, 7 E. & B. 885; *Dows v. Montgomery*, 5 Robt. (N. Y.) 445; *Spencer v. Hale*, 30 Vt. 314.

² *Pinkham v. Mattox*, 53 N. H. 600.

³ The rule is, that on a sale of personal property where the right to receive payment before delivery is waived by the seller, and immediate possession is given to the purchaser, and yet, by express agreement, the title is to remain in the seller until the payment of the price, such payment is strictly a condition precedent, and until performance, the right of property is not vested in the purchaser. *Putnam v. Lamphier*, 36 Cal. 151, S. P.; *McBride v. Whitehead*, Ga. Dec. Part I., 165; *Marston v. Baldwin*, 17 Mass. 606; *Dudley v. Sawyer*, 41 N. H. 326; *Fleeman v. McKean*, 25 Barb. (N. Y.) 474; *Herring v. Hoppock*, 3 Duer (N. Y.) 20; *Bennett v. Sims*, 1 Rice (S. C.) 421; *Reeves v. Harris*, 1 Bailey (S. C.) 563; *Bradshaw v. Thomas*, 7 Yerg. (Tenn.) 497; *West v. Bolton*, 4 Vt.

558; *Goodwin v. May*, 23 Ga. 205; *Shireman v. Jackson*, 14 Ind. 459; *Bailey v. Harris*, 8 Iowa, 331; *Patton v. McCane*, 15 B. Mon. (Ky.) 555; *Comstock v. Smith*, 23 Me. 202; *Hussey v. Thornton*, 4 Mass. 405; *Reed v. Upton*, 10 Pick. (Mass.) 522; *Heath v. Randall*, 4 Cush. (Mass.) 195; *Sargent v. Metcalf*, 5 Gray (Mass.) 306; *Blanchard v. Child*, 7 id. 155; *Deshon v. Bigelow*, 8 id. 159; *Dannefelser v. Weigel*, 27 Mo. 45; *McFarland v. Farmer*, 42 N. H. 286; *Herring v. Willard*, 2 Sandf. (N. Y.) 418; *Piser v. Stearns*, 1 Hilt. (N. Y. C. P.) 86; *Price v. Jones*, 3 Head (Tenn.) 84; *Bigelow v. Huntley*, 8 Vt. 154; *Maxwell v. Briggs*, 17 id. 176; *Luey v. Bundy*, 9 N. H. 298; *Buckmaster v. Smith*, 22 Vt. 203; *Root v. Lord*, 23 Vt. 568; *Armington v. Houston*, 38 Vt. 448; but according to the principal case, the seller may waive his right under the conditional sale, and treating the title as having passed, sue for the price.

not be satisfied in the case of one at the time of the bargain possessed of the goods, inasmuch as that circumstance prevented them from being delivered to him, or actually received by him, in virtue of the sale.¹ But LORD DENHAM, C. J., said: "We have no doubt that one person in the possession of another's goods may become the purchaser of them by parol, and may do subsequent acts, without any writing between the parties, which amount to acceptance; and the effect of such acts, necessarily to be proved by parol evidence, must be submitted to the jury. We entertain this opinion after fully considering all the cases cited, especially *Elmore v. Stone*,² *Nicholls v. Plume*,³ *Maberley v. Sheppard*,⁴ agreeing that such evidence must be unequivocal, but thinking the question, whether it is so or not under all the circumstances, fact for the jury, not matter of law for the court. It was indeed contended that parol evidence was inadmissible to explain the character of the acts relied on to prove acceptance; for that to admit it would let in all the inconvenience which the statute was intended to prevent. No case, however, warrants the holding the rule so strict, nor does convenience require it; for where there is the foundation of an act done to build upon, the admission of declarations to explain that act lets in only that unavoidable degree of uncertainty to which all transactions to be proved by ordinary parol evidence are liable. Upon this principle, stat. 9 Geo. 4, c. 14, § 1, on a very analogous matter, has been construed in the Court of Exchequer. For, whilst in *Willis v. Newham*⁵ it was held that part payment, to take a case out of the Statute of Limitations, could not be proved by verbal acknowledgment *only*, it was held in *Waters v. Tompkins*⁶ that, where a sum had been paid without any statement on what account, declarations were admissible to explain on what account." And in a subsequent case ALDERSON, B., said: "No doubt can be entertained after the case of *Edan v. Dudfield*, which was well decided by the Court of Queen's Bench, that this is a question of fact for the jury, and that if it appears that the

¹ *Edan v. Dudfield*, 1 Q. B. 302-306.

² 1 Taunt. 458.

³ 10 Bing. 99; and see *Dodsley v. Varley*, 12 Ad. & El. 632.

⁴ 3 Y. & J. 518.

⁵ 2 C. M. & R. 723; *S. C.* Tyrwh. & Gr. 137.

⁶ 1 C. & P. 272.

conduct of a defendant, in dealing with goods already in his possession, is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the statute of frauds; as for instance if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alters the nature of the property or the like.”¹

SEC. 338. **Goods in Hands of Third Person.** — When, at the time of sale, the goods are in the possession of a third person, there may be a constructive possession in the buyer, *if the goods are accepted by him, and notice given to the bailee of such transfer of title.*² In some of the cases it is held that, in order to make a valid sale of personal property in the possession of a third person, such person must not only be notified of the change of title, *but must also consent to hold it for the buyer.*³ But this doctrine has no support in

¹ Lillywhite v. Devereux, 15 M. & W. 291.

² Cushing v. Breed, 14 Allen (Mass.) 376; Bass v. Walsh, 39 Mo. 192; Zachrisson v. Pope, 3 Bas. (N. Y.) 171; Franklin v. Long, 7 G. & J. (Md.) 407; Boardman v. Spooner, 13 Allen (Mass.) 353; Townsend v. Hargreaves, 118 Mass. 325; Burton v. Curryea, 40 Ill. 320; Simmonds v. Humble, 13 C. B. N. S. 262; Leonard v. Davis, 1 Black (U. S.) 476; Bentnall v. Burn, *ante*; Farina v. Home, *ante*; Williams v. Evans, 39 Mo. 201; Harkins v. Baker 46 N. Y. 666; Godts v. Rose, 17 C. B. 229; Boynton v. Veazie, 24 Me. 286; Jewett v. Warren, 12 Mass. 300; Cooper v. Bill, 3 H. & C. 722.

³ Bassett v. Camp, 54 Vt. 232; Bentnall v. Burn, *ante*. In Blackburn on Sales, 28, that learned author says. “There can be no question that an actual removal of the goods by the purchaser is an actual receipt by him; and when the goods are in the hands of a third party it is pretty clear that as soon as the vendor, the purchaser, and the bailee agree together, that the bailee shall cease to hold the goods

for the vendor and shall hold them for the purchaser, that is an actual receipt by the purchaser, though the goods themselves remain untouched. They were in the possession of an agent for the vendor, and so, in contemplation of law, in that of the vendor himself, and they become in the possession of an agent for the purchaser, and so in that of the purchaser himself; and it can make no difference, whether this is by a change in the person of the holder of the goods or merely in his character. So far the question of whether there has been a receipt of part of the goods by the purchaser or not is identically the same as whether the vendor has so parted with possession, as to put an end to his lien as to that part of the goods. Thus, in Bentall v. Burn, *ante*, in 1824, the King’s Bench decided that the acceptance and receipt of a delivery order, not lodged with the warehousemen, did not bind the bargain: till the warehousekeepers assented to hold the property as agents to the vendee, they held it as agents of the vendor, and

reason, and places it within the power of a naked bailee to prevent a valid sale of the property without an actual change of possession, and clothes him with an authority and control over the property never contemplated, and for which, at least as affecting the validity of the sale as between the parties, there is no conceivable reason, however it might be as to attaching creditors. In the case of warehousemen, whose business is peculiar and largely regulated by usage, and who, by law, are given powers which individuals not warehousemen do not possess, the rule might be applicable, but in the case of individuals holding the goods of another as a mere bailee, there is no sort of reason for holding that the validity of the sale is dependent upon the circumstance of his refusing or assenting to hold the property for the buyer.

SEC. 339. Receipt by Acceptance of Delivery Order or Dock Warrant. — *The acceptance and receipt by the vendee of a delivery order or dock warrant is not sufficient acceptance and receipt until the warehouseman or dock-keeper has accepted the order or warrant, and has agreed to hold the goods for the vendee. And the delivery order or warrant may be countermanded before it has been accepted by the warehouseman or dock-keeper.¹ But after such acceptance the warehouseman or dock-keeper becomes the agent of the vendee, and there is a complete constructive delivery to him.² Where, on the sale of*

whilst they did so, there could be no actual acceptance (receipt?) of the goods" Boardman v. Spooner, 13 Allen (Mass.) 357; Appleton v. Bancroft, 10 Met. (Mass.) 236; Tuxworth v. Moore, 9 Pick. (Mass.) 347; Chapman v. Searle, 3 id. 38; Chase v. Willard, 57 Me. 157; Warren v. Milliken, 57 id. 97; Linton v. Butz, 7 Penn. St. 89; Hatch v. Lincoln, 12 Cush. (Mass.) 31; Hatch v. Bayley, 12 id. 27.

¹ Lackington v. Atherton, 7 M. & Gr. 360; Boardman v. Spooner, 13 Allen (Mass.) 353.

² Pearson v. Dawson, E. B. & E. 456; Harman v. Anderson, 2 Camp. 243; Dickinson v. Marrow, 14 M. & W. 713; CHAPMAN, J., in Hunter v. Wright, 12 Allen (Mass.) 548. In King v. Jarman, 35 Ark. 190, the parties orally agreed for the purchase

and sale of a lot of cotton consisting of six bales' weight, and stored in a warehouse, and the seller gave the purchaser an order on the warehouseman for it. The seller notified the warehouseman of the sale, and the purchaser applied to him for the cotton, but delivery was postponed by agreement of the warehouseman and the purchaser until the next morning. During the night the warehouse, together with all the cotton but one bale, was destroyed by fire. It was held that there had been a sufficient acceptance and receipt of the cotton to take the contract out of the statute, and that the loss fell upon the purchaser. In Harkins v. Baker, 46 N. Y. 666, a broker offered to the defendants ten casks of prunes, which they orally agreed to take. The broker

wine in the warehouse of the London Dock Company, a delivery order was given to the vendee, it was held that the acceptance of the delivery order by the vendee was not an actual acceptance (receipt?),¹ the court saying: "There could not have been any actual acceptance of the wine by the vendee until the dock company accepted the order for delivery, and thereby assented to hold the wine as the agents of the vendee. They held it originally as the agents of the vendors, and as long as they continued so to hold it the property was unchanged. It has been said that the London Dock Company were bound by law, when required, to hold the goods on account of the vendee. That may be true, and they might render themselves liable to an action for refusing so to do, but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance of them by him until he actually took possession of them."² So where goods were sent to a shipping agent of the plaintiffs in London, who received them and warehoused them with a wharfinger, informing the defendant of their arrival, and the wharfinger handed to the shipping agent a delivery-warrant whereby the goods were made deliverable to him or his assignees by indorsement, on payment of rent and charges, and the agent indorsed and delivered the warrant to the defendant, who kept it for several months, and, notwithstanding repeated applications, did not pay the price of or charges upon the goods, nor return the warrant, but said he had sent it to his solicitor, and that he intended to resist payment, for that he had never ordered the goods, and that they would remain for the present in bond. It was held on the authority of *Bentall v. Burn*,

executed and delivered to the plaintiffs a bought and sold note in the defendants' name for the prunes, and received from the plaintiffs a warehouse order of delivery therefor, which order he delivered to the defendants, who received and retained it, and requested the broker to sell the goods for them. The ten casks had been weighed and separated from the others for the defendants, and were all which they owned at the warehouse. It was held that there had been a suf-

ficient acceptance and receipt by the defendants.

¹ See *Blackburn on Sales*, 29; *Benjamin on Sales*, 2d ed. 133.

² *Bentall v. Burn*, 3 B. & C. 423; Ry. & M. 107; 5 D. & R. 284. See also *Harman v. Anderson*, 2 Camp. 243; *Lucas v. Dorrien*, 7 Taunt. 278; *Bill v. Bament*, 9 M. & W. 36; *Lackington v. Atherton*, 7 M. & Gr. 360; 8 Sc. (N. R.) 42; *Woodley v. Coventry*, 2 H. & C. 164.

supra, that though there was evidence of acceptance there was none of receipt.¹ In *Farina v. Home*,² the foregoing case was followed. There the wharfinger gave the vendor a delivery-warrant, making the goods deliverable to him or to his assignee by indorsement on payment of rent and charges. The vendor forthwith indorsed and sent it to the purchaser, who kept it ten months, and refused to pay for the goods or to return the warrant, saying he had sent it to his solicitor, and intended to defend the suit, as he had never ordered the goods, adding that they would remain for the present in bond. Held to be no actual receipt, but sufficient evidence of acceptance to go to the jury. In *Godts v. Rose*,³ the vendor had the goods transferred by his warehouseman, on the books of the latter, to the buyer's order, and took the certificate of transfer, which he sent by his clerk to the buyer with an invoice for the goods. The clerk handed the invoice and warehouseman's certificate together to the buyer, and asked for a check for the amount of the invoice, which was refused, the buyer alleging that he was entitled to fourteen days' credit. The clerk then asked for the warehouse certificate back again, but the buyer refused to give it up, and the vendor thereupon countermanded the order on the warehouseman; but the purchaser had already got part of the goods, and the warehouseman, thinking that the property had passed, delivered the remainder to the purchaser. The vendor then brought trover against the purchaser, and the court held that the delivery to the purchaser of the warehouseman's certificate was conditional only, and dependent upon his giving a check; that the actual receipt, therefore, had not taken place, the tripartite contract not being complete.

SEC. 340. Possession Taken by Vendee.—Goods in the possession of a third person may be delivered by the vendor, allowing the vendee to take possession of them, and to perform acts of ownership, though they are not actually removed. Thus, where trees on the land of a third person were sold,

¹ *Farina v. Home*, 16 M. & W. 119; *lams*, 2 Man. & Gr. 650; *Godts v. Rose*, 17 C. B. 229. and see *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J. Q. B. 401; *Searle v. Keeves*, 2 Esp. 598; *Salter v. Wool-*

² *Farina v. Home*, 16 M. & W. 119.

³ *Godts v. Rose*, 17 C. B. 229, and 25 L. J. C. P. 61.

the vendee to have the power of removing them when he pleased, and the vendee performed acts of ownership over them, it was held that the transfer of the whole was complete.¹ But the acts of the parties must be of such a character as to unequivocally place the property *within the power, and exclusively under the control of the buyer* as owner, discharged of all lien for the price.²

SEC. 341. Symbolical Delivery. Goods Need not be Removed from Possession of Vendor. — *It is not necessary, in order to constitute a valid receipt of goods within the statute, that they should be removed from the possession of the vendor; as, if the contract is complete, and by their acts the parties evince an intention to change the character of the holding by the seller from that of owner to that of bailee for the purchaser, the delivery is complete, and from that time the title to the goods is in the vendee, and the contract is taken out of the statute.*³ In the language of BLACKBURN, J., "though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and the vendee that the possession shall thenceforth be kept *not as vendor, but as bailee for the purchaser*, the right of lien is gone, and then there is

¹ Tansley v. Turner, 2 Bing. (N. C.) 151; and see Cooper v. Bill, 3 H. & C. 722. In Marshall v. Green, 1 C. P. D. 35, where timber was sold growing upon land in the possession of a tenant, and the buyer cut down some of the trees and sold the tops and stumps to a third person before any of the trees had been removed, it was held that there was sufficient evidence of an actual receipt and acceptance of a part of the goods.

² Marsh v. Rouse, 44 N. Y. 643; French v. Freeman, 43 Vt. 93. Thus, in one case C orally agreed to buy a scale of G for \$60, payable on delivery. G's carman took the scale on a truck to C's office, said he had it on the truck, handed G's bill to C, and was directed to drive it into the back yard. In attempting to do so he accidentally caused the scale to be broken. It was held that there was no receipt of the scale by C sufficient to take the case out of the statute.

Grey v. Cary, 9 Daly (N. Y. C. P.) 363; Yale v. Seeley, 15 Vt. 221.

³ Webster v. Anderson, 42 Mich. 554; Green v. Merriam, 28 Vt. 801; Beaumont v. Brengeri, 5 C. B. 301; Anderson v. Scott, 1 Camp. 235; Chaplin v. Rogers, 1 East, 192; Marvin v. Wallis, 6 El. & B. 726; Barrett v. Goddard, 3 Mass. (N. S.) 107; Wild v. Came, 98 Mass. 152; Janvrin v. Maxwell, 23 Wis. 51; Rappleye v. Adey, 65 Barb. (N. Y.) 589. But in all such cases the contract must be complete in all its details, and there must nothing be left for future settlements, and the lien of the vendor for the unpaid purchase money must have been waived. Safford v. McDonough, 120 Mass. 280; Means v. Williamson, 37 Me. 556; Green v. Merriam, 28 Vt. 801; Elmore v. Stone, ante; Brown v. Hall, 5 Lans. (N. Y.) 177; Janvrin v. Maxwell, 23 Wis. 51; Marsh v. Rouse, ante; Safford v. McDonough, 120 Mass. 290.

a sufficient receipt to satisfy the statute.”¹ In *Webster v. Anderson*² it was orally agreed between a farmer and his employee that the latter should accept certain hogs in payment for his services. They were pointed out, but were to remain in the pasture with other hogs until the employee found an opportunity to sell them; and it was held a sufficient delivery against the seller’s creditors.³ In *Ex parte Safford*⁴ a lot of specified hides were sold, weighed, marked with the vendee’s name, and placed by themselves in the vendor’s warehouse, and he was to send for them when he pleased, and it was agreed that they should be considered as insured for his benefit by the vendor’s general insurance. It was a sufficient acceptance and receipt, **LOWELL, J.**, remarking that “there is no doubt that the vendor may himself be the warehouseman or bailee.”⁵ In a Vermont case⁶ the plaintiff sold to

¹ *Cusack v. Robinson*, 1 B. & S. 308, *per* BLACKBURN, J.; *Sloan Saw Mill & Co. v. Guttshall*, 3 Col. 8; *Safford v. McDonough* 120 Mass. 290; *Wild v. Came*, 98 id. 152; *Knight v. Mann*, 118 id. 143; *Janvrin v. Maxwell*, 35 Wis. 615; *Means v. Williamson*, 37 Me. 556; *Chase v. Willard*, 57 Me. 157; *Barrett v. Goddard*, 3 Mas. (U. S.) 107; *Hatch v. Lincoln*, 12 Cush. (Mass.) 31.

² *Webster v. Anderson*, 42 Mich. 554.

³ See also *Jewett v. Warren*, 12 Mass. 300; *Green v. Merriam*, 28 Vt. 801; *Arnold v. Delano*, 4 Cush. (Mass.) 40.

⁴ *Ex parte Safford*, 2 Lowell (U. S. C. C.) 563.

⁵ *Elmore v. Stone*, 1 Taunt. 458; *Calkins v. Lockwood*, 17 Conn. 154. See statement of case *ante*, p. 571. In *Marvin v. Wallis*, 6 El. & B. 726, the plaintiff sold a horse to the defendant, and requested the defendant to lend it to him, and kept it with the defendant’s consent. It was held that there had been a sufficient delivery. In *Phillips v. Hummell*, 4 Me. 376, under a similar state of facts except that the subject of the sale was a yoke of oxen, it was held that there had

been no delivery. In *Bailey v. Ogden*, 2 John. (N. Y.) 399, the rule that so long as the contract is incomplete in any of its requirements there can be no acceptance and receipt while the goods are in the hands of the vendor was well illustrated. In that case the sugar, which was the subject of the sale, was in the possession of the vendor, an agreement of sale was entered into, and all the terms agreed upon, a minute of the import entry was delivered, indorsed notes were to be given for the price, and the goods were to be stored by the vendor at the purchaser’s expense. It was held that there was no actual delivery, **KENT, C. J.**, saying: “The circumstances which are to be tantamount to an actual delivery should be very strong and unequivocal, so as to take away all doubt as to the intent and understanding of the parties. The agreement about storage might have been conditional, and depending upon the final completion of the contract, as to the giving of the notes with a competent indorser, and the taking of the minute of the import entry was at least but an equivocal act. It was not an *inducium* of ownership.” In *Vincent v. Germond*, 11 Johns. (N. Y.) 282,

⁶ *Green v. Merriam*, 28 Vt. 301.

the defendant sixteen sheep, then in his (the plaintiff's) yard. All the terms of the sale were agreed upon, and the sheep were then driven into another yard of the plaintiff, and the defendant agreed that if the plaintiff would keep them for him until a certain day, he would call and get them, and pay for the sheep *and for the keeping of them*. The court held that this constituted a sufficient acceptance and receipt.¹ In *Chaplin v. Rogers*² the fact that the vendee of a stack of hay had resold part of it to a third party, who had taken away such part, was held to be sufficient to prove that the hay had been received by the purchaser, though he had not attempted to remove it from the vendor's premises. In *Elmore v. Stone*³ it appeared that the plaintiff, a livery-stable

cattle were sold to remain in possession of the vendor, at the vendee's risk, until he called for them, and he afterward took them without saying anything to the vendor. It was held a sufficient delivery. "It may be questioned," said the court, "whether what took place between B. Germond and the plaintiff, if standing alone, would amount to a delivery; but the subsequent conduct of the other defendant in taking away the three oxen, without any new contract, affords sufficient ground to infer a delivery. The defendants dealt with the oxen as their own, and as if in their actual possession."

¹ In *Janvrin v. Maxwell*, 23 Wis. 51, there was a sale of six barrels of beef. The purchaser requested the seller to roll it into the back yard of the shop and store it for him, and sell it for him if he had an opportunity, and subsequently promised to take it away. He gave specific directions for its disposal, and it was held that there had been a sufficient delivery and acceptance. In *Bass v. Walsh*, 30 Mo. 192, there was a sale of 223 bales of hay lying by themselves on the levee. The seller gave the buyer a descriptive ticket, authorizing him to take the hay as soon as weighed. The buyer requested that the hay should not be weighed on that day, to which the seller assented, upon the

condition that the hay should remain at the buyer's risk. It was held that these facts warranted a finding that there had been an acceptance and delivery. A sale, by a broker, of logwood, at the time in bond, was invalid under the statute of frauds. The purchaser hired vessels, and notified the seller to deliver the goods at the wharf where they lay, and received from him a custom-house order, which the custom-house officers refused to act upon, on the ground that no logwood appeared on their books as belonging to the purchaser. The seller was notified of this, and requested to remedy the difficulty by making the proper entries, which he promised, but entirely neglected to do. Part of the logwood was sent to the wharf, and part put on board the purchaser's vessel. The purchaser refused to pay a bill for the logwood sent to him, and finally notified the seller that unless the proper custom-house entries were made on or before a certain day, he would deem the contract dissolved. It was held that there was no delivery to take the case out of the statute of frauds. *Zachrisson v. Poppe*, 3 Bosw. (N. Y.) 171.

² 1 East, 192; and see *Marshall v. Green*, L. R. 1 C. P. D. 35.

³ 1 Taunt. 458; and see *Jacobs v. Latour*, 2 Moo. & P. 205; *Webster v. Anderson*, 42 Mich. 554. In *Shindler*

keeper, sold horses to the defendant, who told him that he (the plaintiff) must keep the horses at livery, whereupon the

v. Houston, 1 Den. (N. Y.) 52, the plaintiff and the defendant bargained respecting the sale, by the former to the latter, of a quantity of lumber piled apart from other lumber on a dock, and in view of the parties at the time of the bargain, and which had been measured and inspected. The parties having agreed as to the price, the plaintiff said to the defendant, "The lumber is yours." The defendant then told the plaintiff to get the inspector's bill and take it to H, who would pay the amount. This was done next day, but payment was refused. The price was above \$50. This was held, by the Supreme Court, a valid delivery and acceptance. The court said: "Delivery in a sale may be either real, by putting the thing sold into the possession or under the power of the purchaser, or it may be symbolical, where the thing does not admit of actual delivery; and such delivery is sufficient and equivalent in its legal effects to actual delivery. It must be such as the nature of the case admits." This was reversed by the Court of Appeals in 1 N. Y. 261, the court holding that something more than mere words is necessary; that superadded to the language of the contract there must be some *act* of the parties amounting to a transfer of possession, and an acceptance thereof by the buyer, and that the case of cumbrous articles is not an exception. GARDINER, J., said: "I am aware that there are cases in which it has been adjudged that where articles sold are ponderous, a symbolical or constructive delivery will be equivalent in legal effect to an actual delivery. The delivering of the key of a warehouse in which goods sold are deposited, furnishes an example of this kind. But to aid the plaintiff, an authority must be shown that a *stipulation in the contract of the sale*, for the delivery of the key or other indicia of possession, will constitute a delivery and accept-

ance within the statute. No such case can be found." BRONSON, J., who was one of the court below, delivered an opinion renouncing his former judgment. He said: "There may be a delivery without handling the property or changing its position. But that is only where the seller does an act by which he relinquishes his dominion over the property, and puts it in the power of the buyer; as by delivering the key of the warehouse in which the goods are deposited, or by directing the bailee of the goods to deliver them to the buyer, with the assent of the bailee to hold the property for the new owner." "Here there was no delivery, either actual or symbolical." WRIGHT, J., also pronounced an opinion the same way. He said of *Elmore v. Stone*, *supra*, that it "was doubted in *Howe v. Palmer*, 3 B. & Ald. 324, and *Proctor v. Jones*, 2 C. & P. 534, and virtually overruled by subsequent decisions." He distinguishes it, however, by removal of the horses from the sale stable to the livery stable, and, *Chaplin v. Rogers*, by the buyer's sale of part of the hay which the purchaser took away. So that in both these cases there were acts in addition to mere words. As to the doubts about *Elmore v. Stone*, of which WRIGHT, J., speaks, BAYLEY, J., in *Howe v. Palmer*, said: "That case goes as far as any case ought to go, and I think we ought not to go one step beyond it. . . . I must say, however, that I doubt the authority of that decision." This is purely *obiter*, for he had clearly distinguished the case as above. In *Proctor v. Jones*, the case of *Elmore v. Stone* was not mentioned. BEST, J., did there doubt *Scott v. Anderson*, *supra*, but without any reason, for there the terms of the contract had been agreed on. The decision in both cases was clearly right, and there are no signs of any overruling of it." See Hollingsworth

latter removed them from his sale-stable to his livery-stable and there kept them at livery. It was held that from that time the plaintiff possessed the horses not as owner, but as any other livery-stable keeper might have them to keep. In *Marvin v. Wallis*¹ the plaintiff sold a horse to the defendant by verbal agreement. The bargain was for immediate delivery, but the plaintiff requested the defendant to lend him the horse, and by the defendant's consent kept it for a short time. Afterwards the defendant refused to take the horse. It was held that there was an acceptance of the horse within the statute.²

In *Tempest v. Fitzgerald*,³ the defendant in August agreed to purchase a horse at the price of 45 guineas, and to fetch it away in September. The parties understood it to be a ready-money bargain. The defendant returned on the 20th September. He then tried the horse, and his servant, at his direction, made some alteration in the harness. The defendant then asked that the horse might remain in the plaintiff's possession for another week, at the end of which he promised

v. Napier, 3 Cal. (N. Y.) 183. In *Fallo v. Miller*, 2 Cr. & Dix, 416, the defendant bought a number of pigs of the plaintiff on Saturday. He said he had no change about him and could not pay any earnest, but he wished the plaintiff's servant to keep the pigs without any food from that time until the Monday following, when he would call for and take them away. His directions were followed, but the defendant never took them away. The plaintiff afterwards sold the pigs, and sued the defendant for the difference between the sum for which they were sold and what he was to pay for them. It was held that there had been no such delivery as took the case out of the statute.

¹ 6 E. & B. 726.

² And see *Martin v. Reid*, 11 C. B. (N. S.) 730; 31 L. J. C. P. 126; *Beaumont v. Brengeri*, 5 C. B. 301. These cases show that if the bargain is complete, the fact that goods remain in the possession of the vendor will not prevent him from proving that they have been actually received. But

there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller as unpaid vendor. *Cusack v. Robinson*, 1 B. & S. 308, *per* BLACKBURN, J. In *Dale v. Stimpson*, 21 Pick. (Mass.) 384, the defendants offered the plaintiff a certain price for a steam-engine, a part of the price to be paid when the engine was taken away by him, which was to be done within two or three weeks, and the balance to be secured by note. The plaintiff accepted the offer and said: "Then you consider the engine yours?" to which the defendant answered "Yes." The boiler was set in bricks in the plaintiff's shop, and could not be removed until they were taken away, and the plaintiff was to take them away, which he did the next week. The defendant told a witness he had bought the engine, and made inquiries as to the terms on which he could get it carried to another place. It was held that there was no delivery and that the sale was within the statute.

³ 3 B. & Ald. 680.

to fetch it away and pay the price. The horse died before the defendant paid the price or took it away. It was held that there had been no acceptance, upon the ground that the defendant had no right of property in the horse until the price was paid, and that until then he could not exercise any acts of ownership.¹ Again, in *Carter v. Toussaint*,² the plaintiffs, who were farriers, sold to the defendant a race-horse which at the time of the sale required to be fired; this was done with the approbation of the defendant and in his presence, and it was agreed that the horse should be kept by the plaintiffs for twenty days without any charge being made for it. At the expiration of the twenty days the horse was, by the defendant's directions, taken by a servant of the plaintiffs to a certain park for the purpose of being turned out to grass there. It was there entered in the name of one of the plaintiffs, which was also done by the direction of the defendant, who was anxious that it might not be known that he kept a race-horse. It was held that there had been no acceptance, *as the vendor was not compellable to deliver the horse until the price was paid*, though if it had been sent to the park and entered in the defendant's name by his directions, that would have been an acceptance.

In *Castle v. Sworder*³ the plaintiffs, wine and spirit mer-

¹ And see *Holmes v. Hoskins*, 9 Exch. 753; 23 L. T. 70.

² 5 B. & Ald. 855.

³ *Castle v. Sworder*, 6 H. & N. 828; 30 L. J. Ex. 310. Cockburn, C. B., said: "We are all of opinion that the judgment of the court below must be reversed, and the rule made absolute to enter a verdict for the plaintiffs. The question for us is not how the jury would have found it if it had been left to them, but whether there was any evidence of an acceptance and receipt of the goods to satisfy the statute. I think that those terms are equivalent, and in my opinion there was such evidence. It appears that the defendant had entered into a contract with the plaintiffs' traveller to buy the goods, and he was to have a right to take them whenever he thought fit. In the meantime the goods were to remain in the ware-

house of the plaintiffs for six months without payment, and afterwards subject to the payment of rent. The plaintiffs had a bonded warehouse in which they kept not only their own goods but those of other people. The plaintiffs appropriated particular goods to the defendant, and sent him an invoice specifying the goods so appropriated. Some time after this the defendant, finding that it did not suit his convenience to keep the goods, proposed to the plaintiffs' traveller to take them back, and wrote to the plaintiffs suggesting that they should do so. The question is whether these facts amount to evidence of a constructive acceptance of the goods by the defendant. The important particular which has existed in several of the cases, viz., a lien on the part of the seller, which imports a right of possession incompatible with the pos-

chants, kept a bonded warehouse, where they took in other persons' goods as well as their own, charging warehouse rent. Of this warehouse the plaintiffs had one key and the custom-

session of the purchaser, did not exist here. The goods were sold on credit, and it is incontestable that during six months the buyer might have claimed these specific goods. The first point, then, is whether upon these facts the possession which the sellers retained was a possession by virtue of their original property, or as bailees of the buyer. *I think there was evidence that the possession of the plaintiffs, which had originally been as owners and sellers, had been converted into a possession by them as bailees for the buyer; for as soon as the goods had been specifically appropriated, the defendant, by virtue of his right as purchaser, evidenced by the terms of the invoice, availed himself of his right by having the goods warehoused in the general warehouse of the sellers, and by requesting the sellers to take back the goods, and failing that to resell them for him. Under the contract he was entitled to have the goods warehoused for a certain period free of charge, and after that at a rent; and he dealt with the goods as if they had been warehoused for him. This was a constructive possession in the buyer, and a constructive acceptance of the goods by him. It is unnecessary to consider whether, if the goods had not been according to the contract, the defendant might have repudiated them; or whether the case falls within the rule that where a person chooses to accept goods without exercising his right to inspect them, he waives his right to reject them, and must be taken to have accepted them without examination. The defendant was content that the goods should remain in the plaintiffs' warehouse till it suited him to deal with them as owner. Therefore that difficulty does not arise. A buyer may well waive his right to examine goods and accept them, trusting to his remedy by action if they turn out not according to con-*

tract. I am clearly of opinion that there was evidence for the jury."

CROMPTON, J., said: "I am of the same opinion. The only question in the court below was whether there was any evidence to go to the jury in support of the plaintiffs' case. We do not differ from the Court of Exchequer except in thinking that there was some evidence of the plaintiffs' character being changed from that of seller to that of warehouse-keeper. I take it to be clear that *where goods are left by a buyer in the hands of the seller, who is also a warehouse-keeper or livery-stable keeper, there may be a change in the character in which he holds the goods so as to make him the agent for the buyer.* Here I think that there was evidence to show that the defendant had admitted that the goods had become his, and remained in the plaintiffs' hands as warehouse-keepers. After that I think he could not have rejected them, though he might have had a remedy by action for damages if they were not according to contract. I think it is settled by the cases that where the goods are left by the purchaser with the seller his character may be changed; and that where he becomes the bailee for the purchaser the statute is satisfied. In *Farina v. Home*, 16 M. & W. 119 it was held that the mere giving of a transfer order for the goods was not sufficient, because they were held by a warehouse-keeper as agent for the seller; but where a delivery order is lodged and attorned to by the bailee he holds for the buyer, and the statute of frauds is out of the question. The only peculiarity of this case is that the same person was both seller and warehouse-keeper. *In such case, in order to satisfy the statute, it is necessary that there should be some evidence of a change in the character in which the plaintiffs held the goods.* Now it is impossible to say that there was not

house officer another. The defendant agreed to buy of the plaintiffs two puncheons of rum, which were to remain in bond till wanted, the defendant to have six months' further credit. The plaintiffs sent the defendant an invoice describing the puncheons by marks and numbers, with the words "free six months," which was explained to mean that they might remain in the plaintiffs' warehouse without charge for six months. The plaintiffs entered in the rum-book of their warehouse the puncheons of rum as sold to the defendant, and proved that after the entry they had no power to get the goods out. The rum remained in the warehouse for two years; during which time the defendant on several occasions asked the plaintiffs to take back the goods or buy them of him. It was held that there was evidence to go to the jury that the character in which the plaintiffs held the goods was changed, and that if they held as warehousemen for the defendant, there was evidence of an acceptance and receipt of the goods by the defendant to satisfy the statute.

The rule may be said to be that *where articles are ponderous and incapable of manual delivery, a delivery sufficient to vest the title to the property in the vendee, and which gives to him the exclusive dominion over it, is sufficient, although the actual possession is not changed*¹ to satisfy the reason and

some evidence to show that the goods were in the hands of the plaintiffs as warehouse-keepers. The defendant made statements and wrote letters which show that he acquiesced in the plaintiffs holding the goods as his agents. Particular casks were appropriated to the defendant by the invoice. The defendant kept the invoice, and may be presumed to have assented to the terms of it. The invoice states that the goods were to remain 'free for six months.' This shows that the plaintiffs would keep the goods as warehouse-keepers free of charge for a certain time. It may therefore be inferred that the defendant knew that the plaintiffs were warehouse-keepers, and assented to their keeping the goods in that capacity for him. When applied to for payment he asks what the plaintiffs will give

him for the rum. That is strong evidence of acceptance. When this is taken in connection with the entries in the rum and brandy books, and the proof that after that entry the plaintiffs could not get out the goods, there is evidence of a change of character. After that I think that the defendants could not say that these goods did not pass to them, though they might have brought an action if they were not according to contract."

¹ Atwell v. Miller, 6 Md. 10; Cooke v. Chapman, 6 Ark. 197; King v. Jarman, 3 id. 190; Pleasants v. Pendleton, 6 Rand (Va.) 473; Jordan v. James, 5 Ohio, 88; Leisherness v. Berry, 38 Me. 83; Taylor v. Richardson, 4 Houst. (Del.) 300; Peoples' Bank v. Gridley, 91 Ill. 457; Shurtleff v. Willard, 19 Pick. (Mass.) 210; Adams v. Foley, 4 Clarke (Iowa) 52;

the policy of the statute.¹ The rule may be said to be, that if the goods sold are ponderous, and not capable of actual delivery, and the buyer accepts them, and in virtue of such transfer of the property, proceeds to exert a right over them, disposing of them, or giving orders and directions respecting them, as the owner thereof, such proceedings may counter-vail the *actual* delivery, and vest the property of the buyer, without any written contract or earnest paid, notwithstanding the statute; and though it is proper for the court to say whether a case does or does not fall within the statute, yet it may be specifically put to the jury to say whether upon the evidence there was or was not an acceptance of the thing by the purchaser.² In order, however, to make such a delivery operative, *the minds of the parties must have met upon all the essential details of the contract, and there must be nothing left undone which interferes with the exclusive dominion of the*

Bethel Steam Mill Co. v. Brown, 57 Me. 9; Hayden v. Dunets, 53 N. Y. 426; Boynton v. Veazie, 24 Me. 286; Taylor v. Richardson, 4 Houst. (Del.) 300; Calkins v. Lockwood, 17 Conn. 174; Leonard v. Davis, 1 Black. (U. S. C. C.) 476.

¹ Puckett v. Reed, 31 Ark. 131; King v. Jarman, 35 id. 190.

² Vincent v. Germond, 11 John. (N. Y.) 283; Babcock v. Stanley, 11 id. 178; Wightman v. Caldwell, 4 Wheat. (U. S.) 85; Bailey v. Ogden, 3 John. (N. Y.) 399; Calkins v. Lockwood, 17 Conn. 174; King v. Janvrin, *ante*. The law relating to the delivery of personal property does not require parties to a sale to perform acts extremely inconvenient, if not impossible; but accommodates itself to their business, and the nature of the property. Thus, where all the logs and boards designated by a particular mark are sold while afloat, a constructive or symbolical delivery only is required, and this may be done by the performance of any act which shows that the seller has parted with the right and claim to control the property, and that the purchaser has acquired that right. In such case, the delivery of one raft of boards upon

the water, having the same mark as of the logs upon it, for the whole lumber thus marked, would afford sufficient evidence of such a delivery: And the same raft may be used to make such a delivery of the whole lumber having the same marks, although it had before been used to make a delivery of a portion thereof, between the same parties. Boynton v. Veazie, 24 Me. 286. See also Leonard v. Davis, 1 Black. (U. S.) 476. Property in chattels may be transferred in writing without delivery, the delivery of the writing being a symbolical delivery of the property. Southworth v. Sebring, 2 Hill (S. C.) 587. A delivery of part of a number of chattels, and a symbolical delivery of the remainder, is a sufficient transfer of possession. Chappel v. Marvin, 2 Aik. (Vt.) 79.

An order on the depositary of goods sold, given by the vendor to the vendee, constitutes a good delivery as between themselves. Sigerson v. Harker, 15 Mo. 101; McCormick v. Hadden, 37 Ill. 370; How v. Barker, 8 Cal. 603; 11 Cal. 393; Cushing v. Breed, 14 Allen (Mass.) 376; Anthony v. Wheatons, 7 R. I. 490.

purchaser over the property. The property must be of a specific character, and clearly identified and separated from other property of the same kind, and the sale must not be dependent upon any conditions or contingencies, *and the possession must be the best which the nature and the situation of the property admits of.*¹ In the words of LORD ELLENBOROUGH,² "where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse,³ or other indication of property."⁴ In such cases, the delivery is constructive, and

¹ *Wilkes v. Ferris*, 5 John. (N. Y.) 335; *Chappel v. Marvin*, 2 Aik. (Vt.) 79; *Gibbs v. Benjamin*, 45 id.; *King v. Jarman*, 25 Ark. 190; *Chaplin v. Rogers*, 1 East. 192. In *Rieder v. Machen*, 57 Md. 56, a sale was made of a part of a quantity of coal. The part sold was not separated from the rest, and was neither weighed nor measured. It was held that the sale was merely executory. If the whole or a part of the price is to be paid before it is to be taken away, there is no delivery until such payment is made. *Dole v. Stimpson*, 21 Pick. (Mass.) 384.

² *Chaplin v. Rogers*, *ante*.

³ *Gray v. Davis*, 10 N. Y. 285; *Packard v. Dunsmore*, 11 Cush. (Mass.) 282; *Wilkes v. Ferris*, 5 John. (N. Y.) 335. Upon the sale of a safe, weighing some 2000 pounds, a delivery of its key, as well as a key of the room in which it is situated, is sufficient to constitute a valid sale as against creditors. *Benford v. Schell*, 55 Penn. St. 393; *Chappel v. Marvin*, 2 Aik. (Vt.) 79.

⁴ *Bentnall v. Burn*, 3 B. & C. 423; *Lucas v. Dorreen*, 7 Taunt. 278; *Woadly v. Coventry*, 2 H. & C. 164; *Harmon v. Anderson*, 2 Camp. 243; *Lackington v. Atherton*, 7 M. & G. 360. Where the owner of lumber sells it, and indorses and delivers to the purchaser the receipt of the proprietor of the lumber yard in which it is deposited, this symbolical delivery is sufficient to pass the title as between

the vendor and vendee. *Mitchell v. McLean*, 7 Fla. 329. The delivery of a shop, so separated from the realty as to be an article of personal property, may well be effected by delivery of the key, though that delivery take place at a distance from the shop itself. *Vining v. Gilbreth*, 39 Me. 496. The delivery of the invoice of goods shipped, with an assignment of the goods indorsed upon it, the assignor having no bill of lading, was held to be a symbolical delivery of the goods. *Gardner v. Howland*, 2 Pick. (Mass.) 599. Delivery of the key of a building in which personal property is stored, by the vendor to the vendee, with intent to surrender possession of the property, is a sufficient delivery as against subsequent attaching creditors of the vendor. *Packard v. Dunsmore*, 11 Cush. (Mass.) 282; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335; *Gray v. Davis*, 10 N. Y. 285. But plucking a handful of half-grown grass, and delivering it to a purchaser in a field upon a sale of the grass, with an agreement that the vendor shall cut it for the vendee at a proper time, is not a constructive delivery of the hay as a chattel, which will pass a title to it, as against third persons. *Lamson v. Patch*, 5 Allen (Mass.) 586. In the sale of oxen, a delivery of brass knobs which had been worn upon their horns is not a symbolical or constructive delivery of the oxen, unless specially so agreed. *Clark v. Draper*, 19 N. H. 419.

is sufficient for the purpose of taking the contract out of the statute. *But if anything remains to be done before the contract is complete, as if the goods have not been separated from others of the same kind,*¹ or if they have not been weighed or measured,² or some precise means of ascertaining the value agreed upon, which only leaves the ascertainment of

¹ *Dunlop v. Perry*, 5 Ill. 327; *Cleveland v. Williams*, 29 Tex. 204; *Gardner v. Snyder*, 7 N. Y. 357; *Eager v. Eichelberger*, 6 Watts (Penn.) 29. A sale of property is not fully completed so long as anything remains to be done to the thing sold to put it in a condition for sale, or to identify it, or discriminate it from other things, or to determine its quantity, if the price depends on this, unless this is to be done by the purchaser. *McClung v. Kelley*, 21 Iowa, 508. Thus, if several barrels of mackerel have been inspected, and marked as of different qualities, and the whole of those having a particular mark are sold, a bill of sale being given and a formal delivery made, the property will pass without further separation or designation, though such barrels are intermingled with others. But if the whole of such barrels are not sold, the title will not pass without some future separation or designation, notwithstanding a storage receipt is given. *Ropes v. Lane*, 9 Allen (Mass.) 502. If a verbal contract is made for the sale and delivery of certain specified quantities of different kinds of spirituous liquors, at agreed prices, the property will not pass, and the sale is not complete until the liquors are separated and set apart for the purchaser. *Bancher v. Warren*, 33 N. H. 183. If one joint owner of a crop sells to the other his share of it to pay a debt, and it is divided in the presence of both, for the purpose of ascertaining the amount to be credited on the debt, there is no trespass in the purchasing partner's removing the property, though forbidden by the other. *Warbitton v. Savage*, 4 Jones (N. C.) L. 382. Where the part of an undivided lot of prop-

erty is sold, and an order given for its delivery, *there must be some act of selection under the order before the right of property is changed.* *Woods v. M'Gee*, 7 Ohio, Part II. 127.

² *Everett v. Clements*, 9 Ark. 478; *Courtright v. Leonard*, 11 Iowa, 32. In *Ockington v. Richey*, 41 N. H. 275, it was held that a sale of lumber to be taken and measured from a larger bulk, and to be an average lot as to thickness and quality, is not complete, even as between the parties, until selected and measured. The question of delivery or non-delivery of the thing sold is a question of what was the intention of the parties; and where, out of five or six hundred bales of cotton stored in a warehouse, 125,000 pounds are bargained and sold for the purpose of being used in a factory near thereto, and the buyer, after the bargain and sale to him, sells one-half to his partner in the factory, and a portion of that first bought is consumed in the factory by the partnership, and the first buyer receives from his partner full payment for his half in another lot of cotton of the same quantity at another place, such use and acts and circumstances show the intention of the parties to treat the entire 125,000 pounds as delivered for consumption in the factory, to be weighed as needed from time to time, and altogether amount to a sufficient delivery thereof, though the whole quantity sold was not weighed and severed from the bulk. 1876, *Phillips v. Ocmulgee Mills*, 55 Ga. 633. And it must be a delivery under the contract and in pursuance of it. *Matthiessen &c. R. R. Co. v. McMahon*, 38 N. J. L. 537.

the price a mere matter of computation,¹ there is no delivery, because the elements do not exist which give to the buyer exclusive dominion over the property, and divest the seller of the right to recede from the contract.

SEC. 342. Delivery of Goods to a Carrier may be Delivery to Vendee. — The delivery of goods by the vendor to a common carrier for the purpose of transmission to the vendee may, in the absence of any special arrangement, and where the contract is otherwise binding, amounts to a delivery to the vendee, so as to vest the property in the goods in him, and in the case of loss or damage he will be the proper person to bring an action against the carrier.²

In a New York case,³ it was held that "upon a verbal contract for the sale of goods of more than fifty dollars in value, a delivery of them, in accordance with such contract, to a

¹ *Gibbs v. Benjamin*, 45 Vt.; *Tyler v. Strange*, 21 Barb. (N.Y.) 198.

² *Dawes v. Peck*, 8 T. R. 330; *Fragano v. Long*, 4 B. & C. 219; *Dutton v. Solomonson*, 3 B. & P. 584; *Johnson v. Dodgson*, 2 M. & W. 653; *Dunlop v. Lambert*, 6 C. & F. 600; *Norman v. Phillips*, 14 M. & W. 277; *Wait v. Baker*, 2 Ex. 1; *Meredith v. Meigh*, 2 E. & B. 364; *Hart v. Bush*, 3 E. B. & E. 494; 27 L. J. Q. B. 271; *Cusack v. Robinson*, 1 B. & S. 299; *Smith v. Hudson*, 6 B. & S. 431; 34 L. J. Q. B. 145. In *Hausman v. Nye*, 62 Ind. 485, an agent of a principal residing in Ohio contracted with a person residing in Indiana, to sell him goods exceeding \$50 in price. Nothing was said as to the manner of shipment. There was no memorandum, earnest money, nor payment, and the vendee did not receive any part of the goods. The principal afterward in Ohio, without the knowledge or assent of the vendee, shipped a part of the goods to the vendee, who refused to receive them. It was held that the contract was an Indiana contract; that it was an entire contract, and the vendee was not bound to accept part; that the delivery to the carrier under the circumstances was not a legal delivery to the ven-

dee; and that the contract was void under the statute of frauds. As to acceptance, see *Johnson v. Cuttle*, 105 Mass. 447; *Kirby v. Johnson*, 22 Mo. 354; *Edwards v. Grand Trunk Railway Co.*, 54 Me. 105; *Hewes v. Jordan*, 39 Md. 472; *Stone v. Browning*, 68 N. Y. 598; *Hooker v. Knabe*, 26 Wis. 511; *Everett v. Parks*, 62 Barb. (N. Y.) 9; *Magruder v. Gage*, 33 Md. 344; *Cobb v. Arundell*, 26 Wis. 533; *Foster v. Rockwell*, 104 Mass. 167; *Strong v. Dodds*, 47 Vt. 348; *Hunter v. Wright*, 12 Allen (Mass.) 348; *Putnam v. Tilleston*, 13 Met. (Mass.) 517; *Merchant v. Chapman*, 4 Allen (Mass.) 362; *Orcutt v. Nelson*, 1 Gray (Mass.) 536. But it must not be forgotten that a delivery to a carrier appointed by the purchaser only amounts to a receipt and not to an acceptance of the goods. *Allard v. Greasart*, 61 N. Y. 1; *Snow v. Warner*, 10 Met. (Mass.) 132; *Maxwell v. Brown*, 39 Me. 98; *Denmead v. Glass*, 30 Ga. 637; *Rodgers v. Phillips*, 40 N. Y. 519; *Frostburgh Mining Co. v. N. E. Glass Co.*, 9 Cush. (Mass.) 115; *Atherton v. Newhall*, 123 Mass. 141; *Quintard v. Bacon*, 99 id. 185; *Boardman v. Spooner*, 13 Allen (Mass.) 353.

³ *Rogers v. Phillips*, 40 N. Y. 519.

general carrier, not designated or selected by the buyer, does not constitute such a delivery and acceptance, under the statute of frauds, as to pass the title to the goods. Although in the case of a contract, itself valid, such a delivery might be sufficient to transfer the title and risk to the purchaser.”¹

In a Georgia case,² it is said in the opinion of the court: “Under the proof, was this case within the seventeenth section of the statute of frauds? The statute requires that the purchaser shall ‘actually receive’ the goods. And although goods are forwarded to him *by a carrier by his direction*, or delivered abroad on ‘board of a ship chartered by him, still there is no actual acceptance to satisfy the act, *so long as the buyer continues to have the right, either to object to the quantum or quality of the goods.*”³

In *Maxwell v. Brown*,⁴ the court say: “From the language of this statute it is apparent, that when there is no written contract, a mere delivery will not be sufficient. There must further be an acceptance by the purchaser, else he will not be bound. In *Baldey v. Parker*,⁵ ‘it was formerly considered,’ observes BEST, J., ‘that a delivery of goods by the seller was sufficient to take a case out of the seventeenth section of the statute of frauds: but it is now clearly settled, that there must be an acceptance by the buyer as well as a delivery by the seller.’” In the same case HOLROYD, J., said: “*As long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.*”

In *Cross v. O'Donnell*,⁶ an action was brought by the plaintiffs to recover the price of 24,000 hoops at \$11.50 per 1,000, bought by the defendants of the plaintiffs, at Baltimore in 1863. There was no memorandum of the contract and no part of the purchase-money was paid by the purchaser. But the purchaser inspected and accepted the hoops *and designated the steamer* upon which they should be conveyed to New York. The hoops were thus delivered to the

¹ *Strong v. Dodds*, 47 Vt. 348; & *Co.*, 20 Ga. 574; *Shepherd v. Pres-*
Bacon v. Eccles, 43 Wis. 227; *Allard sey*, 32 N. H. 49.
v. Greasart, 61 N. Y. 1.

² *Lloyd v. Wright*, 25 Ga. 215.

⁴ *Maxwell v. Brown*, 39 Me. 98.

⁵ 2 B. & C. 37.

³ *Acebal v. Levy*, 10 Bing. 376; ⁶ *Cross v. O'Donnell*. 44 N. Y. 661;
Howe v. Palmer, 3 B. & Ald. 321; 4 Am. Rep. 721.
Lloyd & Pulliam v. Wright, Griffith,

steamer; but she was sunk on her voyage in the Chesapeake Bay. The defendants refused to pay for the hoops, and pleaded the statute of frauds. It was held that the plaintiffs were entitled to recover as the hoops had been *accepted* by the defendant, and that their delivery to the carrier designated by him was a delivery to the defendant and a receipt of the hoops by him, EARL, C., saying: "In this case, the purchasers designated the agents of the 'Curlew' to receive and transport the hoops to them. They were the agents of defendants for the purpose of receiving the hoops from the plaintiffs. It is not necessary to determine in this case that a mere carrier, designated by the buyer, can both accept and receive for him, so as to make a compliance with the statute; but I can find no reason, founded upon principle or authority, to doubt that, after the buyer has accepted the article purchased, a carrier, designated by him to take and transport it, can bind him as his agent by receiving it. While there is not upon this question entire harmony in the views of judges, and while the authorities cannot all be reconciled, the general drift of them is toward the conclusion I have reached.¹

It is said by some writers that, to create such an appropriation of the goods by the buyer as will answer the meaning attached to the words 'accept and receive' in the statute, there must be such an actual delivery by the seller as will destroy all lien for the purchase-price, or right of stoppage *in transitu*. This, to the full extent, is not true. The seller has a lien for the purchase-price of the goods while they remain in his possession. And this lien he loses when he voluntarily parts with the possession, except when he delivers them to a carrier. In the latter case, his lien is extended and lasts, although the title has passed to the buyer, until the carrier has delivered the goods to the actual possession of the buyer. This lien is an arbitrary one, created by law. As observed by LORD KENYON,² it is 'a kind of equitable lien adopted by the law for the purpose of substantial

¹ *Outwater v. Dodge*, 6 Wend. (N. Y.) 397; *The People v. Haynes*, 14 id. 546; *Glen v. Whitaker*, 51 Barb. (N. Y.) 451; *Spencer v. Hale*, 30 Vt. 314; *Maxwell v. Brown*, 39 Me. 98; *Hanson v. Armitage*, 5 B. & Ald. 557; *Acebal v. Levy*, *ante*; *Coats v. Chaplin*, 3 Q. B. 483; *Morton v. Tibbett*, *ante*.
² In *Hodgson v. Lay*, 7 T. R. 436.

justice.' When the seller retakes the property in the exercise of this right of stoppage, he is not reinvested with the title, but simply placed in the actual possession of the goods, holding them as security for the purchase-price. The stoppage must be while the goods are *in transitu*, and that is usually when they are not in the actual possession of either party; and yet they may be in the actual possession of the buyer under such circumstances as not to take away the right of stoppage. This right exists, although the goods are shipped upon the buyer's own vessel, consigned to him at his place of residence.¹ The fact that the right of stoppage exists is no evidence that both the title and possession have not passed to the buyers. The contract of sale may be in writing, part of the purchase-money may have been paid, and there may have been a part delivery, and yet, if the seller consigns the goods by a carrier to the buyer, to be delivered to him at the place of their destination, the right of stoppage exists. And this may be so, even if the buyer is also master of the vessel, and he in person takes the goods and loads them upon his own vessel, provided, as in this case, the seller consigns the goods to the buyer, to be carried by him to their place of destination.² Hence I hold that *a carrier designated by the buyer may receive the goods purchased, so as to make a compliance with the statute of frauds.*'

SEC. 343. Executory Contract partly Executed.— Upon an executory contract for the delivery of goods periodically, which is void under the statute for want of writing, the vendor may sue for goods actually delivered.³ The claim in such case is not upon the terms and footing of the contract, but upon a *quantum meruit*.⁴

¹ *Stubbs v. Lund*, 7 Mass. 453;
Illsley v. Stubbs, 9 id. 65; *Story on*
Sales, § 336.

² *Pars. on Mar. Law*, 335.

³ *Mavor v. Pyne*, 3 Bing. 285.

⁴ *Earl of Falmouth v. Thomas*, 1
 Cr. & M. 109.

CHAPTER XIII.

THE MEMORANDUM OR NOTE IN WRITING.

SECTION.

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for a Principal.
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 - 403. Effect of Parol Variations in Memorandum upon Remedy of Parties.
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SECTION 344. Difference between the Fourth and Seventeenth Sections.—Both the fourth and seventeenth sections of the statute of frauds use the words “*memorandum or note in writing*” to indicate the means by which contracts are to be authenticated. The wording of the two sections in other respects is slightly different. The words of the fourth section are: “Unless the agreement on which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him *lawfully authorized*.” Those of the seventeenth are: “Except that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged with such contract, or their agents thereunto lawfully authorized.” The meaning of the two sections is substantially the same,¹ but this distinction has been drawn: that if the memorandum states all that is to be done by the party to be charged, that is sufficient within the seventeenth section, though not enough to make a valid agreement in cases within the fourth section.²

¹ Kenworthy v. Schofield, 2 B. & C. 947.

² Sarl v. Bourdillon, 1 C. B. (N. S.) 188; 26 L. J. C. P.; Egerton v.

SEC. 345. **Form of the Memorandum.**—If the memorandum contains all the essential elements of a contract, the form in which it is written is of no account, as any instrument, however informal, or bunglingly constructed, which describes the property, the price to be paid therefor, if the price has been agreed upon,¹ the parties and the essential terms of the agreement,² either by its own terms or by reference to other writings, so that parol evidence is not necessary to establish or explain it, is as valid and binding as the most formal instrument which could be constructed.³ The statute only contemplated that such a note or memorandum should be made as men in the hurry of business may be supposed to be likely to make;⁴ *but, nevertheless, of such a defi-*

Matthews, 6 East, 307; Laythroop v. Bryant, 6 Bing. (N. C.) 735; Hinds v. Waterhouse, 7 East, 558; Bailey v. Sweeting, 9 C. B. (N. S.) 843.

¹ But the omission of the price has been held not to render a memorandum invalid, when sufficient in other respects. Thus, a writing as follows: "Please get us 360 hogs, instead of 250, if you can, so as to make three carloads at your place. Be careful about the weight," signed by the defendant, was held to be sufficient, although the price was not stated, the court holding that the price might be shown by parol. O'Neil v. Cram, 67 Mo. 250. But this must only be understood as being the rule where either by statute, or the decisions of the courts, a statement of the consideration is unnecessary. But if the price has been agreed upon, it must be stated. Ives v. Hazard, 4 R. I. 14; Norris v. Blair, 39 Ind. 90; McElroy v. Buck, 35 Mich. 434; Soles v. Hickman, 20 Penn. St. 180; Wright v. Cobb, 5 Sneed (Tenn.) 143; Parker v. Bodly, 4 Bibb. (Ky.) 102; McFarson's Appeal, 11 Penn. St. 503; Farwell v. Lowther, 18 Ill. 252; Brown v. Bellows, 4 Pick. (Mass.) 178; Fugate v. Hanaford, 3 Litt. (Ky.) 262; Holman v. Bank, 12 Ala. 369. But see Johnson v. Ronald, 4 Munf. (Va.) 77.

² It must state the contract so that the substance of it can be understood with reasonable certainty from the

writing itself. Abeel v. Radcliffe, 13 John. (N. Y.) 297; Parkhurst v. Van Cortlandt, 1 John. Ch. (N. Y.) 274; Dodge v. Lean, 13 John. (N. Y.) 297; Vanderbergh v. Spooner, L. R. 1 Exchq. 317. It need not contain a detail of all the particulars. Ives v. Hazard, 4 R. I. 14. A memorandum of a contract for the sale of a cargo of coal which states the kind, the price per ton, the place of delivery, and the draft of the vessel in which it is to be carried, and of which duplicate copies are made, one of them only being signed by the buyer alone and kept by the seller, the other accepted by the seller, and given to the buyer, sufficiently describes the quantity, and the two papers are properly submitted in evidence together, and thus form a sufficient memorandum under the statute of frauds. Rhoades v. Castner, 12 Allen (Mass.) 130.

³ Bailey v. Ogden, 3 John. (N. Y.) 309; Shaw v. Finney, 13 Met. (Mass.) 453; Ide v. Stanton, 15 Vt. 685; Adams v. McMillan, 7 Port. (Ala.) 73; Wood v. Davis, 82 Ill. 311; Holmes v. Johnston, 12 Heisk. (Tenn.) 155; Lang v. Henry, 54 N. H. 57. In Beckwith v. Talbot, 95 U. S. 289, it was held that parol evidence is admissible to identify the agreement referred to in the instrument to supply the defect of signature.

⁴ TINDAL, C. J., in Acebal v. Levy, 4 M. & Sc. 220.

nite character in all the essentials of the contract, that the intention of the parties, their names, and relation to each other under the contract, can be gathered from the memorandum itself, leaving nothing to be supplied by parol.¹ But a memorandum which is deficient in any of these respects, is insufficient to take the contract out of the statute. Thus, an agreement for the plaintiff to act for the defendant as travelling salesman, as follows: "The understanding with Mr. A, is as follows: \$2,000 for the first year; \$2,500 for the second year sure, and provided the increase in sales shall warrant it, he is to have \$3,000; 3 year in proportion to business as above," and signed by both parties, was, inasmuch as it contained no mention of the nature of the services, held insufficient to take the case out of the statute of frauds.² So in an action against

¹ Sievewright v. Archibald, 17 Q. B. 102. In Reid v. Kenworthy, 25 Kan. 701, it was held that a paper containing merely the date of an agreement, the name and place where written, certain figures, and the names of certain parties, and the signature of the party intended to be charged, is not a memorandum of agreement within the statute of frauds. In Grafton v. Cummings, 99 U. S. 100, it was held that a memorandum not identifying the other party thereto, was not sufficient, as parol evidence is not admissible for that purpose. So it has been held that parol evidence is not admissible to show who was the seller or who the buyer under a memorandum of the sale of goods, where the word "sold" was omitted from the memorandum by mistake. Lee v. Hills, 6 Ind. 474. If it refers to letters or other documents, they may be used as a part of the memorandum; but taken as a whole, they must contain all the essentials of the contract. And it must be a completed contract. Rossitur v. Mills, L. R. 3 H. L. 1128; Gaunt v. Hill, 1 Stark, 10; Oakman v. Rogers, 120 Mass. 214; Winn v. Bull, 7 Ch. Div. 29; Ballingall v. Bradly, 16 Ill. 373; Roberts v. Tucker, 3 Exchq. 632; Barry v. Coombs, 1 Pet. (U. S.) 640; Hazard v. Day, 14 Allen (Mass.) 48; Williams v. Robinson, 73 Me. 186; 40 Am. Rep. 352.

² Drake v. Seaman, 27 Hun (N. Y.) 63. Letters showing a marriage engagement, without stating the time therefor, are not a sufficient note or memorandum within the statute of frauds, of an agreement by its terms not to be performed within one year. Ullman v. Meyer, 10 Abb. (N. Y.) N. C. 281. Nor is a letter referring generally to a contract as existing; without stating any of its terms or otherwise identifying it, sufficient under the statute of frauds to bind the writer to a contract, the terms of which must be supplied by parol evidence. Smith v. Jones, 66 Ga. 338; 42 Am. Rep. 72. Telegrams signed by the defendant, merely stating the terms of payment and directing the plaintiff to draw a contract, together with the written agreement so drawn, are not sufficient memoranda within the statute, that agreement being executed in violation of the Sabbath. Hazard v. Day, 14 Allen, 487. A telegram sent by one of the parties accepting an offer made by the other, is sufficient evidence of a subscription to take the case out of the statute. Trevor v. Wood, 36 N. Y. 307. That the names of both parties are required in a memorandum, see Calkins v. Falk, 39 Barb. (N. Y.) 620. But they need not both be in the same paper if the memorandum is made up of two or more. It is enough if it appears in one of them. Lerner v.

L to recover for goods sold and delivered, a memorandum written on a bill-head of L, and, by an averred mistake, omitting the word *sold* before L's name, and set up in his answer and offer of set-off, denying delivery, etc., was held not to be a "note or memorandum in writing of the bargain," within the statute of frauds, and that parol evidence was not admissible to supply the word.¹ *There is a distinction between evidence of a contract, and evidence of a compliance with the statute of frauds.* The effect of the statute is, that although there is a contract which is good and valid, no action can be maintained upon it, if made by parol only, unless there be a note or memorandum in writing of the contract, *signed by the party to be charged.*² In the case of a written contract, the statute has no application. In the case of other contracts, the compliance may be proved by part payment, or part delivery, or memorandum in writing. Where a memorandum in writing is to be proved in compliance with the statute, it differs from a contract in writing in that *it may be made at any time after the contract, and before action is brought.* It is not necessary that the memorandum should be contemporaneous with the contract, but it is sufficient if it has been made at any time afterwards, *and then anything under the hand of the party sought to be charged,*

Wannemacher, 9 Allen (Mass.) 412; Grafton v. Cummings, 99 U. S. 100. A memorandum cannot be partly in writing and partly by parol, consequently every essential part of the agreement must be contained therein. Wright v. Weeks, 25 N. Y. 153.

¹ Lee v. Hills, 66 Ind. 474. In Wiener v. Whipple, 53 Wis. 298, it was held that a valid memorandum is not open to parol proof to explain, vary, or change its terms. See also Peet v. Railroad Co., 19 Wis. 118; Whiting v. Gould, 2 id. 552; Lowber v. Connit, 36 id. 176; Hubbard v. Marshall, 50 id. 322; Shultze v. Coon, 51 id. 416; Meyer v. Evereth, 4 Camp. 22; Meres v. Ansell, 3 Wil. 375; Gardiner v. Gray, 4 Camp. 144.

² Ridgway v. Wharton, 6 H. L. 305; Bailey v. Sweeting, 9 C. B. N. S. 859. The memorandum is not the con-

tract itself, but the evidence thereof, which the statute has made indispensable. Bird v. Munroe, 66 Me. 337. Sievwright v. Archibald, 17 Q. B. 107; Bill v. Boment, 9 M. & W. 36; Fricker v. Thomlinson, 1 M. & G. 772; Gibson v. Holland, L. R. 1 C. P. 1; Jones v. Victoria Graving Dock Co., 2 Q. B. Div. 314; Parton v. Crafts, 33 L. J. C. P. 189; Barkworth v. Young, 4 Drew, 1; Hart v. Carroll, 85 Penn. St. 508; Lerner v. Wannemacher, 9 Allen (Mass.) 412; Williams v. Bacon, 2 Gray (Mass.) 287; Ide v. Stanton, 15 Vt. 685; Benziger v. Miller, 50 Ala. 206; Batturs v. Sellers, 5 H. & J. (Md.) 117; Old Colony R. R. Co., 6 Gray (Mass.) 25; Lanz v. McLaughlin, 14 Minn. 72; Mizell v. Burnett, 4 Jones (N. C.) L. 249; Thayer v. Luce, 22 Ohio St. 62.

admitting that he had entered into the agreement, will be sufficient to satisfy the statute, which was only intended to protect parties from having parol agreements imposed upon them.¹ Thus, in the case first cited in the last note, it appeared that the parties entered into an agreement for a lease of certain premises for fifteen years, and an attorney was employed to prepare the lease, which he did. Afterwards the defendant, finding himself unable to perform, requested the plaintiff to cancel the lease. The plaintiff consented to do this, if the defendant would reimburse him for his expenses and inconvenience in the matter, and would relinquish the agreement in writing. The defendant thereupon endorsed upon the draft of the lease the following: "I hereby request Mr. Shippey (the plaintiff) to endeavor to let the premises to some other person, as it will be inconvenient for me to perform my agreement for them, and for doing so, this shall be a sufficient authority. J. Derrison." And this was held to be a sufficient note or memorandum in writing to satisfy the statute. This rule is forcibly illustrated in a recent English case.² In that case, in an action for breach of a contract for the hire of a carriage for more than a year from the date of the agreement, at a specified sum per month, it was proved that the plaintiff agreed to let the carriage to the defendant; a memorandum of the terms of the agreement was signed by the plaintiff, but not by the defendant. The defendant subsequently wrote a letter to the plaintiff, desiring to terminate the agreement, in which he referred to "our arrangement for the hire of your carriage," and "my monthly payment." There was no other

¹ *Shippey v. Derrison*, 5 Esp. 193; *Bailey v. Sweeting*, 9 C. B. N. S. 857; *Tawney v. Crowther*, 3 Bro. C. C. 161; *Bradford v. Roulston*, 8 Ir. C. L. (N. S.) 468; *Webster v. Zeiley*, 52 Barb. (N. Y.) 482; *Lerned v. Wannemacher*, 9 Allen (Mass.) 416; *Sanborn v. Chamberlin*, 101 Mass. 416. It is the uniform doctrine of the courts of this country and England that it is a sufficient compliance with the statute of frauds if only "the party charged" shall have signed the memorandum or agreement, whether the other party sign or not. *Williams v. Tucker*, 47

Miss. 678; 1873, *Marqueze v. Caldwell*, 48 Miss. 23; *Brooklyn Oil Refinery v. Brown*, 33 How. Pr. (N. Y.) 444. A written proposal containing the names of both parties, and signed by a duly authorized agent of the proponent, is, within the meaning of the Ohio statute of frauds, "an agreement in writing and signed," and the assent thereto may be proved by parol testimony. *Himrod Furnace Co. v. Cleveland & C. R. R. Co.*, 22 Ohio St. 451.

² *Cave v. Hastings*, 45 L. T. N. S. 348.

arrangement between the parties to which the expressions of the defendant could have any reference, except the agreement contained in the memorandum signed by the plaintiff. It was held that the letter of the defendant was so connected by reference to the document containing the terms of the arrangement, as to constitute it a note and memorandum of the contract signed by him within the fourth section of the statute of frauds. As has previously been stated, the statute does not require that the contract itself shall be in writing, but that it shall be evidenced by a writing under the hand of the party to be charged. Consequently, if an agreement in writing exists, which is signed only by *one* of the parties, so long as this condition of things exists, it is enforceable only against the party so having signed it; but, if subsequently, at any time before action is brought, the other party in any manner admits in writing, under his own hand, or that of an authorized agent, the existence of such contract, it becomes binding upon him because the two papers are to be taken together as forming the note or memorandum required by the statute. Therefore, in this view, which seems to be the result of the better authorities, it is immaterial in what form the memorandum is made, or whether it was ever delivered to the other party or not, provided that, in itself, or by reference to other writings, it embraces all the essential elements of the contract. Nor is it material in what form the writing admitting the existence of a contract, a memorandum of which is signed by one party, is made by the other party. *If it admits the contract, and refers to the memorandum in such a manner that the court can connect it therewith, and ascertain the terms of the contract without the aid of parol evidence, it is sufficient to bind him, although he did not intend thereby to ratify the contract.* The moment written evidence of the contract, under his hand, in whatever form, exists, the contract is taken out of the statute,¹ even though such admis-

¹ In *Townsend v. Hargreaves*, 118 Mass. 325, the court said: "The purpose of this celebrated enactment, as declared in the preamble and gathered from all its provisions, is to prevent fraud and falsehood, by requiring a party who seeks to enforce an oral contract in court, to produce, as addi-

tional evidence, some written memorandum signed by the party sought to be charged, or proof of some act confirmatory of the contract relied on. It does not prohibit such contract. It does not declare that it shall be void or illegal, unless certain formalities are observed. If executed, the effect

sion is in the form of a letter *repudiating* the contract.¹ But in order to make a writing of this character sufficient, it must

of its performance on the rights of the parties is not changed, and the consideration may be recovered. *Stone v. Dennison*, 13 Pick. (Mass.) 1; 23 Am. Dec. 654; *Basford v. Pearson*, 9 Allen (Mass.) 387; *Nutting v. Dickinson*, 8 id. 540. The memorandum required is the memorandum of only one of the parties; the alternative acts of the 17th section proceed from one only; they presuppose a contract, and are in affirmance or partial execution of it; they are not essential to its existence; need not be contemporaneous, and are not prescribed elements in its formation. It is declared in the 4th section that no action shall be brought upon the promises therein named, unless some memorandum of the agreement shall be in writing; and in the 17th, that no contract for the sale of goods 'shall be allowed to be good,' or, as in our statute, 'shall be good and valid,' unless the buyer accepts and receives part or gives earnest, or there is some memorandum signed by the parties to be charged, or, as in our statute, by the party to be charged. It is true there is difference in phraseology in these sections; but in view of the policy of the enactment, and the necessity of giving consistency to all its parts, this difference cannot be held to change the force and effect of the two sections. 'Allowed to be good' means good for the purpose of a recovery under it; and the clause in the last part of the latter section, which requires the memorandum to be signed by the party or parties to be charged, implies that the validity intended is that which will support an action on the contract. We find no case in which it is distinctly and authoritatively held otherwise. See *Leroux v. Brown*, 12 C. B. 801; *Carrington v. Roots*, 2 M. & W. 248; *Reade v. Lamb*, 6 Exch. 130. In carrying out its purpose, the statute only affects the modes of proof as to all

contracts within it. If a memorandum or proof of any of the alternative requirements peculiar to the 17th section be furnished; if acceptance and actual receipt of part be shown, then the oral contract, as proved by the other evidence, is established with all the consequences which the common law attaches to it. If it be a completed contract, according to common-law rules, then, as between the parties at least, the property vests in the purchaser, and a right to the price in the seller, as soon as it is made, subject only to the seller's lien and right of stoppage *in transitu*. Many points decided in the modern cases support by the strongest implication the construction here given. Thus, if one party has signed the memorandum, the contract can be enforced against him, though not against the other, showing that the promise of the other is not wholly void, because it affords a good and valid consideration to support the promise which, by reason of the memorandum, may be enforced. *Reuss v. Picksley*, L. R. 1 Ex. 342. The memorandum is sufficient, if it be only a letter written by the party to his own agent; or an entry or record in his own books; or even if it contain an express repudiation of the contract. And this because it is evidence of, but does not go to make the contract. *Gibson v. Holland*, L. R. 1 C. P. 1; *Buxton v. Rust*, L. R. 7 Ex. 1, 279; *Allen v. Bennet*, 2 Taunt. 169; *Tufts v. Plymouth Gold Mining Co.*, 14 Allen, 407; *Argus Co. v. Albany*, 55 N. Y. 495; S. C., 14 Am. Rep. 296."

¹ *Buxton v. Rust*, L. R. 7 Exchq. 279; *Wilkinson v. Evans*, L. R. 1 C. P. 407. In *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140, the defendant wrote a letter, admitting the purchase and referring to the plaintiff's letter containing the invoice, but denied any liability, because the goods had been sent by a wrong route. The

admit the existence of a previous *completed* contract between the parties. It cannot be used to *make*, but only to prove a contract already made; and although it admits the contract, if it annexes conditions to it, or otherwise varies it, it has no effect as a memorandum.¹ The statute simply requires some note or memorandum of the agreement entered into, in writing, signed by the party to be charged. Therefore it is only necessary that the essential terms of the contract should be evidenced by some writing which is ratified by the party to be charged under his own signature, or that of an authorized agent; and, as before stated, the *form* of the writing is not material, but any writing or number of written documents may be used to constitute a memorandum under the statute, if they are connected with each other by proper reference,² although such writings were not signed by the

court held that the letter was a sufficient note of the bargain to satisfy the statute, because it did not deny any of the terms of the contract, but merely sought to avoid it because it had not been properly performed. *Bailey v. Sweeting*, 9 C. B. N. S. 843; *Cave v. Hastings*, *ante*.

¹ *Nesham v. Selby*, L. R. 7 Ch. 406; *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20; *Smith v. Surman*, 9 B. & C. 561; *Williams v. Bacon*, 2 Gray (Mass.) 387; *Williams v. Morris*, 95 U. S. 444. *Rossiter v. Miller*, *ante*; *Bailey v. Sweeting*, 9 B. & C. 843; *McLean v. Nicoll*, 7 H. & N. 1124.

² The requisite written evidence of the contract may be established through the medium of letters and separate documents containing references to each other. Any printed papers or communications in writing which may have passed between the parties, forming on the face of them part of one connected transaction, may be incorporated and construed together, and made to establish the requisite written evidence of an "agreement" within the statute. *Bird v. Blosse*, 2 Ventr. 361; *Dobell v. Hutchinson*, 3 Ad. & El. 355; *Home v. Booth*, 4 Sc. N. R. 559. But the terms of the agreement must ap-

pear upon the face of the written instruments themselves, when placed in juxtaposition, and cannot be established in any way through the medium of oral testimony. *Coe v. Duffield*, 7 Moore, 252; *Stead v. Liddard*, 1 Bing. 4; *Kenworthy v. Schofield*, 2 B. & C. 945; *Ridgeway v. Wharton*, 22 Law T. R. 265. The note or memorandum of the agreement for the sale and purchase of lands, or of any interest in or concerning them, need not be drawn up in technical language, or in words of form, but there must be written evidence of an *aggregatio mentium*, or mutual agreement, on the part of the vendor and purchaser to sell and to buy; and both the subject-matter of the sale and the price to be paid for it must be specified. It would not be sufficient to say, "I agree to sell A B mylands," without specifying the terms or the price, and if those could be supplied by oral evidence, we should let in all the mischief against which the statute of frauds was meant to guard, viz., of having important parts of the contract proved by oral evidence. *BAYLEY, J.*, in *Saunders v. Wakefield*, 4 B. & Ald. 601; *Ogilvie v. Foljambe*, 3 Mer. 53. If upon negotiations for the purchase and sale

party to be charged, *if they were in existence before the writing which is signed by him was executed*;¹ and it is sufficient, if

¹ Wood v. Midgley, 5 De G. M. & G. 41; Jackson v. Lowe, 1 Bing. 9; Rishton v. Whatmore, 8 Ch. Div. 467; Dobell v. Hutchinson, 3 Ad. & El. 371; Williams v. Jordan, 6 Ch. Div. 517; Scarlett v. Stein, 40 Md. 512; Drury v. Young, 58 id.; Mayer v. Adrian, 77 N. C. 83; Washington Ice Co. v. Webster, 62 Me. 341; Williams v. Morris, 95 U. S. 444; Briggs v. Munchon, 56 Mo. 467; Tallman v. Franklin, 14 N. Y. 584; Kronheim v. Johnson, 7 Ch. Div. 60; Wilkinson v. Evans, L. R. 1 C. P. 407; Ridgway v. Ingram, 50 Ind. 145, and so many of them as of themselves show a relation to each other may be taken together as a memorandum. Buxton v. Rust, L. R. 7 Exchq. 279; Lerner v. Wannemacher, 9 Allen (Mass.) 412; Beckwith v. Talbot, 95 U. S. 289; Ide v. Stanton, 15 Vt. 685; Work v. Cawhick, 81 Ill. 317; Thayer v. Luce,

22 Ohio St. 62; Peabody v. Speyers, 56 N. Y. 230, but not otherwise, as parol or extrinsic evidence is not admissible to connect them. Boardman v. Spooner, 13 Allen (Mass.) 353; Stocker v. Partridge, 2 Rob. (N. Y.) 193; Morton v. Dean, 13 Met. (Mass.) 385; Johnson v. Buck, 35 N. J. L. 338; Freeport v. Bartol, 3 Me. 340; Schafer v. Farmer's Bank, 59 Penn. St. 144; Johnson v. Kellogg, 7 Tenn. 262; Wiley v. Robert, 27 Mo. 388; Clark v. Chamberlin, 112 Mass. 19; Ridgway v. Ingram, 50 Ind. 145; O'Donnell v. Seeman, 43 Me. 158; Jacob v. Kirk, 2 Moor. Ry. 221; Hinde v. Whitehouse, 7 East, 558; Counins v. Scott, L. R. 20 Eq. 11; Tawney v. Crowther, 3 Bro. C. C. 318; Peirce v. Corf. L. R. 9 Q. B. 210; Jackson v. Lowe, 1 Bing. 9; Coles v. Trecothick, 9 Ves. 234.

of an estate the owner writes a letter which amounts to a distinct offer to sell the property upon certain terms, and the party to whom the letter is addressed answers it and accepts the offer within a reasonable period, the contract is complete, and an action may be maintained upon it at common law, or the owner may be compelled to perform it *in specie* in equity. Coleman v. Upcot, 5 Vin. Abr. 527, pl. 17; Dunlop v. Higgins, 1 H. L. C. 381. But if there has not been a clear offer and acceptance of one and the same set of terms, if the property has not been clearly described and defined, and any material particulars are left unsettled between the parties, there is not a concluded contract capable of supporting an action, or a bill for specific performance. Kennedy v. Lee, 3 Mer. 451; Thomas v. Blackman, 1 Coll. 312. Where a draft agreement had on the back of it, "We approve of this draft," and this was signed by the intended parties to the agreement, it was held that it merely

amounted to evidence of something they intended to agree to, and not to an actual agreement. "If the words," observes LORD TENTERDEN, "imported an agreement, there would never be any necessity for any other instrument." Doe v. Pedgriph, 4 C. & P. 312. "Still," observes SIR E. SUGDEN, "where the parties themselves not being professional persons sign such a memorandum, it is a question to be decided in each case whether they signed in that form, as simply approving of the draft as such, or whether they intended to give validity to it as an agreement." Sugd. Vend. 129. "It is not necessary that the note in writing should be cotemporary with the agreement. It is sufficient if it has been made at any time before action is brought thereon, and adopted by the party afterwards, and then anything under the hand of the party expressing that he had entered into the agreement will satisfy the statute, which was only intended to protect persons from having oral agreements

the writing which is signed *admits* the contract, there being a memorandum thereof in writing, previously executed by the other party, although it is a mere request to be absolved therefrom.¹ A stated account in which the vendor charges himself with the price of land,² a receipt for money, or a bill of parcels³ may, if signed by the party to be charged, or

imposed upon them." *Shippey v. Derrison*, 5 Esp. 192.

If it relates to a bargain for the sale of goods, it must state the names of the contracting parties or their agents: *Champion v. Plummer*, 4 B. & P. 254; *Graham v. Musson*, 5 Bing. (N. S.) 605; 7 Sc. 769; *Sherburne v. Shaw*, 1 N. H. 157; *Nichols v. Johnson*, 10 Conn. 192; *Godet v. Cowdry*, 1 Duer (N. Y.) 132; and the price to be paid, if the price was fixed and agreed upon at the time of the making of the contract: *Elmore v. Kingscote*, 5 B. & C. 583; 8 D. & R. 343; *Smith v. Arnold*, 5 Mas. (U. S.) 414; *Ide v. Stanton*, 15 Vt. 685; *Adams v. McMillan*, 7 Port. (Ala.) 73; but if no price was positively and definitely fixed and agreed upon, the note or memorandum will be sufficient, in the case of the sale of a chattel, without any statement of price, and the law will infer that a reasonable price was to be paid. *Hoadley v. MacLaine*, 10 Bing. 482; *Accbal v. Levy*, ib. 227, 376; *Valpy v. Gibson*, 4 C. B. 864; 16 Law J. C. P. 248. It is not necessary that all the minutiae and particulars of the contract should appear upon the face of the written memorandum; any note, or an entry in a book or ledger, acknowledging the fact of the sale, mentioning the name of the vendor and the thing sold, and signed by the purchaser or his agent, will take the case out of the statute. The contract may be authenticated and established through the medium of bills of parcels, entries in books, letters, and separate writings, *provided they refer to each other and to the same persons and things, and manifestly relate to the same contract and transaction*. *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennett*, 3 Taunt. 169.

Where goods were sold by auction to an agent acting on behalf of an undisclosed principal, and the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue; it was held, that the entry in the catalogue and a letter afterwards written by the principal to the agent, recognizing the purchase, might be coupled together to constitute and establish the requisite written memorandum of the contract. *Phillimore v. Barry*, 1 Campb. 513. And where a buyer wrote to the seller: "I give you notice that the corn you delivered to me, in part performance of my contract with you for one hundred sacks of good English seconds flour, at 45s. per sack, is so bad, that I cannot make it into saleable bread." And the seller replied: "I have your letter or notice of the 24th September, in reply to which I have to state that I consider I have performed my contract as far as it has gone." It was held, that the first letter and the answer might be coupled together, and incorporated, and were sufficient evidence in writing to satisfy the terms of the statute of frauds, and enable the buyer to sue the seller for the non-delivery of an article corresponding with that mentioned and described in the buyer's letter. *Jackson v. Lowe*, 1 Bing. 9.

¹ *Cave v. Hastings*, 45 L. T. Rep. N. S. 348.

² *Bourland v. County of Peoria*, 16 Ill. 538; *Barry v. Coombs*, 1 Pet. (U. S.) 640.

³ *Williams v. Morris*, 95 U. S. 444; *Barickman v. Kuykendall*, 6 Blackf. (Ind.) 2; *Evans v. Prothero*, 1 De G. M. & G. 572; *Ellis v. Deadman*, 4 Bibb. (Ky.) 466, as to bill of parcels.

recognized by some other writing under his hand, amount to a sufficient memorandum,¹ provided it contains a description of the property sold, and the essential terms of the agreement, and this is the rule both as to chattels and land.² But a memorandum, in whatever form, which does not in itself, or by reference to other *written* papers, contain all the essential terms of the contract as well as a sufficient description of the property, is not sufficient.³ But, to comply with the statute, the memorandum need only contain the *substance* of the contract, and need not set forth all the details or particulars. It is enough if the names of the parties, the price (if it has been agreed upon), such a description of the property that it can be identified, and such other special terms, if any, as have been agreed upon are set forth, so as to make a complete agreement without the aid of parol evidence.⁴ If terms of credit are agreed upon, they should be stated in the memorandum, otherwise it will be treated as a sale for cash.⁵ So if a special time for delivery has been agreed upon, it must be stated in the memorandum or it will be treated as a contract to deliver at once.⁶ In the case of a lease, or rather an agreement for a lease, the *term* should be stated in the memorandum, and cannot be shown by parol evidence.⁷

The fact of the making of a note or memorandum presupposes the existence of a prior parol contract, and while there

Hawkins v. Chace, 19 Pick. (Mass.) 502; Batturs v. Sellers, 5 H. & J. (Md.) 117; Saunderson v. Jackson, 2 B. & P. 238; Drury v. Young, 58 Md. 546.

¹ Barickman v. Kuykendall, *ante*; Cosack v. Descourdes, 1 McCord (S. C.) 425; Shoofstall v. Adams, 2 Grant (Penn.) 209.

² Sherburne v. Shaw, 1 N. H. 157; Stafford v. Lick, 10 Cal. 12; Sheid v. Stamps, 2 Sneed. (Tenn.) 172; Kay v. Curd, 6 B. Mon. (Ky.) 100; Ferguson v. Storer, 33 Penn. St. 411; Nichols v. Johnson, 10 Conn. 192.

³ McCarty v. Kyle, 4 Cold. (Tenn.) 348; Knox v. King, 36 Ala. 367; Doty v. Wilder, 15 Ill. 407; White v. Watkins, 13 Mo. 423; Kurtz v. Cummings, 24 Penn. St. 35.

⁴ Knox v. King, 36 Ala. 367; Doty v. Wilder, 15 Ill. 407; Ives v. Hazard, 4 R. I. 4.

⁵ Wright v. Weeks, 3 Bos. (N. Y.) 372; Davis v. Shields, 26 Wend. (N. Y.) 341; Elfe v. Gadsden, 2 Rich. (S. C.) L. 373; Smith v. Jones, 7 Leigh. (Va.) 165; Fessenden v. Mussey, 11 Cush. (Mass.) 127. So if a *time* for the delivery of the goods is agreed upon, it should be stated. Davis v. Shields, 26 Wend. (N. Y.) 341. So if the goods are warranted as to quality: Newberry v. Wall, 65 N. Y. 454; Smith v. Dallas, 35 Ind. 255; Peltier v. Collins, 3 Wend. (N. Y.) 459.

⁶ Williams v. Robinson, 73 Me. 24; Clarke v. Fuller, 16 C. B. (N. S.) 297; Abeel v. Radcliffe, 13 John. (N. Y.) 297; Riley v. Williams, 123 Mass. 506; Hodges v. Howard, 5 R. I. 149; Parker v. Tainter, 123 Mass. 185; Fitzmaurice v. Bayley, 9 H. L. Cas. 79.

is a distinction between the note or memorandum, and the contract itself, yet the note or memorandum being required to embody all the essential terms of the contract, excludes parol evidence as to any of the essential terms of such prior contract.¹ The object of the statute, in requiring a note or memorandum in writing to be made, is to prevent disputes as to what the parties had agreed to and intended, and therefore the memorandum or note supersedes the prior parol agreement, and excludes all proof as to what was said by the parties, or even to show a mistake in the writing itself.²

¹ See §§ 384-401, as to instances in which parol evidence is admissible to explain, etc., memorandums.

² *Watkins v. Rymill*, 10 Q. B. Div. 178; *Stoops v. Smith*, 100 Mass. 63; *Ridgway v. Bowman*, 7 Cush. (Mass.) 268; *Grout v. Story*, 44 Vt. 200; *Pitcher v. Hennessey*, 48 N. Y. 415; *Clark v. N. Y. L. Ins. & F. Co.*, 7 Lans. (N. Y.) 322. In *Eden v. Blake*, 13 M. & W. 614, the defendant bought at auction for less than £10 a dressing-case, which in the printed catalogue was described as having *silver* fittings, but which *before* the sale the auctioneer stated was a mistake, and that the fittings were *plated*. The court held that as the contract was not in writing, parol evidence was admissible to show that the dressing-case was sold as having only plated fittings although the catalogue itself was not altered. *POLLOCK, C. B.*, said: "I am of opinion that this rule ought to be discharged. I accede altogether to the authorities cited by the defendant's counsel, and to the proposition, that, whatever be the value of the goods sold, whether it be such as calls for a memorandum in writing under the statute of frauds or not, *if there has been a memorandum in writing, it cannot be altered by extrinsic evidence; and consequently, the plaintiff could not be allowed to prove that, at the time of the sale, the auctioneer made declarations contradicting the printed conditions of sale.* In *Shelton v. Livius*, 2 C. & J. 411, the catalogue as it originally stood formed part of

the contract entered into; for there, although the auctioneer announced in the sale-room an alteration in the conditions of sale, he afterwards signed the book without making any alteration in the printed catalogue; and that signature bore reference to the catalogue, which contained the conditions of sale, and constituted the contract. In this case no question arises on the statute of frauds, for the amount sold being less than £10, no writing was requisite, and the question is what in point of fact was bargained and sold; and that is altogether a question for the jury. According to the evidence, it appears that, before this article was put up for sale, the auctioneer stated publicly that the fittings were not silver, as stated in the catalogue, but plated, and that the dressing-case would be sold as having plated fittings. Now it was for the jury to say whether the defendant bargained for these things as being only plated, or as silver, what, in point of fact, was the article bargained and sold. It is the same as if the auctioneer had put up and sold an article not named in the catalogue at all. The objection taken in the cases which have been cited does not arise in the present."

ALDERSON, B., said: "I am of the same opinion. The question turns entirely on the *facts*, for the *law* on the subject is clear. If the auctioneer had signed a book containing or referring to the catalogue, without making any alteration in it relative to these

The legal effect of a note or memorandum is left precisely as it was at the common law, *but the whole contract must be embraced in the writing or other collateral writings connected therewith, and no part of it left resting in parol*, because in such an event, all the mischiefs which the statute was intended to prevent might ensue.¹ Therefore a memorandum

fittings being plated, and not silver, I should agree that it would not be competent to the opposite party to show that, previous to the bidding, the auctioneer had declared that the goods to be sold were only plated; because, having subsequently signed in the book a statement that they were silver, it is that subsequent act of signing which binds the purchaser, and not the mere proceedings at the sale. That would be in accordance with the case of *Shelton v. Livius*, ante, because there the auctioneer signed the book without making any alteration in the particulars of sale, although he had stated verbally that the alteration was to be made. Whether the subject-matter of the sale be land or goods is immaterial for this purpose. The sole question is, what were the terms upon which this article was sold. Are those terms in writing? If they are, they cannot be varied by parol testimony; but if they exist only in parol, they of course may be varied by parol; and as it appears that the article was not sold under an agreement in writing, it is for the jury to say whether the contract existed in the printed particulars alone, or partly in them and partly in parol; namely, that the auctioneer stated that there was an inaccuracy in the particulars, which declaration was heard by the defendant, who, after hearing it, bid for the article. This the jury have found. I am therefore of opinion that the rule ought to be discharged."

ROLFE, B., said: "I am of the same opinion. Where there is a sale of land, the party cannot be bound, except by a contract signed either by himself, or by some person either expressly or impliedly constituted his

agent to sign for him. After the passing the statute of frauds, the question arose, whether the express words of that statute, that an agreement for the sale of land, or of goods above the value of £10, should be 'signed by the party to be charged therewith, or some person thereunto by him lawfully authorized,' could be got over by holding that an auctioneer might act as agent for both parties. It has however been settled, that if he signs the printed particulars of sale, he signs them as the agent of the purchaser; but if, before the sale, he gave a parol intimation of an alteration in the particulars, there might be great doubt whether the party who bid simpliciter at a sale of land would be bound by that intimation, unless he gave an express authority to the auctioneer to sign the altered particulars as agent for him; but where, as is the case here, the chattel to be sold is under the value of £10, and consequently no writing is required by the statute of frauds, the auctioneer might very well say, 'I have no such article to sell as that described by the catalogue to have silver fittings, but I will put this up as a plated article which does not appear in the catalogue.' A party bids for it, and when the auctioneer strikes down his hammer, the contract is complete. It is not clear to me that what the auctioneer signs afterwards makes any difference, for the contract is completed by the act of sale; but, as the case stands, there is no pretence for this rule." *Taylor v. Riggs*, 1 Pet. (U. S.) 591; *Hakes v. Hotchkiss*, 23 Vt. 291; *Carter v. Hamilton*, 11 Barb. (N. Y.) 147; *Small v. Quincy*, 4 Me. 497.

¹ In *Bird v. Munroe*, 66 Me. 337, it was held that a writing ante-dated as

or note in writing which does not contain the terms of the agreement, but is an agreement to take the property "*upon the terms specified*," and the terms referred to rest in parol, is incomplete and inoperative.¹ But as we shall see hereafter,

an original contract of the date of the verbal contract first made, is not in law the contract itself, but is merely the necessary evidence by which the contract may be proved and the statute satisfied, and that parol evidence is admissible to show that the contract was ante-dated. In *McElroy v. Buck*, 35 Mich. 434, it was held that where a verbal contract had been entered into by an agent for the purchase of property, a telegram from the principal accepting the action of the agent, but which did not express the terms of the contract, leaving the terms of the contract to be proved by parol, did not constitute a sufficient memorandum under the statute.

¹ *Wright v. Weeks*, 25 N. Y. 153; *McElroy v. Buck*, 35 Mich. 434; *Whelan v. Sullivan*, 102 Mass. 204; *Frank v. Miller*, 38 Md. 450. *The contract must be certain in itself, or capable of being made so by reference to some other written evidence.* *Abeel v. Radcliffe*, 13 John. (N. Y.) 300; *Parkhurst v. Van Cortlandt*, 1 John. Cas. (N. Y.) 274; *Hagan v. Domestic Sewing Machine Co.*, 9 Hun (N. Y.) 73. In *Clark v. Chamberlin*, 112 Mass. 250, a memorandum of a sale of land described the land as being "lots No. 1 and 2 on F Street," and did not refer to any plan by which the premises could be identified, and it was held insufficient, because it left the land (the subject-matter of the contract) to be identified by parol. See also *Wheeler v. Sullivan*, 102 Mass. 204. But in *Scanlan v. Geddes*, 112 Mass. 15, a memorandum as follows: "Boston, Nov. 10, 1870. Received of Scanlan \$20.00 as forfeit-money and part payment of the price of house on Fifth Street, between D and E Street. The price agreed on to be paid for the house is \$3,400. The purchaser agrees to pay \$2,000 when the house is finished, the balance of \$1,400 to remain on mortgage

for a term of three years. The undersigned agrees to have the house completed by Dec. 1, 1870; also to give a warranty deed of the property, free from incumbrance," was held sufficient, provided the promisor owned but one house upon the street. In a later case, *Mead v. Parker*, 115 Mass. 413, a memorandum which merely described the property as being "a house on Church Street," was held sufficient, and parol evidence to identify the property was held admissible. See also *Slater v. Smith*, 117 Mass. 96. If the last cases cited contain the true rule, it is difficult to understand upon what principle the doctrine of *Clark v. Chamberlin*, *ante*, can be sustained. If parol evidence was admissible to identify the "house" in *Mead v. Parker*, and *Scanlan v. Geddes*, *ante*, it was equally admissible in *Clark v. Chamberlin*. It is true that no particular plan was referred to, neither was any plan referred to in the other cases, but the data for ascertaining the identity of the property was as perfect in the one case as in the other. *And the whole contract must appear from the writings.* A written acceptance of an oral offer will not, unless it states the terms of the contract, be sufficient. Thus, in *Palmer v. Marquette & Pacific Rolling Mill Co.*, 32 Mich. 274, the defendant sent a telegram to the plaintiff, as follows: "You may come on at once, at salary of two thousand, conditional only upon satisfactory discharge of business"; and in an action for damages for refusing to take the plaintiff into service this was held insufficient, because it did not state either the time, price, or business with definiteness. In *Sweet v. Lee*, 4 Scott (N. R.) 77, the following memorandum was made between the plaintiff and the defendant, and signed with their respective initials: "Dic. of Practice, £80 per annum for five years,

the same rules prevail in reference to the admissibility of parol evidence to explain and apply a note or memorandum

commencing Michaelmas, 1828; £60 per annum for the rest of Mr. Lee's life, if he survive the five years, payable, in either case, quarterly, 'the first payment Michaelmas, 1828, Mr. Lee to separate the practices K. B. and C. P.'" Held, that parol evidence was admissible to explain the document; but that, inasmuch as it appeared to be a memorandum of a contract that was not to be performed within a year, and no consideration was stated on the face of it, it came within the fourth section of the statute of frauds, and was, therefore, not capable of being enforced by action. The plaintiff having paid the annuity for several years under this memorandum, held, that he could not (upon the defendant's setting up the above objection to its legality) recover back the money as upon a failure of consideration. In *McLean v. Nicoll*, 7 H. & N. 1024, the true rule as to what should be embraced in a memorandum was announced. It was an action for goods sold, etc., and it appeared that the plaintiff was a looking-glass manufacturer, and that, on the 18th December, 1860, the defendant called at his shop and ordered the goods mentioned in the invoice. He desired that the goods might be sent to Jersey, to be delivered there, and it was agreed that the glass should be plate-glass of the best quality, and that the plaintiff should insure it from breakage. The plaintiff, on shipping the goods, sent an invoice as follows:

JANUARY 8, 1861.

Mr. Nicoll bought of Charles M'Lean, 78 Fleet Street and 144 Oxford Street:
1861.

Jan. 7. Two compo chimney-glasses, gilt, 70x50, and 60x50, stock	£22 00
" Insur. of glass from breakage, Six 8-inch silvered plates, at 2s.	1 15
" Loan of cases for ditto, to be returned	12
" 16-ft. table and slab, stock	1 10
" Carved chimney-glass, C. C. T., stock, plate 58x48	8 05
" Insurance of breakage of glass to Jersey	9 00
" Loan of cases, to be returned,	1 00
Net cash	1 00
	£45 2

To which the defendant replied in the following letter:

"MIDVALE HOUSE,
JERSEY, Jan. 18, 1861.

Sir:—You advise having forwarded a printed list, patterns, and prices; it has not reached. In your account I apprehend there must be some mistake; your charge for loan of cases and packing is equivalent to their value. Please rectify this.

Yours truly,

EDWARD NICOLL.

Mr. M'Lean, London."

The ship by which the goods were sent was lost, and the goods were rendered useless. On this evidence, *BRAMWELL, B.*, ordered the plaintiff to be non-suited, for want of a memorandum, as required by the seventeenth section of the statute of frauds, with leave to move for a rule to set aside the non-suit, and enter a verdict for £48 10s., if the court should be of opinion that the documents in evidence constituted a sufficient memorandum. A rule having been obtained, the defendant contended that the documents put in at the trial did not set out the actual contract. They cited *Cooper v. Smith*, 15 East, 103; *Bailey v. Sweeting*, 9 Weekly Rep. 273; *Archer v. Baynes*, 5 Exch. 625; and *Goodman v. Griffiths*, 1 H. & N. 574. And the plaintiff contended that the defendant, by his answer to the invoice, acquiesced in its accuracy as a statement of the real contract.

POLLOCK, C. B.: "We are all of opinion that the rule must be discharged. We all think the memorandum must contain all the terms of the contract. Now, the invoice, taken with the answer, does not contain all the terms of the contract. No doubt cases have decided that an invoice, responded to by a signed letter, may form a memorandum to satisfy the statute of frauds; but in those cases it was held that the memorandum must contain all the terms of the con-

under the statute, as exist at common law in reference to any written contract. The statute simply requires that the

tract; and the invoice, taken with the answer, does not contain all the terms of the contract, according to the evidence of the plaintiff. *One term of the contract, relating to the quality of the glass, is not mentioned in the invoice at all; and as the memorandum should contain all the terms of the contract, we cannot hold that the statute of frauds has been complied with.* We are first to inquire what was the real contract, and then whether the invoice and answer together furnish a memorandum of what was the real contract. We can hold that it does, for the reasons I have stated. It is to be regretted that we should be under the necessity of entering upon such frequent instances of non-compliance with the statute. The cases have gone very far in putting the correspondence of parties together, and constituting a memorandum to satisfy the statute. But I think we should not be always searching for something equivalent to a memorandum; and in this case, certainly, we could not on any principle hold that any had been shown."

In *Justice v. Lang*, 47 N. Y. 493, the plaintiffs brought action upon the following memorandum, signed by the defendants:

"NEW YORK, May 13, 1861.

We agree to deliver P. S. Justice one thousand Enfield pattern rifles, with bayonets, no other extras, in New York, at eighteen dollars each, cash upon such delivery; said rifles to be shipped from Liverpool not later than July 1, and before, if possible.

W. BAILEY LANG & Co."

Held, that when accepted by the other party, it was sufficient to take the case out of the statute. The ends and objects of the statute are attained by written proof of the obligation of the defendant, and the statute is complied with when the note or memorandum is signed by the parties to be charged thereby, and the fact that the party who does not sign is not liable

thereon, does not destroy or annul the consideration and terms which form the inducement of the other party to make it obligatory on himself, by complying with all the requirements of the law to make it so. The contract must not only be in writing, but all the essential elements of the contract must be in writing. Thus, in *Tuttle v. Sweet*, 31 Me. 555, the defendant by parol employed the plaintiff to work for him making powder-casks for the term of three years. Held, that the contract being within the statute of frauds, no recovery could be had for its breach. In that case it appeared that the plaintiff verbally offered to labor for the defendant three years, at a certain price. The defendant wrote the plaintiff three letters as follows:

"June 12, 1847.

I have concluded to hire you at your offer; shall depend on you as you talked."

"October 10, 1847.

I have talked with Jones about your coming. Have concluded to keep on a year longer without you."

"January 31, 1848.

I received yours. If anything is wrong and of damage to you, let it stand until I come and I will endeavor to do right."

Held, that the letters were not a sufficient memorandum to take the contract out of the statute. The memorandum must be signed by the party to be charged, and the names of both parties must be contained therein. *Sams v. Fripp*, 10 Rich. Eq. (S. C.) 447. In *Old Colony R. R. Co. v. Evans*, 6 Gray (Mass.) 25, the court say: "A written contract, signed by one and acted upon by both, may be enforced in equity against the one who did not sign it." *Allen v. Bennet*, 3 Taunt. 176; *Douglass v. Spears*, 2 N. & Mc. (S. C.) 207; *Pennemari v. Hartshorn*, 13 Mass. 91; *Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Roget*

contract shall be evidenced by writing, but it leaves the law relating to the effect of the written contract, and the admissibility of parol evidence to explain or apply it, as it existed at the common law.¹

v. Merritt, 2 Cai. (N. Y.) 120; *Reynolds v. Dunkirk &c. R. R. Co.*, 17 Barb. (N. Y.) 613. In *Lang v. Henry*, 54 N. H. 57, the defendant took a bill of sale of the entire stock of boots and shoes finished and unfinished, belonging to Charles A. Lang, the plaintiff's son. But by the terms of the sale the boots and shoes were to be finished by Lang. This sale was made in August, 1851, and in the following September the workmen became uneasy about their pay, when Charles A. Lang went to Boston to see the defendant, and he gave the plaintiff the following letter:

"Boston, Sept. 25, 1869.

CHARLES A. LANG:

Dear Sir.—In relation to your workmen's pay, have no fear; they shall be paid for all their labor on the shoes made and sent to me.

Yours truly,

JOHN J. HENRY."

This letter was shown to the plaintiff, who was one of the workmen to whom Lang was indebted for work on the shoes. The workmen intended to have secured their claims by attachment of the shoes, but on the strength of this letter they forbore their suits, and the next day about \$1,200 worth of shoes were forwarded to the defendant. The court held that the undertaking not being an original one, and a part of the terms of the sale, and the plaintiff not being privy thereto, and no sum being named as due to him, no action could be maintained by him, the undertaking being within the statute of frauds. *Wood's Master and Servant*, 377-380. A memorandum: "Received of L \$408.35, being his proportion of the first payment on the Bradley Sand Bank purchase, I having agreed to give him an interest of four-fifths of said purchase at cost, and hereby bind myself, when the purchase-money

shall have been all paid, to cause a deed of general warranty to be made to him and myself in like proportion, to wit, L four-fifths and myself one-fifth," although duly dated and signed, was held to be insufficient within the statute of frauds, as not showing the *time of purchase nor the locality of the property, nor referring to any writing to determine if the purchase was of the entire property.* *Johnson v. Kellogg*, 7 Heisk. (Tenn.) 262. And the same was also held where F agreed to pay certain notes of K & Co., and gave a written memorandum to that effect in which the notes, so to be paid, were not specified with any accuracy or particularity, for the reason that parol evidence was required to show what notes were meant. The rule that a contract required by the statute of frauds to be in writing, cannot be partly in writing and partly in parol, was also applied. *Frank v. Miller*, 38 Md. 450. So a writing: "I to-day made the agreement with O to let him take the sand out of the pit fifty feet wide, the entire length, for the sum of \$650, and give him one year's time to take it out, from the date above," signed by the landowner only, was held void as to O, he not having signed it as required by the statute of New Jersey. *O'Donnell v. Brehen*, 36 N. J. L. 257.

¹ *Blackburn on Sales*, 46; *Benjamin on Sales*, Sec. 205; *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352. "To satisfy the statute," says *VIRGIN, J.*, in the case last cited, "the memorandum must contain within itself, or by some reference to other written evidence, the names of the vendor and vendee, and all essential terms and conditions of the contract, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to, if any, without aid from

SEC. 346. When Mutuality is Requisite.—Ordinarily, if one party signs the memorandum, and it is accepted orally by the other party, he is bound, although the other party is not.¹ Thus, *a proposal in writing, signed by the party to be charged, and accepted by parol by the party to whom it is*

parol testimony. *O'Donnell v. Seman*, 43 Me. 158; *Jenness v. Mt. Hope Iron Co.*, 53 id. 20; *Horton v. McCarty*, 53 id. 394; *Washington Ice Co. v. Webster*, 62 id. 341; 16 Am. Rep. 462. And when a memorandum is made, signed, and delivered between the parties as and for a complete memorandum of the essential terms of the contract, *and it is capable of a clear and intelligible exposition*, it is conclusive between the parties, and parol evidence is incompetent to contradict or vary its terms and construction; and if in fact some of the conditions actually made be omitted from it, the defendant cannot avail himself of them." *Small v. Quincy*, 4 Me. 497; *Coddington v. Goddard*, 16 Grey (Mass.) 436; *Hawkins v. Chase*, 19 Pick. (Mass.) 502; *Ryan v. Hall*, 13 Met. (Mass.) 523; *Warren v. Wheeler*, 8 id. 97; *Cadet v. Winsor*, 1 Allen (Mass.) 546; *Remick v. Sandford*, 118 Mass. 102. A telegram from a principal, saying he would take certain property for the purchase of which his agent had negotiated, was held not a sufficient memorandum to satisfy the statute of frauds, where it did not express the terms of the contract, but these would have to be ascertained from the oral negotiations between the agent and the seller. *McElroy v. Buck*, 35 Mich. 434. And, generally, a memorandum, to take a contract out of the statute, must express all the essential terms of the contract with such certainty as to render it unnecessary to resort to parol evidence to determine the intent of the parties. *Hagan v. Domestic S. M. Co.*, 9 Hun (N. Y.) 73. The statute does not require the memorandum to be drawn in any particular form, but one which, either in its own terms, or by reference to other writings, *shows the names*

of the parties, a sufficiently clear description of the subject-matter to render it capable of identification, the terms and conditions of the contract, and price to be paid, or other consideration given, is sufficient. *Wood v. Davis*, 82 Ill. 311.

¹ *Getchell v. Jewett*, 4 Me. 350; *Barstow v. Gray*, 3 id. 409; *Small v. Quincy*, 4 id. 497; *Atwood v. Cobb*, 16 Pick. (Mass.) 227; *Rogers v. Saunders*, 16 Me. 92; *Laythoarp v. Bryant*, 2 Bing. (N. C.) 469; *Old Colony R. R. Co. v. Evans*, 6 Gray (Mass.) 25; *Hatton v. Gray*, 2 Ch. Cas. 164; *Ives v. Hazard*, 4 R. I. 14; *Coleman v. Upcot*, 5 Vin. Ab. 528; *Sams v. Tripp*, 10 Rich. (S. C.) Eq. 447; *Bowen v. Morris*, 2 Taunt. 374; *Martin v. Mitchell*, 2 Jac. & W. 413; *Clason v. Bailey*, 14 John. (N. Y.) 484; *Hunter v. Seton*, 7 Ves. 265; *Ballard v. Walker*, 3 John. Cas. (N. Y.) 60; *Lowry v. Mehaffy*, 10 Watts. (Penn.) 287; *Varley v. Shirley*, 7 Blackf. (Ind.) 452; *Parrish v. Koons*, 1 Pars. Cas. (Penn.) 79; *Gale v. Nixon*, 6 Cai. (N. Y.) 445; *Roget v. Merritt*, 2 Cai. (N. Y.) 117; *Flight v. Bolland*, 4 Russ. 298; *Ormond v. Anderson*, 2 B. & B. 363; *Child v. Comber*, 3 Swanst. 423; *Hunter v. Giddings*, 97 Mass. 41; *Mason v. Decker*, 72 N. Y. 598; *Cook v. Anderson*, 20 Ind. 15; *McFarson's Appeal*, 11 Penn. St. 503; *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352; *Gartrell v. Stafford*, 12 Neb. 545; 41 Am. Rep. 767. The statute simply requires that the party *sought to be charged* should sign. *Fowle v. Freeman*, 9 Ves. 351; *Seton v. Slade*, 7 id. 265; *Lowber v. Connit*, 36 Wis. 176; *McCrea v. Purmont*, 16 Wend. (N. Y.) 460; *Thayer v. Luce*, 22 Ohio St. 62; *Justice v. Lang*, 42 N. Y. 493; 1 Am. Rep. 576.

made, has been held sufficient to satisfy the statute,¹ although

¹ In *Reuss v. Picksley*, L. R. 1 Exch. 343, this rule was well illustrated. In that case it appeared that the plaintiffs carried on business at Manchester and the defendants carried on business as agricultural implement makers, at Leigh, near Manchester, under the style of Picksley, Sims & Co. In the autumn of 1864 an industrial exhibition was fixed to be held at Moscow, and the defendants were desirous of exhibiting some of their machines there. Accordingly they entered into negotiations with the plaintiffs, with the view of the plaintiffs undertaking to look after the goods sent by the defendants whilst at the exhibition. The plaintiffs at first declined the responsibility, but upon the defendants proposing to make an agency for ten years with them if they would bear a part of the expense of the exhibition, one of the plaintiffs, Mr. Ernst Reuss, stated that he would go to Moscow and himself superintend the arrangements necessary for exhibiting the defendants' goods. With that intention he went to Moscow in July, 1864, and remained there for a month. Meantime a quantity of goods were sent by the defendants to the plaintiffs for the purpose of being forwarded to the exhibition. On Mr. Reuss's return he requested an interview with Mr. Sims, one of the defendants, with reference to the Russian agency. An interview thereupon was had, at which the terms of the agency were discussed, and afterwards the plaintiffs wrote to the defendants the following letter:—

“MANCHESTER,
8th September, 1864.

Messrs. PICKSLEY, SIMS & Co.,
Leigh:—Referring to our conversation with Mr. Sims, respecting the machinery for the Moscow exhibition, it was arranged that we take charge of all the machines, etc., in Hull, and pay for your account all freight charges, insurances, etc., till delivered in Moscow. That we sell in Moscow as many of the machines as possible,

and that after the close of the exhibition the unsold remainder be at your risk and expense, either to keep in Moscow or return home as you think fit at your expense. That we pay you here cash for all machines sold during the exhibition, the price to be calculated at list price less the full trade discount for cash, that you pay the travelling expenses there and back of Mr. Smith, but that we pay his additional salary whilst in Moscow of 10s. per day, and his hotel bill. That the agency for Russia be for ten years from date on following conditions. You to allow us full discount for cash on all orders received by us direct, and that you hand over to us to be dealt with in the same way all orders you receive from Russia (excepting those from Odessa). On all orders executed by you from Russia, excepting Odessa, that may come through any other agent in Great Britain, you allow us a commission of £5 per cent. That we act as and are hereby appointed your sole agents for the kingdom of Italy, on the same conditions as for Russia. Awaiting your reply, we are, etc.,

ERNST REUSS & Co.”

To that letter the defendants replied as follows:—

“BEDFORD FOUNDRY,
LEIGH, LANCASHIRE,
September 9th, 1864.

Our Mr. Sims desires me to acknowledge the receipt of your favor dated the 8th inst., and to say as far as the agency for Russia goes he considers it satisfactory, except that you must confine yourselves to us for every description of machinery we manufacture, and which you sell in Russia. With respect to Italy, Mr. Sims cannot at present say anything about it, in consequence of the change which is likely to take place in our firm shortly. I am, etc.,

p.p. PICKSLEY, SIMS & Co.,
JOSEPH SMITH.

Messrs. ERNST REUSS & Co.”

The plaintiffs sent no reply to this

the party accepting such proposal is not bound, provided he is ready to perform upon his part, as must always be the

letter, but after the date of it goods were sent to them by the defendants, and were forwarded by the plaintiffs to Moscow, where they were shown at the exhibition, which took place on the 7th September, 1864. At the close of the exhibition a great proportion of the goods remained unsold, and in respect of these, as well as in respect of those sold, the plaintiffs incurred considerable expenses.

On the 8th December, 1864, the defendants transferred their business to a Joint Stock Company, and in the February following the plaintiffs' Moscow agent died. Shortly afterwards the plaintiffs and defendants entered into a correspondence with a view to a settlement of the matters connected with the Moscow exhibition, but the parties were unable to come to any agreement. The plaintiffs thereupon brought this action. No orders for machinery from England had been received by either plaintiffs or defendants for Russia (except Odessa) at the time of the alleged breach. Upon the trial the judge directed the jury that the Moscow and Russian stipulations in the letters of the 8th and 9th September were parts of one and the same contract, and the jury found that the plaintiffs did accept and accede to the terms of that contract. A verdict was accordingly entered under the direction of the learned judge for the plaintiffs, damages £850. Leave was reserved to the defendants to move to set aside the verdict and enter a nonsuit on the ground that there was no sufficient memorandum in writing of the contract under the statute of frauds.

The verdict was sustained, WILLES, J., saying: "We are all of opinion that the judgment of the Court of Exchequer should be affirmed. It appears that the plaintiffs, through a member of their firm, had some negotiations with the defendants, through

a member of their firm, with reference to so much of the contract declared upon as related to the Moscow exhibition. In the course of these negotiations, the plaintiffs refused to encounter the expenses of this exhibition unless the defendants would undertake in some way or other to reimburse them, and accordingly communications as to the manner in which this object could be effected were entered into between the parties. It was suggested by the plaintiffs that they should be employed for a term of ten years as agents in Russia for the sale of machinery. But when first broached that negotiation did not come to a head. One of the plaintiffs went abroad, and on his return sent word that he wished to see one of the defendants, Mr. Sims, on business, that business being with reference to the agency in Russia. An interview was thereupon had, at which the terms of the agency were discussed, and letters afterwards passed relating to the Moscow exhibition, the agency in Russia, and an agency which the plaintiffs desired in Italy. On the 8th September, 1864, one letter was written by the plaintiffs, and on the 9th an answer was sent by the defendants. The letter of the plaintiffs was to this effect. [The learned judge read so much of the letter as refers to the Moscow exhibition.] Then the letter proceeds to speak of the Russian agency in terms not applicable to a distinct or separate contract. Having dealt with the matters connected with the Moscow exhibition, which was to operate as accessory to the general agency, and as an advertisement, the letter goes on to detail the terms of the agency for Russia; and as to this part of the arrangement the plaintiffs do not state that they are to abstain from taking orders from other persons. To this, and to this alone, the defendants objected in the letter of the 9th. Then follows, in the letter

case when a party seeks to enforce a contract,¹ and the fact of such acceptance may be proved by parol evidence.²

¹ *Laythroap v. Bryant*, 2 Bing. (N. C.) 735; *Morin v. Murtz*, 13 Minn. 191; *Brumfield v. Karson*, 33 Ind. 94; *Clason v. Bailey*, 14 John. (N. Y.) 484; *Shirley v. Shirley*, 7 Blackf. (Ind.) 452; *Penniman v. Hartshorn*, 13 Mass. 87; *Fenley v. Stewart*, 5 Sandf. (N. Y.) 101; *Douglass v. Shears*, 2 N. & M. (S. C.) 207; *Barstow v. Gray*, 3 Me. 409; *Justice v. Lang*, 42 N. Y. 493; 1 Am. Rep. 576.

² *Reuss v. Picksley*, L. R. 1 Excheq. 342; *Western Union Tel. Co. v. Chicago &c. R. R. Co.*, 86 Ill. 246; *Ward v. Kirkman*, 27 Miss. 823; *Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Justice v. Lang*, 42 N. Y. 493; *Argus Co. v. Albany*, 55 N. Y. 495; *Griffith v. Rembert*, 2 S. & C. 410; *Lanz v. McLaughlin*, 14 Minn. 72; *Ivory v. Murphy*, 36 Mo. 534; *De Cordova v. Smith*, 9 Tex. 129; *Dresel v. Jordan*, 104 Mass. 412.

of the 8th, the paragraph respecting the Italian agency.

In answer to this letter comes the letter of the 9th September. So far, therefore, as the Russian agency goes, the letter of the 8th was otherwise satisfactory to the defendants. Now, the letter of the 8th dealt with the Russian agency and also with the arrangement respecting the Moscow exhibition. There was no reference to the one as distinct from the other, and the conclusion is, that as to the Moscow exhibition no observation was required, and as to the Russian agency the sole objection was that the plaintiffs, instead of having the agency given to them without limitation, were to be prevented from being agents for any one else. As to the Italian agency, that is put out of the question. The meaning, therefore, of the whole is this: 'True, we made a certain arrangement yesterday as to Russia, but we meant it to be with a limitation, and as to Italy, we made no arrangement at all.'

Now, this was either a memorandum of agreement, or at least a proposal with the terms of the letter of the 8th as a basis; a proposal, that is, that the plaintiffs should act as agents at Moscow, and become agents for Russia, pledging themselves to take no other agency. Therefore, I say these letters constitute either an agreement or at least a proposal. Assume it in favor of the defendants to be the latter. We must now con-

sider what followed. The Moscow exhibition took place, and the goods intended for exhibition were forwarded and dealt with by the plaintiffs as they undertook to deal with them. Expenses were incurred by the plaintiffs which they certainly would not have incurred without a promise of the Russian agency; and these expenses were incurred with reference to the Moscow exhibition. Was this evidence of assent on the part of the plaintiffs to the terms of the letter of the 9th September? The defendants maintain that it was not, and their argument depends on a dissection of the terms of the letter of the 8th. But we see no reason for disavowing those terms. The whole appears to have been one arrangement. When taking the two letters together we find the second silent as to the Moscow exhibition, and when we find moreover that the exhibition was accessory to and connected by way of advertisement with the rest of the Russian agency, we conclude that the whole transaction between the parties was one and indivisible. Therefore there was a performance of their part by the plaintiffs, which was evidence of an assent to the terms of the letters of the 8th and 9th September, or, treating the letter of the 9th as a modified proposal, there was evidence that the plaintiffs assented to it.

Now in point of law what was the effect of this assent? Putting for the moment the statute of frauds out of

But where the contract is one which imposes the performance of mutual recurring acts and services from time to time on the

the question, no inquiry would be made as to the precise time at which the different parts of one single transaction took place. The question would be, was it or was it not one transaction, and was an assent contained in it? and in this case we are of opinion that the transaction was one, and did contain an assent. But the statute of frauds introduces a new element, because it makes it necessary by § 4 that an agreement not to be performed by either party within a year must be in writing, signed by the party to be charged therewith. Now all that was signed here was not a formal agreement, but a proposal on one side, and there was an assent to that proposal on the other. All difficulty as to the terms of the proposal is out of the case. It contained the names of the parties and all the terms by reference to the letter of the 8th September, which must be taken to be recited in the letter of the 9th. *The only question is, whether it is sufficient to satisfy the statute that the party charged should sign what he proposes as an agreement, and that the other party should afterwards assent without writing to the proposal?* As to this it is clear, both on reasoning and authority, that the proposal so signed and assented to does become a memorandum or note of an agreement within the 4th section of the statute. Many cases might be put in illustration of this proposition, but one or two will be sufficient. Take for example a case arising under the Joint Stock Companies Act, whereby it is provided that no person shall be deemed to have accepted any share in the company unless he testifies his acceptance by writing under his hand. It was at first supposed that something must be done by the shareholder in writing after allotment, and that otherwise he would not be a shareholder because he proposed in writing to become one and to accept his

shares upon allotment. But the Court of Common Pleas, when the case was brought before them, said that it was a mistake to suppose that under these circumstances there was no acceptance in writing. The true mode, they said, of regarding such a transaction was that it was from beginning to end one transaction, and accordingly they held that the acceptance was complete, and the statute satisfied by a proposal in writing to accept the shares, followed by an allotment. The court there acted on a judgment delivered in the Court of Queen's Bench by my Brother BLACKBURN to the effect that the 'acceptance' of goods to satisfy the statute of frauds, § 17, may be prior to the actual delivery of them. *Cusack v. Robinson*, 1 B. & S. 209; *The Bog Lead Mining Company v. Montague*, 10 C. B. (N. S.) 481. It is indeed quite a fallacy to suppose that because certain acts happen at different periods they cannot be so connected as to form one transaction. That was the ground of the Lord Keeper's decision in *Coleman v. Upcot*, 5 Vin. Abr. 527; where he held that an offer to sell an estate, made in writing and afterwards accepted by parol, bound as a contract. The principle of that case was recognized and assented to by KINDERSLEY, V. C., in *Warner v. Willington*, 3 Drew, 523; he did not, however, treat it as precisely in point, probably on account of the note in *Viner*, stating that, in fact, there was an acceptance in writing. The judgment, however, was founded on the consideration that the parol acceptance was sufficient, and it is cited to support that position by LORD ST. LEONARDS (*Sugden, Vendors and Purchasers*, 10th ed. vol. I. p. 164). The case of *Warner v. Willington* was followed by the Court of Common Pleas in *Smith v. Neale*, 2 C. B. (N. S.) 67, and by the Court of Exchequer in *Liverpool Borough Bank v. Eccles*, 4 H. & N. 139.

parties, both must be bound by the contract, or neither can be made liable upon it, except in respect to acts done and services actually rendered.¹ Thus, where a servant con-

So far as to agreements which must be mutual, but where the statute only requires the signature of the party to be charged. But we may usefully consider two classes of contracts. One class includes cases where a proposal is made which may or may not be acted on. The most ordinary example is a guarantee, which by § 4 of the statute must be in writing. The creditor may supply goods to the person whose credit is guaranteed or not as he pleases; but if he does supply them, the surety is bound to accept in cases like *Mozley v. Tinkler*, 1 C. M. & R. 692, where on the true construction of the guarantee, which was in the form of a letter to the plaintiffs, it was held that notice of the plaintiffs' acceptance of it should have been given. But in that case it does not seem to have occurred to any of the court that the acceptance need be in writing. Indeed, the judgment of Lord Wensleydale (PARKE, B.) rather points to the opposite conclusion. That case, therefore, is confirmatory of our decision that the whole evidence of an agreement need not be in writing, but only all the terms along with the signature of the party to be charged.

It has been urged upon us that this conclusion will lead to fraud and perjury, and to the very mischiefs the statute was passed to prevent. We do not concur in that view, because no one will be able to enforce an agreement of the sort we are now discussing, without proving that he did or was ready to do his part to entitle him to performance on the part of the other contracting party. Moreover, if good for anything, that argument is good to show that a regular *agreement* or memorandum of it, signed by one party only, ought not to bind him. The reason we have given is a good answer to the argument, but that argument was also considered by the

Court of Common Pleas in *Laythoarp v. Bryant*, 2 Bing. (N. C.) 735, where the court held, in spite of a weighty dictum of SIR W. GRANT in *Martin v. Mitchell*, 2 Jac. & Walk. 428, that only the party to be charged need sign, the other party, however, at the same time being ready to fulfil his own part of the agreement before suing.

Again, take another case, viz., the case of a contract where both parties must sign, of which the most familiar example is an ordinary lease for years not under seal which, by the conjoint operation of §§ 1 and 4 of the statute, must be in writing, signed by the parties making the same. I am referring for the moment to leases before the 7 & 8 Vict. c. 76, and the 8 & 9 Vict. c. 106, which enacted that leases required to be in writing by the statute of frauds shall thenceforth be under seal. Where such a lease was signed by the lessee only, he took no interest, and was not bound according to the principle laid down in *Soprani v. Skurro*, Yelv. 18. Now, suppose the lessee were to sign before the lessor. Every argument which has been urged to show that a subsequent act cannot turn what is not an agreement into an agreement would apply; but could any one seriously contend that it would make any difference whether the lessor or lessee signed a lease first? The law is clear upon the point. We are not to look at the precise moment at which an assent is given, but at the entire transaction, and if the assent when given does make a contract, that is enough; for the proposal though prior in time is, in fact, a memorandum or note of the terms of that contract, signed by the party to be charged within the meaning of the statute."

¹ *Haddeson Gas Co. v. Haslewood*, 6 C. B. (N. S.) 239; *Souch v. Strawbridge*, 2 C. B. 808; *Callis v. Bothamley*, 7 W. R. 87.

tracted in writing to work for A at his trade, and for no other person during twelve months, and so on for twelve months until he should give notice of quitting, and the memorandum was not signed by A, it was held that the agreement was invalid for want of mutuality.¹

SEC. 347. Memorandum may be in the Form of a Letter Addressed to Third Party. — *It is not necessary that the memorandum should be made between the parties to the contract only, but it may be addressed to a third person, who is the agent of one of the parties.* Thus, letters addressed by the person to be charged to a third party, who is the authorized agent of either party relating to the transaction, or who is made so by the terms of the letter, may be sufficient to bind the sender, *if they either contain or refer to documents which contain the terms of the agreement.*² In *Gibson v. Holland*,³ a

¹ *Sykes v. Dixon*, 9 Ad. & El. 693.

² *Smith v. Watson*, Bunb. 55; *Welford v. Beazley*, 3 Atk. 503; 1 Ves. 6; 1 Wils. 118; *Cooke v. Tombs*, 2 Ans. 420; *Longfellow v. Williams*, Peake Add. Cas. 225; *Rose v. Cunynghame*, 11 Ves. 550; *Owen v. Thomas*, 3 M. & K. 353; *Goodwin v. Fielding*, 4 D. M. G. 90.

³ L. R. 1 C. P. 1. In this case the objection relied upon was that the note or memorandum was a note passing between the party to be charged and his own agent. But the court held it to be sufficient, and *STONE, J.*, in commenting upon this case in *Drury v. Young*, 58 Md. 546; 42 Am. Rep. 343, says: "The object of the statute of frauds was the prevention of perjury in the setting up of contracts by parol evidence, which is easily fabricated. With this view, it requires the contract to be proved by the production of some note or memorandum in writing. Now a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves or between one of them and his own agent. Indeed, one would incline to think that a statement made by the party to his own agent would be the more satisfactory evidence of the two." *Ar-*

gus Co. v. Albany, 55 N. Y. 495; *Buck v. Pickwell*, 27 Vt. 167; *Townsend v. Hargreaves*, 118 Mass. 335; *Buxton v. Rust*, L. R. 7 Excheq. 279; *Tufts v. Plymouth Gold Mining Co.*, 14 Allen (Mass.) 407; *Goodwin v. Fielding*, 4 De G. M. & G. 90; *Leroux v. Brown*, 12 C. B. 801; *Bradford v. Roulston*, 8 Ir. C. L. R. 473; *McMillan v. Bentley*, 16 Grant (Ont.) 387.

Quere? Why, then, is not a letter to any person, whether an agent or not, sufficient, if it admits the contract in such a manner that its terms are clearly deducible therefrom? Is it quite correct to say that the note or memorandum is merely evidence of the contract? Is it not, when complete, the contract? If not, why is it necessary, in order to give effect to a letter so written by the party to be charged to a third person, that such person should be the agent of one of the parties in reference to the transaction? And see *Moss v. Atkinson*, 44 Cal. 3, 16, where it was held that a letter signed by the owner of land and addressed to A, stating that he has agreed with B to sell B the land, and giving the general terms of the agreement, with a general description of the land and its price, is a sufficient memorandum of a contract for the

letter signed by the party to be charged, written to his own agent, referring to letters of the agent, stating the terms upon which the latter had made a contract on his behalf with the other party for the purchase of goods, was held to be a sufficient note or memorandum of the bargain to satisfy the statute. So where a guarantee was addressed by the defendant to the plaintiff's attorney, it was held that the plaintiff was entitled to the benefit of it.¹ And a guarantee addressed to *one* of several partners in a firm will enure for the benefit of all, if the partner to whom it is addressed does not carry on any separate business, or if there is evidence that it was given for the benefit of all.² *But a letter addressed to a third person, who is not the agent of either party, relative to the transaction, or clothed with any power as such by the terms of the letter, is not a sufficient note or memorandum to satisfy the statute.*³ Nor is a letter addressed to an agent, or to the other party even, sufficient, unless it contains within itself, or by reference to other writings, the essential terms of the agreement.⁴ But a letter of credit *directed to any person who may act upon it*, or, in other words, to a person unnamed, agreeing to be responsible for the amount of any bill which the bearer may contract not exceeding a certain sum, has been held sufficient to enable a person who acted upon the faith of it, to maintain action against the writer.⁵ Thus, in a South Carolina case,⁶ the defendant signed a letter addressed to F, as follows: "As you request, we are willing to help you in the purchase of a stock of goods. *We will therefore guarantee the payment of any bills which you may*

sale of the land within the statute of frauds, and may be enforced by B in equity. If the terms of the contract, the consideration, the subject of the sale, etc., are stated with reasonable certainty, the memorandum is sufficient. Form is not important. The fact that the memorandum was found only in a letter addressed to a third person by the party to be charged was held not to defeat its validity. But see *Davis v. Moore*, 9 Rich. (S. C.) 215, where such a letter was held not sufficient, unless such third person was the agent of *one* of the parties.

¹ *Bateman v. Phillips*, 15 East, 272.

² *Walton v. Dodson*, 3 C. & P. 162; *Garrett v. Handley*, 4 B. & C. 664.

³ *Davis v. Moore*, 9 Rich. (S. C.) 215; *LORD HARDWICK* in *Wilford v. Beazely*, 3 Atk. 503; *Ayliffe v. Tracy*, 2 P. Wms. 64; *Seagood v. Meale*, Prec. Ch. 560.

⁴ *Clark v. Wright*, 1 Atk. 12; *Whaley v. Bagnel*, 6; Bro. C. C. 45; *Jackson v. Titus*, 2 John. (N. Y.) 430; *Ayliffe v. Tracy*, *ante*.

⁵ *Griffin v. Rembert*, 2 S. C. 410; *Williams v. Brynes*, 8 L. T. N. S. 69.

⁶ *Griffin v. Rembert*, *ante*. See also *Williams v. Brynes*, *ante*.

make, under this letter of credit, in Baltimore, not exceeding, in the whole, fifteen hundred dollars." It was held that any party in Baltimore, advancing goods to F, upon the faith of the promise contained in the letter, could maintain an action thereon against defendants as guarantors, though his name did not appear therein. The fact that he became a party to the agreement could be shown by parol. Because in such a case, the name of the other party could not be given until he acted upon the faith of the letter; the letter itself being in the nature of an open letter of credit, available to *any* person who, in good faith and in reliance upon it, furnished the credit sought thereby, who thereupon became a party thereto, and the ambiguity being latent, the name of such party may be shown by parol, because it is plain that the writer intended the letter for no person in particular, but for any one who might act upon it. But where it is evident upon the face of the instrument that the writer intended it for a particular person, whose name is omitted through mistake or otherwise, or even is erroneously given, the letter is inoperative under the statute, because the ambiguity in this respect is patent, and the name of the party intended cannot be shown by parol.¹ So a letter which is signed, and contains the terms of the agreement, or which refers to other writings which contain such terms, although they are not signed² or, to something else which is certain, as to a custom of the country or well-established usage of trade, is sufficient.³ But it is held by some of the cases that in order to make a letter written by a principal to his own agent operative as a memorandum, *it must appear that it was seen by and read and assented to by the other party*, and it is not enough to show that its contents were communicated to such party by the agent.⁴ Thus, in the case last cited, the plaintiff, who sought to compel the specific performance of a contract relating to the purchase of land, alleged that the defendants were the owners of certain lands described in the petition, and that the

¹ In *Grant v. Naylor*, 4 Cr. (U. S.) 224, the letter was addressed to John and *Joseph*, and was delivered to John and *Jeremiah*. Held not sufficient, and that parol evidence was not admissible to show that John and *Jeremiah* were the parties for whom the letter was intended.

² *Tawney v. Crowther*, 3 Bro. C. C. 318; *Sanderson v. Jackson*, 2 B. & P. 288.

³ *Brodie v. St. Paul*, 1 Ves. Jr. 336.

⁴ *Steel v. Fife*, 48 Iowa, 99.

plaintiff applied to one Johnson, who was agent for the defendant, to purchase the same, and that afterward Johnson informed him that he had received a letter from the defendant stating that they would sell a certain portion of the land for \$650, and that the plaintiff thereupon accepted the proposal and requested Johnson to procure a deed thereof, and the defendant refused to execute it. It was not shown that the plaintiff ever saw the letter, nor was it produced or its contents proved upon the trial, except as to what was stated by Johnson. The court held that the letter was not sufficient as a note or memorandum under the statute, *SEEVERS, J.*, saying: "It is not alleged in the petition that Johnson was the agent of the plaintiffs, but that he was the agent of the defendant. This being true, *the delivery of the letter to Johnson could have no other or greater effect than if it had been written and retained in the possession of the defendant.* It is unquestionably true that a memorandum, agreement, or deed must be executed by the party to be bound, or his authorized agent, *and delivered to and accepted by the other party*, to take the case out of the operation of the statute and its clear intent and meaning." He cited and approved the doctrine of a Pennsylvania case,¹ in which it appeared that there was found among the papers of Robert Martin, deceased, a plot of certain lands, on which was endorsed, in his handwriting, "These lands sold to Robert Morris, Esq., of Philadelphia. Deeds fall to him. Purchase-money paid me, Robert Martin. The over measure to be cast up and accounted for." It was sought to compel a specific performance. The defence was the statute of frauds. The court say: "An agreement is the assent of two minds to the same thing; it requires that the written evidence of it, when it is reduced to writing, as well as the agreement itself, should be seen and assented to by both parties. . . . It may be evidenced by a letter sent from the one to the other, and accepted as well as acted upon as an offer of terms, or by a receipt or memorandum sufficiently stating the conditions; *but in these instances the paper is parted with as evidence of the thing agreed to.* The principle that delivery is necessary to give effect to a written agreement is not confined to spe-

¹ *Grant v. Levan*, 4 Penn. St. 393.

cialties." But in these cases the court lost sight of the fact that *the note or memorandum is treated as merely evidence of the contract, and not the contract itself*, and that *the statute only requires written evidence of the contract under the hand of the parties to be charged*, and is wholly silent upon the question of its delivery. Therefore there would appear to be no good reason why such evidence, produced from the custody of the defendant himself, or any other person, is not as efficacious as though it had been in the custody of the plaintiff. In a Maryland case¹ the note or memorandum relied upon was made by the book-keeper of the defendants, by the direction of one of them, and was deposited in their safe upon the day of its date, and remained there until it was produced in court. It did not appear that it was ever *seen* by the defendants, or even its existence known to them until the time of trial. It was insisted by the defendants that the memorandum was not sufficient under the statute, because it had never been delivered. But the court held that the memorandum, being otherwise sufficient, satisfied the statute whether it had ever been delivered or not. "It must be borne in mind," said STONE, J., "that the statute of frauds was not enacted for cases where the parties have signed a written contract; for in these cases the common law affords quite a sufficient guarantee against frauds and perjuries. The intent of the statute was to prevent the enforcement of parol contracts unless the defendant could be shown to have executed the alleged contract by partial performance, or unless his signature to some written note or memorandum of the bargain, not to the bargain itself, could be shown.

¹ Drury v. Young, 58 Md. 546; 42 Am. Rep. 343. In Peabody v. Speyers, 56 N. Y. 230, it was held that a paper stating the terms of a contract, signed by a party to be charged and addressed to a third person, *though it did not, at the time, come to the knowledge of the other party*, may be deemed as part of the sufficient memorandum of the contract required by the statute of frauds; and the fact that the latter is compelled to resort to such paper to complete the written evidence of

the contract will not affect his rights in a particular in which the writings known to the parties are sufficient and definite, where there is no absolute incompatibility between them. Where, therefore, by the written memoranda known to the parties, the party to be charged appears as principal, the fact that such other paper shows him to have contracted for another does not prevent his being charged as principal.

The existence of the note or memorandum presupposes an antecedent contract by parol, of which the writing is a note or memorandum. Now the statute itself is entirely silent on the question of the delivery of the note or memorandum of the bargain, and its *literal* requirements are fulfilled by the existence of the note or memorandum of the bargain, signed by the party to be charged thereby. The statute itself deals exclusively with the existence, and not with the custody, of the paper. If the non-delivery of the note does not violate the letter of the statute, would it violate its spirit and be liable to any of the mischiefs which the statute was made to prevent?

The statute was passed to prevent fraud practised through the instrumentality of perjury. It was passed to prevent the defendant from suffering loss, upon the parol testimony of either a perjured or mistaken witness, speaking of a bargain different from the one in fact made. It made the defendant only liable when a note or memorandum of the bargain signed by himself was produced at the trial. If produced from the defendant's own custody, it guards against the mischief that the statute was passed to prevent, just as well as if produced from the custody of the plaintiff. The plaintiff is the one likely to suffer by leaving the evidence of his bargain in the hands of the defendant—not the defendant himself.” In an English case before cited¹ the only note or memorandum of the bargain was a letter addressed by the defendant to his own agent; the court decided that to be sufficient, and ERLE, C. J., in delivering his opinion, said: “But the objection relied on is, that the note or memorandum of that contract was a note passing between the defendant, the party sought to be charged, and his own agent, and not between the one contracting party and the other.” The object of the statute was the prevention of perjury by setting up parol contract: with this view it requires the contract to be proved by written evidence. Now there can be no good reason why a note or memorandum in writing is not equally efficacious whether it passes between the parties themselves or between one of them and his own agent. In another English case² the defendant made a note of the sale in his

¹ *Gibson v. Holland*, L. R. 1 C. P. 1. ² *Johnson v. Dodgson*, 2 M. & W. 653.

own book, and got the plaintiff's agent to sign it, and it was held to be sufficient, although it had never been delivered.

SEC. 348. **Records of Corporations.**—The record of the vote of a corporation containing the terms of a contract which the corporation voted to make, attested by the clerk, is a sufficient memorandum within the statute,¹ and this is the rule as well in reference to municipal as other corporations.² Thus, a vote of an authorized committee of a city, electing their clerk, city engineer, for a year from a subsequent day, duly recorded and signed by him *as clerk*, has been held sufficient to take the appointment out of the statute, although the amount of compensation was not stated in the vote,³ the court saying: "If the agreement was within the statute, we are of the opinion that the recorded vote of the committee on streets, passed on the 21st February, 1854, and signed by the plaintiff as clerk, was a sufficient note or memorandum thereof in writing." In a New York case⁴ a similar view was adopted. In that case the common council of the city of Albany, on the 10th December, 1862, adopted a resolution referring it to the printing committee of the council to consider and report as to the propriety of establishing an official organ for the city and the proper compensation for the same. This committee afterward reported a resolution that the proceedings of the board should be reported for, and published in one daily paper, to be designated by the board at an annual expense not to exceed \$1,000, and that all city advertising should be published at the rates prescribed by law for the publication of legal

¹ *Johnson v. Trinity Church Society*, 11 Allen (Mass.) 123; *Tufts v. Plymouth Gold Mining Co.*, 14 id. 407. The secretary of a religious society wrote to a minister informing him that the society had voted, on the 1st of January, to employ him for one year from that date, for a sum in gross. He accepted the offer, stipulating, however, that the year should begin on the 1st of February, and the payments be made quarterly. In the December following the society passed a vote, which was duly recorded, reciting that they should not "become

indebted to him by the terms of the agreement until November following." Held, that there was a sufficient memorandum of a contract extending to the 1st of February. *Johnson v. Trinity Church Society*, 11 Allen (Mass.) 123.

² *Chase v. Lowell*, 7 Gray (Mass.) 33; *District of Columbia v. Johnson*, 1 Mackey (D. C.) 51; *The Argus Co. v. Albany*, 7 Lans. (N. Y.) 264; *affd.* 55 N. Y. 495.

³ *Chase v. Lowell*, *ante*.

⁴ *Argus Co. v. Albany*, *ante*.

notices in the same paper, the designation to be for the term of three years; also, that all printing and binding, chargeable to the city, should be done by the proprietor or proprietors of such paper, for the like term, at the rates current in the city, and that the chamberlain should be and he was thereby authorized to enter into contract accordingly with such proprietor or proprietors as the board might designate. This resolution was adopted on the 26th of January, 1863, by a two-thirds vote, taken by yeas and nays.

The newspaper of the plaintiff was, on motion, designated as such official paper on the 26th of January, 1863, and a contract in writing, pursuant to such resolution, was entered into between plaintiff and defendants on the 27th of January, 1863, for three years from that date, such contract being signed and sealed on the part of the defendants by the chamberlain. On January 16, 1866, the common council adopted a resolution "that the Argus be and hereby is designated as the official paper, in accordance with the former resolution of the common council establishing an official organ for this city." This resolution was not adopted by a vote taken by yeas and nays, but it was entered on the minutes of the minutes of the board, which were signed by the clerk of the common council, and, after the adoption of the resolution, the plaintiff subscribed a written acceptance thereof, which was filed by the plaintiff with the clerk of the common council January 27, 1866.

After such acceptance the plaintiff proceeded to publish the proceedings of the common council in the Argus, and continued so to do for the space of three years thereafter. On the 4th of June, 1866, the common council passed a resolution purporting to rescind that of January 16, 1866, and also resolutions modifying that of January 26, 1863, and awarding the printing, binding, and advertising to three other papers.

After the adoption of these resolutions the plaintiff, having protested in writing against their being carried into effect, the defendant refused to furnish the plaintiff with any printing, etc., under the original resolution. The court held that the resolution under which the plaintiff was appointed city printer for the term aforesaid, having been entered in the

minutes of the council, and signed by the clerk in the discharge of his official duties, and accepted by a writing signed by the plaintiff, created a valid contract in writing under the statute of frauds, entitling the plaintiff to recover the compensation agreed upon for the whole period of three years, and that, even though it might have been contemplated by the resolution, that a more formal contract should be entered into in behalf of the city, by its chamberlain, yet the parties could waive, and had waived this formality, by entering at once upon the performance of the agreement. In a case before the Supreme Court of the District of Columbia,¹ the city in December, 1867, passed an ordinance granting authority to the defendants to erect a wharf at a point on the river front of the city, for the yearly rent of \$1,000, for the term of ten years. The ordinance was to take effect on the execution by the grantees of a bond to fulfil the requirements of the ordinance. The grantees gave the bond and went into possession. In 1878, the city brought an action to recover the accrued rent. It was held that the grantees, by entering into possession of the premises and accepting the ordinance, made the latter the written memorandum of the contract, which was of itself sufficient to take the case out of the statute, and that the execution of the bonds under the requirements of the ordinance also would be sufficient as a memorandum. An entry made by the plaintiff or his agent in the defendant's book, at his request, does not constitute a memorandum under the statute, unless the defendant actually signed it.²

SEC. 349. Alteration of Memorandum.—A material alteration in a contract, after the agreement is entered into, without the consent of the other party to the contract, annuls the instrument, so as to preclude the party making the alteration from recovering upon the contract evidenced by the instrument so altered by him.³ Thus, the affixing a seal to a guaranty so as to give it the appearance of a deed,⁴ and

¹ *District of Columbia v. Johnson*, 1 Mackey (D. C.) 51. *ham v. Musson*, 5 Bing. (N. C.) 603; *Groover v. Warfield*, 50 Ga. 644.

² *Champion v. Plummer*, 5 Esp. 240; *Barry v. Low*, 1 Cr. (U. S. C. C.) 77; *Newby v. Rogers*, 40 Ind. 9; *Graham v. Fretwell*, 3 M. & G. 368; *Gra-*

³ *Powell v. Divelt*, 15 East, 29.

⁴ *Davidson v. Cooper*, 13 M. & W. 343.

the addition of words to a sold note, which would make it import that the goods sold were to be of the vendor's own manufacture,¹ have been considered such material alterations as to invalidate the contract. If the memorandum is made in duplicate, for the sale of goods, the party selling signing one and the buyer signing the other, and the plaintiff adds a stipulation to the copy signed by him only, the original contract may be enforced by him.²

SEC. 350. Filling Blanks in Deed, etc.—Blanks left in a memorandum, which do not change its character or terms, such as filling in the date, etc., may be filled without vitiating it. Thus, where a mortgagor executed a mortgage deed to A B, the solicitor who prepared it, and on the following morning A B filled in the date of the deed, the names of the tenants, and the date of the proviso for redemption, it was held that this alteration did not render the deed void.³ So it seems that, where an alteration in a memorandum is written across its face, merely correcting an error, will bind the party writing it, although he does not sign it. Thus, in *Bluck v. Gompertz*,⁴ it was held that a memorandum written across the face of a signed agreement correcting an error in one of its terms, would bind the writer although he did not sign it, and that the agreement thus corrected was valid under the statute.

SEC. 351. When Price must be Stated.—Ordinarily, except in those States in which the statute expressly requires the consideration to be stated, the price to be paid for goods need not be stated in the memorandum, but *if when the verbal contract is entered into the parties agree upon the price to be paid*, the memorandum must state the price, as it is then of the essence of the contract. Thus where,

¹ *Mollett v. Wackerbarth*, 6 C. B. 181.

² *Lerned v. Wannemacher*, 9 Allen (Mass.) 412.

³ *Adsetts v. Hives*, 33 Beav. 52.

⁴ 7 Exch. 862; *Ide v. Stanton*, 15 Vt. 685; *Soles v. Hickman*, 20 Penn. St. 180; *Kay v. Curd*, 6 B. Mon. (Ky.) 103; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Waul v. Kirkman*, 27 Mo. 823; *Kinloch v. Savage*, *Spears Eq.*

(S. C.) 472; *Ellis v. Deadman*, 4 Bibb. (Ky.) 467; *Ives v. Hazard*, 4 R. I. 14; *Williams v. Norris*, 95 U. S. 444; *Shied v. Stamps*, 2 Sneed (Tenn.) 172; *M'Farson's Appeal*, 11 Penn. St. 503; *Norris v. Blair*, 39 Ind. 90; *Farwell v. Lowther*, 18 Ill. 252; *Barickman v. Kuykendal*, 6 Blackf. (Ind.) 21; *Smith v. Arnold*, 4 Mas. (U. S. C. C.) 414; *McElroy v. Buck*, 35 Mich. 434; *Buck v. Pickwell*, 27 Vt. 157.

after a verbal contract for the sale of a horse for 200 guineas, the defendant wrote to the plaintiff as follows: "Mr. Kingscote begs to inform Mr. Elmore that, if the horse can be proved to be five years old on the 13th of this month, in a perfectly satisfactory manner, of course he shall be most happy to take him; and if not most clearly proved, Mr. K. will most decidedly have nothing to do with him," and there was no other memorandum of the contract; it was held that the above letter was not sufficient, as the price constituted a material part of the contract.¹ So, where the defendant agreed to purchase of the plaintiff certain goods at a discount of £5 per cent, from a list of goods with prices annexed, and he signed an order for the goods referring to the list, but not mentioning the discount, it was held that the order was not a sufficient memorandum within the statute, as it did not contain the price.²

*But if the verbal contract is silent as to the price, then it is not necessary that it should be stated in the memorandum, for a contract for the sale of a commodity, in which the price is left uncertain, is in law a contract for what the goods shall be found to be reasonably worth.*³ Thus, where the defendant gave the plaintiff an order as follows: "Sir Archibald McLaine orders Mr. Hoadley to build a new, fashionable, and handsome landaulet, with the following appointments, etc., the whole to be ready by the 1st of March, 1833," and nothing was said as to the price, it was held that the memorandum was sufficient, TINDAL, C. J., saying: "What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract which is silent as to price, and the parties therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth"; and PARK, J.: "It is only necessary that price should be mentioned when price is one of the ingredients of the bargain; the dicta in *Elmore v. Kingscote* are applied to the facts of that case, in which the bargain was for a specific price, and it is admit-

¹ *Elmore v. Kingscote*, 5 B. & C. 583. *v. Muir*, 33 Mich. 223, it was held that a memorandum of an executory contract, which is within the statute, must state the price as well where a reasonable price is agreed upon as any other.

² *Goodman v. Griffiths*, 1 H. & N. 574; see also *Kain v. Old*, 2 B. & C. 627.

³ Blackst. bk. 2, c. 30. In *James*

ted on all hands that if a specific price be agreed on, and that price is omitted in the memorandum, the memorandum is insufficient.¹ The price may be stated in any form, either by letters or figures which clearly indicate, as applied to the subject-matter, what the price is, and it is sufficient, if the figures or letters, or both, by the aid of a prevailing usage, afford the means by which to ascertain the price.²

SEC. 352. Formal Agreement to be Prepared.—A memorandum which contains the terms of the proposed contract, and is signed by the party to be charged, will bind him, although the contracting parties have agreed that a more formal agreement shall be prepared. Whether the parties intend to bind themselves is a question of fact which must depend on the particular circumstances of each case.³ Thus where the purchaser of an estate wrote to the vendor's solicitor, asking him when he would forward the agreement to be entered into with the vendor, "relative to the purchase I have concluded with him"; the solicitor having a memorandum containing the terms of the proposed agreement, as was shown by the evidence, it was held that there was a sufficient contract within the statute.⁴

Where the alleged contract was founded on expressions in a letter written by the defendant's agent to the intended lessee, to the effect that instructions had been given for the preparation of the lease in conformity with terms arranged, specific performance was refused, no agreement having been actually signed.⁵

SEC. 353. What is Sufficient Description of Property.—*It is not necessary that the agreement should contain a very pre-*

¹ *Hoadly v. M'Laine*, 10 Bing. 482; *Acebal v. Levy*, 10 Bing. 376; *Joyce v. Swann*, 17 C. B. (N. S.) 84; *Ashcroft v. Morrin*, 4 M. & Gr. 451; *Valpy v. Gibson*, 4 C. B. 864.

² *Gowen v. Klous*, 101 Mass. 449; *Carr v. Passaic & Co.*, 19 N. J. Eq. 424; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446; *Smith v. Arnold*, *ante*; *Bird v. Richardson*, 8 Pick. (Mass.) 252; *Atwood v. Cobb*, 16 id. 227.

³ *Child v. Comber*, 3 Swanst. 423

(n.); *Fowle v. Freeman*, 9 Ves. 351; *Card v. Jaffray*, 2 Sch. & Lef. 374; *Thomas v. Dering*, 1 Keen, 741; *Gibbins v. North Eastern Metropolitan Asylum*, 11 Beav. 1; *Chinnock v. Marchioness of Ely*, 4 De G. J. & S. 646.

⁴ *Morgan v. Holford*, 1 S. & G. 101; and see *Crossley v. Maycock*, L. R. 18 Eq. 180.

⁵ *Ridgway v. Wharton*, 3 D. M. G. 677; 6 H. L. C. 238, 264.

*cise description of the property to be sold, as parol evidence is admissible to identify it,*¹ where the memorandum or note contains sufficient data to apply the description to the subject-matter by the aid of such evidence, without requiring any aid from such evidence as to the intention of the person sought to be charged, where he owns other property to which the writing might apply.² If reference is so made thereto in the memorandum, that it can be applied to the subject-matter of the agreement with reasonable certainty, "facts existing at the time of making the agreement may," said WIGRAM, V. C., "be admissible to assist the court in determining the meaning of the language, an act done or letter written at the time material to the right interpretation of the agreement. But no point of law can, I apprehend, be better settled than this: that in construing the agreement, no acts of the parties subsequent to the making of it are (as such) admissible for the purpose of determining its meaning. The acts of the parties subsequent to the agreement may be material to show that a writing does not express that which the parties intended to express in it; and proof of that may be a reason why this court should refuse to act upon the written agreement. But that is a very different thing from deducing from the acts of the party the meaning of the agreement itself."³ *If the note or memorandum does not contain either in itself, or by reference to any other writing, the means of identifying the property, it is insufficient.*⁴ Thus, a simple description of premises as "lots No. 1 and 2," without referring to any particular plan or data by which the lots can be identified, is insufficient because in such a case it would be

¹ Scanlan v. Geddes, 112 Mass. 15.

² Ogilvie v. Foljambe, 3 Mer. 53; McMurray v. Spicer, L. R. 5 Eq. 527; and see Daniels v. Davison, 16 Ves. 249. Parol evidence is admissible to identify the subject-matter of the writing. Miller v. Stevens, 100 Mass. 518; Caulkins v. Hellman, 14 Hun (N. Y.) 330; Bateman v. Phillips, 15 East, 272; Chambers v. Kelly, 7 Ir. R. Ch. 231; Stoops v. Smith, 100 Mass. 63; Shortridge v. Check, 1 Ad. & El. 57; Sweet v. Shumway, 102 Mass. 357; Mumford v. Gething, 7 C. B. (N. S.) 305. Thus, it was held ad-

missible to show to what an agreement to buy "your wool" applied. Macdonald v. Longbottom, 1 E. & E. 197. But such evidence is only admissible when the writing does not distinctly define the property so as to admit of its being applied without the aid of such proof. Pike v. Fay, 101 Mass. 134; Hill v. Rowe, 11 Met. (Mass.) 268; Hart v. Hammett, 18 Vt. 127.

³ Monro v. Taylor, 8 Hare, 56.

⁴ Whelan v. Sullivan, 102 Mass. 204; Eggleston v. Wagner, 46 Mich. 610.

necessary to show what the party intended to convey, as well as the location, by parol.¹ But where the writing, within itself or by reference to other writings, contains sufficient data so that by the aid of parol evidence no question as to the intention of the party can arise, it is sufficient.² Thus, a memorandum describing the property as "my estates" located in certain towns, is sufficient, if it is shown that the party owned no other estates in the towns named, because the writing can be definitely applied to the subject-matter, by the aid of parol evidence without raising any question as to the real intention of the party, except such as is apparent from the writing itself.³ So such descriptions as "the land bought of Mr. Peters,"⁴ "Mr. Ogilvie's house,"⁵ "the property in Cable Street,"⁶ or "a house on Church Street,"⁷ or "the house in Newport,"⁸ "my house,"⁹ "the intended new public-house at Putney,"¹⁰ "the mill property, including cottages in Esher village,"¹¹ have been held to be sufficient. A description of the property in a title bond, as "a steam-mill and distillery, with all the machinery," etc., "situate in the county of Smith, and State of Tennessee, near the village of Rome, in civil district No. 13, on the banks of the Cumberland River, supposed to contain one and a half acres of land," was held to be sufficient, and parol evidence to be

¹ *Clark v. Chamberlin*, 112 Mass. 19.

² *Slater v. Smith*, 117 Mass. 96; *Hurley v. Brown*, *ante*; *Scanlan v. Geddes*, 112 Mass. 15.

³ *Slater v. Smith*, 117 Mass. 96; *Scanlan v. Geddes*, *ante*; *Mead v. Parker*, 115 id. 413.

⁴ *Rose v. Cunynghame*, 11 Ves. 550.

⁵ *Ogilvie v. Foljambe*, 3 Mer. 53.

⁶ *Bleakley v. Smith*, 11 Sim. 150; *Scanlan v. Geddes*, 112 Mass. 15. Where, in a written contract, the words are "house and lot on" a certain street, it is presumed that the words relate to a house and lot owned by the person signing the contract, and, although there are other houses on the street, and oral evidence is admissible to show which house and lot such person owned. *Hurley v. Brown*, 98 Mass.

545. But, if he owned more than one house on the street, the memorandum would be insufficient, because in such a case parol evidence is not admissible to show which house the party intended to sell. *Mead v. Parker*, 115 id. 413.

⁷ *Mead v. Parker*, 115 Mass. 413; *Scanlan v. Geddes*, 112 id. 15.

⁸ *Owen v. Thomas*, 3 M. & K. 353.

⁹ *Cowley v. Watts*, 17 Jur. 172.

¹⁰ *Wood v. Scarth*, 2 K. & J. 33. But in *King v. Wood*, 7 Mo. 389, it was held that a memorandum describing the estate as "all that piece of property known as The Union Hotel property," was insufficient because it required parol evidence to show what property was comprehended under the words "Union Hotel property."

¹¹ *McMurray v. Spicer*, L. R. 5 Eq. 527.

admissible for the identification of the premises.¹ So a written contract to convey a house on a certain street named is a contract to convey the house of the grantor there, and is sufficiently definite within the statute; and if it is shown *aliunde* that there are other houses on that street, it may be shown that there is no other owned by the grantor.² So an auctioneer's memorandum of sale of "the lot or lots of land situate at the corner of C and G streets in D, belonging to the estate of Thomas Gowen, deceased, delineated on a plan by L. B. and adjacent to" certain estates named, in which the number of the lot is written against the name of the purchaser, sufficiently describes the land sold, although the land belonged to the estate of Thomas W. Gowen.³ A memorandum describing the estate in this form was also held sufficient: "Ellsworth, Dec. 15, 1854; received of D. B. and C. S. C. \$1,000 to be accounted for, if they shall furnish me satisfactory security for certain lands on the Naraguagus Rivers, say 119,000 acres for \$113,000, on or before Friday morning next; otherwise to be forfeited. John Black";⁴ because in such a case parol evidence is admissible to show what land John Black owned on the river named, and that he owned no other land there than that described. In order to render a written contract for the sale of real estate binding under the statute of frauds, it is not essential that the description should have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the subject-matter. The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transaction; so that with the assistance of external evidence the description, without being contracted or added to, can be connected with and applied to the very property intended and to the exclusion of all other property. The circumstance that in any case a conflict arises in the outside evidence cannot be allowed the force of proof that the written description is in itself insufficient to satisfy the statute. Whether the description answers the requirement of the statute is a question which occurs on the face of the

¹ White v. Motley, 4 Baxt. (Tenn.) 544.

² Gowen v. Klous, 101 Mass. 449.

³ Clark v. Burnham, 2 Story (U.

⁴ Hurley v. Brown, 98 Mass. 545. S. C. C.) 1.

papers and is naturally preliminary to the introduction of testimony to connect the contract with the property, and the decision of it would regularly seem to be required on an inspection of the documents, and before the arrival of opportunity for any conflict of the kind referred to. Moreover, it would hardly be deemed reasonable to allow the validity of the written description to depend on the ability of a party to bring about a conflict in the outside testimony.¹ If the de-

¹ Tallman v. Franklin, 14 N. Y. 584; Hurley v. Brown, 98 Mass. 545; Scanlan v. Geddes, 112 id. 15; Mead v. Parker, 115 id. 413; Slater v. Smith, 117 id. 96; White v. Hermann, 51 Ill. 243; Nichols v. Johnson, 10 Conn. 192; Colerich v. Hooper, 3 Ind. 316; Waring v. Ayers, 40 N. Y. 357; King v. Ruckman, 20 N. J. Eq. 316; Ogilvie v. Foljambe, 3 Mer. 53-60; Bleakley v. Smith, 11 Sim. 150; Owen v. Thomas, 3 My. & K. 353; White v. Bradshaw, 16 Jur. 738; Stuart v. London & N. W. R. Co., 1 D. M. & G. 721; Commins v. Scott, L. R. 20 Eq. Cas. 11; Barry v. Coombe, 1 Pet. (U. S.) 640; Dobson v. Litton, 5 Coldw. (Tenn.) 616; Eggleston v. Wagner, 46 Mich. 610. If land is the subject of sale, it must be described with such certainty that it can be identified. White v. Motley, 4 Baxt. (Tenn.) 544; Fisher v. Kerlin, 54 Miss. 480; Force v. Dutcher, 18 N. J. Eq. 401; Baldwin v. Kerlin, 46 Ind. 426; Church & Co. v. Farrow, 7 Rich. (S. C.) Eq. 378; McMurry v. Spicer, L. R. 5 Eq. 527; Ferguson v. Stover, 33 Penn. St. 411; Carmack v. Masterton, 3 S. & P. (Ala.) 311; Pipkin v. James, 1 Humph. (Tenn.) 325; Clinan v. Cooke, 1 Sch. & L. 22; Hartnell v. Yelding, 2 id. 549; Lindsay v. Lynch, 2 id. 1. But it is sufficient if it is described in such a manner that it can be certainly identified by parol, as the land purchased by me of A. Atwood v. Cobb, 16 Pick. (Mass.) 227; Johnson v. Kellogg, 7 Heisk. (Tenn.) 262; Simmons v. Spruill, 3 Jones (N. C.) Eq. 9; Grace v. Dennison, 114 Mass. 16; or, indeed, in any way that leaves no doubt as to the property intended to be conveyed. Hurley v.

Brown, 98 Mass. 545; Mead v. Parker, 115 id. 413. But see Holmes v. Evans, 48 Miss. 247, in which a receipt for \$100 for lot on corner of Main and Pearl Streets, city of Natchez, etc., was held insufficient. Where a memorandum, purporting to contain the terms of a contract for the sale of land, and signed by both parties, is not sufficiently certain to satisfy the requirements of the statute, its defects may be supplied by instruments reciprocally executed by the parties a few days afterwards, only inoperative as deeds for want of delivery; and the connection between the memorandum and deeds may be shown by parol proof of the attendant circumstances. Jenkins v. Harrison, 66 Ala. 345. A receipt for a part of the purchase-money, for "one house and lot, in the town of H.," without any other description of the property to be conveyed, is not a sufficient note or memorandum of an agreement, under the statute of frauds, and cannot be helped out by parol evidence. Murdock v. Anderson, 4 Jones Eq. (N. C.) 77. But see Hurley v. Brown, 98 Mass. 545, where it was held that a written contract to convey a certain house imports an agreement to convey the fee. Hurley v. Brown, 98 Mass. 545. This seems to conflict with and overrule Farwell v. Mather, 10 Allen (Mass.) 322. See also Scanlan v. Geddes, 112 Mass. 15; Mead v. Parker, 115 id. 413; and Slater v. Smith, 117 id. 96, from the doctrine of which it would seem that, under such circumstances, parol evidence would be admissible to show whether the person giving the receipt owned more than one house and lot

scription is such that it can be identified beyond a doubt, it is sufficient. Thus, where land was described as "ten acres of land adjoining B on the north," it was held sufficiently definite.¹ So "I will give J S 100 acres of the land next to either S or N, for \$450, or I will give him 200 acres with a clear title, for his house and lot."² But a writing which furnishes no data by which to identify the land is not sufficient. Thus, the following: "January 4, 1808, received of J E \$—, in part pay of a lot he bought of me in the town of V, it being the cash part of the purchase of said lot. Nathan Deadman, Test, Will Atwood," was held insufficient.³ But there is a tendency to relax the rigor of the rule as to the admissibility of parol evidence in such cases, and where the note or memorandum contains sufficient data, so that it can, with the aid of parol testimony, be certainly applied to the land, it is, in some of the States, held to be sufficient. Thus, in a Massachusetts case,⁴ S, in a writing signed by himself and P, agreed to convey to P "my estates located as follows: Three houses in the town of R, as shown this day; two are French-roof, and valued at \$3,000 each; the other is a pitch-roof house, and valued at \$6,000; together with all the land as now fenced; the whole being valued at \$12,000. Also, three tenement houses on B street, in C, as shown this day, and valued at \$8,000, subject to a \$2,000 mortgage; all the aforementioned estates having an equity of \$18,000." On a bill brought by P and wife for specific performance, it was held that the contract, though not signed by the wife, was a sufficient memorandum within the statute of frauds, and that a demurrer to the bill must be overruled. So in an Illinois case,⁵ a letter from a vendor to his agent, sent by the pur-

in the town, and if he did not, to identify it. *Peltier v. Collins*, 3 Wend. (N. Y.) 459.

¹ *Hurly v. Blackford*, 1 Dana (Ky.) 1. A receipt as follows: "Received of L. Anderson \$300 cash on payment on house," was held insufficient. *Patterson v. Underwood*, 29 Ind. 607.

² *Simpson v. Breckennidge*, 32 Penn. St. 287. A paper signed by parties in possession of a lot that had been leased for ten thousand years, but without seals, agreeing "to take

the lot," describing it, on a ground rent of \$60, it was held to be an agreement in writing, under the statute of frauds, for a lease of the land on ground rent. *Cadwalader v. App*, 81 Penn. St. 194.

³ *Ellis v. Deadman*, 4 Bibb. (Ky.) 466; *Murdock v. Anderson*, 4 Jones (N. C.) Eq. 77; *Holmes v. Evans*, 48 Miss. 247; *S. P. Gigas v. Cochran*, 54 Ind. 593.

⁴ *Slater v. Smith*, 117 Mass. 96.

⁵ *Spangler v. Danforth*, 65 Ill. 152.

chaser and stating that the latter had "agreed to take the pasture lot for \$2,400 — \$1,000 cash, \$400 Dec. 1, 1871, at 10 per cent; \$1,000 July 1, 1872, at 10 per cent, secured by mortgage," and directing the agent to "make the papers," and acknowledging the receipt of \$20 on the contract, was held to be a sufficient memorandum under the statute of frauds, and to give a superior equity to that of a person who, earlier on the same day, had verbally contracted with the agent for the same land without paying any money until after notice of the rival purchase.¹ So, a receipt stating that the sum received was for "the Fleming farm, on French Creek," was held to be a sufficient memorandum under the statute.² But in all cases where the memorandum or note is of an agreement to *sell* certain land, it is sufficient although it does not set forth whether an estate in fee simple or a less estate is intended, as in such cases, it is presumed that the vendor intends to convey the estate or title which he has in the land, and that the other party knows what the nature of that estate is.³ A memorandum of an agreement for a lease, which excepts a portion of the premises, without specifying what part

¹ See also *Crutchfield v. Donothan*, 49 Tex. 691. In *White v. Hermann*, 51 Ill. 243, it was held that a description of land in a contract will not be held to be invalid if sufficient to enable a surveyor to locate the premises, as where a description of land as "Sec. 27, T. 38, 14 E. of 3d P. M.," omitted to state the range and the position of the land as to the base line; the government surveys showing that no township 38 lay south of the base line and 14 east of that meridian which would locate the land in the given county.

² *Ross v. Baker*, 72 Penn. St. 186. But see *King v. Wood*, 7 Mo. 389, where a memorandum describing the property as that "known as the Union Hotel" was held insufficient because it required the aid of parol evidence to identify it. See also *Farwell v. Mather*, 10 Allen (Mass.) 322. A receipt in these terms, "Received from A \$20 on account of the purchase of the house and lot No. 38 Hammond, at \$2,900, subject to a lease to B for four years from the 1st of May next;

\$1,000 may remain by bond and mortgage; the balance the 1st of May, when the deed will be executed and possession given," amounts to a valid written contract for the sale of the land, under the statute in New York. *Westervelt v. Matheson*, 1 Hoffm. (N. Y.) 37. An assignment of a certificate of entry in these words, "I, B, do *sine* the within certificate over to A, which is to empower him to lift the deed in his own name," was held sufficient upon proof of a valid consideration. *Halsa v. Halsa*, 8 Mo. 303. Where A bought of B some groceries and an ice-house and lot, and a memorandum of the sale was made as follows: "Invoice of articles purchased by A of B August 29, 1836," and one of the items stated was "ice-house and lot \$140," it was held void as to them, because it did not describe them with any certainty. *Pipkin v. Lames*, 1 Humph. (Tenn.) 325.

³ *Atwood v. Cobb*, 16 Pick. (Mass.) 227; *Howe v. Deming*, 2 Gray (Mass.) 476.

is excepted, is good. Thus, where the lessor agreed to let a farm "except 37 acres thereof," which were not specified, it was held that the agreement was not void for uncertainty, as the lessor had the right of selection.¹ So, where an agreement for a lease reserved to the lessor the right to search for and work mines and minerals, "etc.," it was held that these stipulations did not render the agreement uncertain.² Again, the terms, "good will, etc.," in a contract for the sale of a foundry, have been considered not to be so uncertain as alone to prevent a decree for specific performance, for the words *et cætera* point to things necessarily connected with and belonging to the good will, and to be defined in the conveyance.³

Where the contract was for a lease of "those two seams of coal known as 'the two-feet coal,' and 'the three-feet coal,' lying under lands hereafter to be defined in the Bank End Estate," it was held that the contract was sufficiently definite to be enforced, and that the true construction of it was, that the boundaries of the estate were to be thereafter defined.⁴ And if it can be shown that the parties knew of the tenure of the property, it is immaterial that the agreement is silent on this point.⁵ So an agreement to take a farm, paying so much rent per acre, is not void because the number of acres is not mentioned.⁶

But an agreement for letting and taking coals, "etc.," under certain lands,⁷ or for the purchase by a railway company of "the land required,"⁸ or a statement that a party has disposed of his title-deeds,⁹ is too indefinite to be specifically enforced. The rule that, in order to admit parol evidence to apply a note or memorandum to the subject-matter of the contract, it must contain within itself or by reference to other data, sufficient to show the real intention of the party, is well illustrated in a Massachusetts case¹⁰ in which there was a memorandum in writing agreeing to give.

¹ *Jenkins v. Green*, 27 Beav. 437.

⁶ *Shannon v. Bradstreet*, Sch. &

² *Parker v. Taswell*, 2 De G. & J. 559.

Lef. 73.

⁷ *Price v. Griffith*, 1 D. M. G. 80.

³ *Cooper v. Hood*, 26 Beav. 293.

⁸ *Stewart v. L. & N. W. R. Co.*, 1

⁴ *Haywood v. Cope*, 25 Beav. 140.

D. M. G. 721.

⁹ *Seagood v. Meale*, Prec. Ch. 560.

⁵ *Monro v. Taylor*, 8 Hare, 51; ¹⁰ *Farwell v. Mather*, 10 Allen (Mass.) 322.

Cowley v. Watts, 17 Jur. 172.

a certain sum "for the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture," etc., and to pay a certain sum quarterly until the principal and interest are paid, and "in addition, pay over the \$1,215 to be received from A, and the proceeds and good will of the 'Times,' all of which shall be deducted from" the gross sum to be paid. The court held that the memorandum was not sufficient to take the case out of the statute, because it contained no such data as would warrant the introduction of parol evidence to apply to it the subject-matter.

Where one of the articles sold on a purchase of goods was described as "candlestick complete," and it was proved that at the time the goods were selected, it was arranged that a "gallery" should be added to the top of the candlestick for the purpose of receiving a "mosquito shade," it was held that the memorandum was sufficient without mentioning the "gallery."¹

SEC. 354. Both Parties Must be Named or Described.—

In order that there may be a binding contract it is necessary that both buyer and seller shall be either named or described expressly, or by sufficient reference, in such a manner that their identity cannot be fairly disputed,² and must also show who is the seller and who is

¹ *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188.

² *Grafton v. Cummings*, 99 U. S. 100; *Coddington v. Goddard*, 16 Gray (Mass.) 442; *Harvey v. Stevens*, 43 Vt. 653; *Brown v. Whipple*, 58 N. H. 229; *Osborne v. Phelps*, 19 Conn. 73; *Waterman v. Meigs*, 4 Cush. (Mass.) 497; *Harvey v. Stevens*, 43 Vt. 653; *Webster v. Ela*, 3 N. H. 229; *Johnson v. Buck*, 35 N. J. L. 338; *Barry v. Law*, 1 Cranch (U. S. C. C.) 77; *Champion v. Plummer*, 1 B. & P. 252; *William v. Lake*, 2 El. & E. 349; *Griffin v. Rembert*, S. C. 460; *Webster v. Ela*, 5 N. H. 540; *Jacob v. Kirk*, 2 Moo. & K. 221; *Allen v. Bennett*, 3 Taunt. 169; *Thomas v. Brown*, 1 Q. B. Div. 714; *Gowen v. Klaus*, 101 Mass. 449; *Cutting v. King*, 5 Ch. Div. 660; *Thornton v. Kelley*, 11 R. I. 498; *Sale v. Lambert*, L. R. 18 Eq. 1; *Walsh v. Barton*, 24 Ohio St. 28; *Bateman v. Phillips*, 15 East,

272; *Thayer v. Luce*, 22 Ohio St. 62; *Williams v. Bacon*, 2 Gray (Mass.) 387; *Commings v. Scott*, L. R. 20 Eq. 11; *Beer v. London & Paris Hotel Co.*, L. R. 20 Eq. 412; *Potter v. Duffield*, 18 id. 4; *Farwell v. Lowther*, 18 Ill. 252; *Sherburne v. Shaw*, 1 N. H. 157; *Waterman v. Meigs*, 4 Cush. (Mass.) 497. *Williams v. Jordan*, 6 Ch. Div. 517; *Nichols v. Johnson*, 10 Conn. 192. A memorandum of the sale of goods containing the stipulation "buyer paying insurance to N. Y." is sufficient, although the amount of insurance is not stated nor for whose benefit, if it does not appear that these were agreed upon. And a memorandum reading "W. W. Goddard to T. B. Coddington & Co.," followed by a description of the goods, etc., sufficiently shows who was vendor and who vendee. *Coddington v. Goddard*, 16 Gray, 436.

*the buyer.*¹ Thus in an English case² it appeared that the plaintiff had purchased at a sale of wreck a quantity of marble; this the defendant agreed to buy, but afterwards repudiated his bargain, and refused payment. The value of the goods was above £10, and the only note or memorandum of the contract in writing, signed by the defendant, was as follows: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenberg, now lying at the Lyme Cobb, at 1s. per foot. D. Spooner."

Evidence was also given to the effect that, after the defendant had signed this document, he wrote out what he alleged to be a copy of it, which at his request the plaintiff, supposing it to be a genuine copy, signed. This was in the following words: "Mr. J. Vandenberg agrees to sell to D. Spooner the several lots of marble purchased by him now lying at Lyme, at one shilling the cubic foot, and a bill at one month. Julius Vandenberg." The jury, however, were of opinion that the first document stated the contract actually

¹ *Lee v. Hills*, 66 Ind. 474; *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *Bailey v. Ogden*, 3 John. (N. Y.) 399; *Nichols v. Johnson*, 10 Conn. 198; *Caulkins v. Falk*, 1 Abb. App. (N. Y.) 291; *Cameron v. Spiking*, 25 Grant (Ont.) 116; *Salmon Falls Mfg Co. v. Goddard*, 14 How. (U. S.) 446; *Osborne v. Phelps*, 19 Conn. 73; *Brown v. Whipple*, 58 N. H. 232; *Newberry v. Wall*, 84 N. Y. 576.

² *Vandenberg v. Spooner*, L. R. 1 Exchq. 316. In a recent English case the plaintiff was the lessee of vaults in the city of London under a lease granted by the mayor and corporation of London and the Mercers' Company. The defendant company entered into a negotiation for the purchase of the lease. The secretary of the company wrote to the house-agents acting for the plaintiff a letter in which he said that the directors thereby offered to purchase the vaults for £2,500 cash, and to take over a mortgage for £3,500 on the lease, these terms to include the lease, goodwill, fixtures, etc. The house-agents answered as follows: "In reply to your letter of the 7th instant we are

now instructed to accept the offer therein contained, and will forward contract as soon as we obtain it from the solicitor." Differences subsequently arose respecting the time when possession should be given, and eventually the plaintiff brought an action against the defendants, claiming damages for breach of contract. *MALINS, V. C.*, held that the letters contained a binding contract between the parties. But this was reversed by the Court of Appeals, and it was held that no binding contract had been entered into, first, because the name of the vendor had not been disclosed or a sufficient description given so as to satisfy the statute of frauds; and secondly, because the letters mentioned only what was the property to be purchased and the price to be given for it, but left the other necessary terms of the agreement, such as the time when possession was to be given, to be settled by a formal contract to be prepared by a solicitor in the ordinary way. *Donnison v. People's Café Co.*, 45 L. T. Rep. N. S. 187.

made, and found a verdict for the plaintiff for £35; leave being reserved to the defendant to move to enter a non-suit, on the ground (amongst others) that there was no sufficient note or memorandum of the contract within the statute of frauds. The verdict was set aside. *BRAMWELL*, B., saying: "The question we have had to consider in this case is, whether the document relied upon by the plaintiff was a sufficient note or memorandum in writing to bind the defendant under section seventeen of the statute of frauds. The document was signed by the defendant, and was in the following terms, 'D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenberg, now lying at the Lyme Cobb, at 1s. per foot.' Can the essentials of the contract be collected from this document by means of a fair construction or reasonable intentment? We have come to the conclusion that they cannot, *inasmuch as the seller's name as seller is not mentioned in it*, but occurs only as part of the description of the goods."¹ In *Coleman v. Upcot*,² *LORD COWPER* said "that if a man (being in company) makes offers of a bargain, and then writes them down and signs them, and the other party takes

¹ But in *Newell v. Radford*, L. R. 3 C. P. 52, there was a memorandum as follows: "Mr. Newell, 32 sacks culasses at 39s., 280 lbs. to await orders. John Williams," and the court held that parol evidence was admissible to show what trade each party was engaged in, and thus create an inference as to which was the buyer and which the seller, and this seems to be a reasonable rule. The names and relation of the parties to each other under the contract should appear with reasonable certainty. *Thomas v. Brown*, 1 Q. B. Div. 714; *Beer v. London & Paris Hotel Co.*, L. R. 20 Eq. 412; *Cutting v. King*, 5 Ch. Div. 660; *Potter v. Duffield*, L. R. 18 Eq. 4; *Sale v. Lambert*, id. 1; *Williams v. Jordan*, 6 Ch. Div. 517; *Webster v. Ela*, 5 N. H. 540; *Griffin v. Rembert*, 2 S. C. 410; *Farwell v. Lowther*, 18 Ill. 252; *Thornton v. Kelly*, 11 R. I. 498; *Gowen v. Klaus*, 101 Mass. 449. And in the case of a guaranty it seems that, if the names

of the parties are inaccurately given, it will not be sufficient. Thus, where a letter of credit was erroneously addressed to John and Joseph, and delivered to John and Jeremiah, who were the parties intended, and who furnished the goods under it, it was held that John and Jeremiah could not maintain an action upon it for the goods furnished by them. *Grant v. Naylor*, 4 Cr. (U. S.) 224. But if such a letter is addressed to a person unnamed, it seems that any person furnishing goods upon it can maintain an action thereon. *Williams v. Brynes*, 8 L. T. N. S. 69; *Griffin v. Rembert*, 2 S. C. 410. Where the names of the plaintiffs appeared upon the title-page of their order-book in which the defendant's order was written, it was held sufficient. *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188; *Havey v. Stevens*, 43 Vt. 653; *Newell v. Radford*, L. R. 3 C. P. 52.

² 5 Vin. Abr. 527.

them up, and prefers his bill, this shall be a good bargain.”¹ But where the memorandum signed by the vendor was as follows: “Sold 100 mining Purdys at 17s. 6d.,” it was held to be insufficient, *as the names of both parties to the contract did not appear*.² So where, on the sale of an estate by auction, the name of the owner did not appear in the particulars or conditions of sale, and the agreement signed by the purchaser did not mention the owner’s name, and was not signed either by him or the auctioneer, it was held that there was no contract on which the vendor could maintain an action for non-completion.³ Where the plaintiff’s agent wrote down the terms of a sale by the defendant, which the defendant signed, as follows: “Bought of W. Plummer, etc.,” but the name of the purchaser did not appear, it was held that there was no contract, MANSFIELD, C. J., saying: “How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiff.”⁴ So where a memorandum in these words: “I will furnish H with funds for the purchase of a steam-engine, and machinery for a flour-mill, on his suiting himself with the same, and notifying the purchase to me,” was signed by J, but not addressed to any one, and was delivered to B with the consent of J, and afterwards orally acknowledged to B by J; it was held that there was no contract within the statute.⁵

SEC. 355. Reference to Conditions or Particulars of Sale. Executors. Proprietor.—But the rule as stated in the previous section is satisfied, *if the memorandum sufficiently shows who are the parties to the contract, by description, instead of by name*. Thus, if the memorandum is written upon, or clearly

¹ And see Sugd. V. & P. 131; Dart. 5th ed. 217.

² Boyce v. Green, Bat. 608; and see Seagood v. Meale, Prec. Ch. 560.

³ Wheeler v. Collier, M. & M. 123; and see Jacob v. Kirk, 2 Moo. & Rob. 221.

⁴ Champion v. Plummer, 1 Bos. & P. (N. R.) 252; and see Graham v.

Musson, 5 Bing. (N. C.) 603; Skelton v. Cole, 1 De G. & J. 596.

⁵ Williams v. Byrnes, 2 N. R. 47; 9 Jur. (N. S.) 363; and see Williams v. Lake, 2 E. & E. 349; 29 L. J. Q. B. 1; over-ruling on this point, it would seem, Walton v. Dodson, 3 C. & P. 162.

refers to conditions or particulars of sale, which show who is the vendor, or if it refers to an advertisement for sale containing the name, that will be sufficient.¹

Where the particulars of sale of a leasehold house stated that it was the property of Admiral F, deceased, and that the sale was by direction of his executors (who did not accept office until after the sale), not naming them, and a memorandum of the sale endorsed on the particulars was signed by the auctioneers as agents of the vendors, it was held that there was a sufficient contract.²

In the case of *Sale v. Lambert*,³ the particulars stated that the sale was by direction of the "proprietor," and it was held that the vendor was sufficiently described, JESSEL, M. R., saying: "The question is *can you find out from the memorandum who the vendor is?* The property is stated to be put up for sale 'by direction of the proprietor.' Therefore, the proprietor is the vendor, and is referred to as the person who employs the auctioneer to sell. What more do you want? It is said that the term 'proprietor' is not a sufficient description. I think it is an excellent description; certainly in Acts of Parliament the proprietor or owner is frequently mentioned as the person on whom notices are to be served and the like."⁴

SEC. 356. When Description is Indefinite. Illustrations.—
*When, however, the description of either of the parties is indefinite, and is equally applicable to two or more persons, it is insufficient. Thus, where the only description of the purchaser was contained in a letter to his solicitor from the vendor, in which he was spoken of as "your client," it was held that the description was insufficient.*⁵ And where real estate was put up for sale under particulars and conditions of sale which did not disclose the vendor's name, but stated that B was the auctioneer, and the purchaser of one of the lots signed a memorandum acknowledging his purchase; and B signed at the foot of his memorandum another in these

¹ *Warner v. Willington*, 3 Drew. 530, per KINDERSLEY, V. C.

² *Hood v. Lord Barrington*, L. R. 6 Eq. 218.

³ L. R. 18 Eq. 1; *Rossiter v. Milner*, 49 L. J. Ch. 228.

⁴ See also *Commins v. Scott*, L. R. 20 Eq. 11; *Beer v. London & Paris Hotel Co.*, ib. 412.

⁵ *Skelton v. Cole*, 1 De G. & J. 587.

words, "confirmed on behalf of the vendor, B," it was held that the memorandum did not sufficiently show who the vendor was, and a bill for specific performance of the contract for sale was dismissed.¹ Where, however, an agreement for the sale of real estate did not disclose the name of the vendors, but it appeared therefrom that the vendors were a company in possession of the property offered for sale, and that they had carried on operations thereon, it was held that the vendors were sufficiently described.²

SEC. 357. Entry in Order Book.—Where the defendant purchased several articles at the plaintiff's shop, which, with their respective prices, were entered in the plaintiff's "order-book" on the fly-leaf, at the beginning of which were written the names of the plaintiffs; and the defendant wrote his name at the foot of the entry, for the purpose of verifying the bargain, it was held that there was a sufficient memorandum of the contract.³ But where a memorandum in writing of a contract for the purchase of flour by the defendant from the plaintiff, a miller, was taken by the plaintiff's rider in his common order-book in these terms, "19th February, 1811, of John Smith £64" (which was explained by the witness to mean so much received of the defendant in satisfaction of a former order), "Do 40 of 3—58," (which was explained to mean a new order for 40 sacks of flour called thirds, at 58s. a sack), and the order was not signed by the defendant, it was held that this was not a sufficient memorandum to bind him, though it was read over to him by his desire at the time it was written.⁴

SEC. 358. Both Parties Named, but Seller not Named as Seller.—*The memorandum or note must in some way indicate*

¹ Potter v. Duffield, L. R. 18 Eq. 4.

² Commins v. Scott, L. R. 20 Eq. 11; and see Beer v. London & Paris Hotel Co., ib. 412.

³ Sari v. Bourdillon, 1 C. B. (N. S.) 188; 26 L. J. (C. P.) 78. In Harvey v. Stevens, 43 Vt. 653, G, the auctioneer at an auction sale of the property of H, caused to be entered by his clerk, as the sales were made, the articles sold, the names of the buyers, and the prices at which the articles were sold,

in a book headed, on the inside of the front cover, "John Harvey's Auction Sale Book." It was held that this memorandum was sufficient to satisfy the requirements of the statute of frauds, and therefore bound the parties upon a contract of sale made by the auctioneer.

⁴ Cooper v. Smith, 15 East, 103; and see Jacob v. Kirk, 2 Moo. & Rob. 221.

who is the buyer, and who the seller. But it may be shown by parol what business the respective parties are engaged in, and if an inference can be drawn therefrom as to who is the vendor and who the vendee, the memorandum will be sufficient. Thus, where the memorandum signed by the defendant was as follows: "D. Spooner agrees to buy the whole lot of marble purchased by Mr. Vandenberg, now lying at the Lyme Cobb, at 1 s. per foot," it was held that the memorandum was insufficient, as the seller's name as seller was not mentioned in it.¹ In a subsequent case, however, a duly authorized agent of the defendant made the following entry in a book belonging to the plaintiff, "Mr. Newell, 32 sacks culasses at 39 s., 280 lbs. to wait orders. John Williams." It was argued on the authority of *Vandenberg v. Spooner*, that it was not possible to tell which was the buyer and which seller, but it was held that it might be proved what the parties would have understood to be the meaning of the words used in the memorandum, and that parol evidence was admissible to show that the plaintiff was a baker and the defendant a dealer in flour. Letters between the parties also were held to show that they stood in the position of buyer and seller.²

SEC. 359. Reference to Other Documents to Describe Parties.

—If the memorandum is defective in that one of the contracting parties is not described in it, the defect may be corrected by other documents having a clear reference to the memorandum. Thus, an order for goods written and signed by the seller in a book of the buyer's, but not naming the buyer, may be connected with a letter of the seller to his agent, mentioning the name of the buyer, and with a letter of the buyer to the seller claiming the performance of the order, so as to constitute a complete contract within the statute.³ But the reference must be clear.⁴ "No doubt, as a general rule," said *KINDERSLEY, V. C.*, "in order to maintain an action upon a memorandum of agreement, signed by a purchaser or intended lessee, the name of the vendor or intended lessor

¹ *Vandenberg v. Spooner*, L. R. 1 Ex. 316.

² *Newell v. Radford*, L. R. 3 C. P. 52.

³ *Allen v. Bennett*, 3 Taunt. 169.

* *Skelton v. Cole*, 1 De G. & J. 596; and see *Jackson v. Oglander*, 2 H. & M. 465; *Newell v. Radford*, L. R. 3 C. P. 52.

must appear in the memorandum, as well as in the other terms of the agreement. But though this is the general rule, there is this exception, that *if it can be ascertained who is the vendor, or intended lessor, from some other document which is sufficiently connected with the memorandum by clear reference, that will cure the defect of the memorandum.*"¹ In the case of a letter, Mr. Dart is of opinion² that, if an envelope be used, and the name of the person to whom the letter is addressed does not appear in it, the court would receive evidence connecting the letter with the envelope.

SEC. 360. Letter Repudiating Contract may be Sufficient Memorandum.—*A letter written for the purpose of repudiating a contract may, nevertheless, amount to a memorandum of it, if there is an admission of the contract, and its substantial terms are stated.* Thus, where the defendant purchased goods, some of which were damaged in the carriage, and he declined to receive them, and wrote to the plaintiffs as follows: "The only parcel of goods selected for ready money was the chimney-glasses, amounting to £38 10s. 6d., which goods I have never received, and have long since declined to have, for reasons made known to you at the time," it was held that the letter, inasmuch as it contained an admission of the bargain and of all the substantial terms of it, was a sufficient memorandum.³ So where the defendant refused goods, returning the invoice with a note signed by him on the back as follows: "The cheese came to-day, but I did not take them in, for they were very badly crushed. So the candles and cheese is returned." It was held that there was a sufficient memorandum of the contract.⁴ The principle upon which these cases rest is, that the letter furnishes, not the contract, but what the statute requires through the admission contained in the letter, *written evidence of a prior parol contract which was before not enforceable because it could only be proved by parol*, and the soundness of the doctrine cannot be questioned.⁵

¹ Warner v. Willington, 3 Drew. 529.

² Dart. V. & P. 5th ed. 218, citing Sarl v. Bourdillon, 5 W. R. 196.

³ Bailey v. Sweeting, 9 C. B. (N. S.) 857; 30 L. J. (C. P.) 150, dissenting from a passage in Blackburn on Sales,

p. 66, in which the contrary opinion is expressed.

⁴ Wilkinson v. Evans, L. R. 1 C. P. 407; and see Gibson v. Holland, ib. 1; Buxton v. Rust, L. R. 7 Ex. 279; McClean v. Nicolls, 9 W. R. 811.

⁵ Cave v. Hastings, 45 L. T. N. S. 348.

SEC. 361. Letter Suggesting Abandonment of Parol Contract.— But a letter written to suggest the abandonment of a *parol* contract will not take a case out of the statute. Thus, where the defendant being unable to make a title to lands sold by auction, his agent wrote a letter to the plaintiff's attorney, naming both the plaintiff and defendant, saying that a title could not be made to the property, and advising the plaintiff "to relinquish his purchase," it was held that there was no contract within the statute.¹ But in

¹ *Gosbell v. Archer*, 2 Ad. & El. 500; and see *Fyson v. Kitton*, 3 C. L. R. 705; *Tanner v. Smart*, 6 B. & C. 603; *Pain v. Coombs*, 1 De G. & J. 34; *Buckmaster v. Russell*, 8 Jur. (N. S.) 155. In *Cave v. Hastings*, 45 L. T. Rep. N. S. 348, it appeared that the terms of the agreement actually made (and sued on) were contained in a memorandum dated 1st of December, 1879, and signed by the plaintiff (but not by the defendant), which was as follows: "I hereby agree to provide you with a victoria (selected), horse, harness, and coachman, to your satisfaction, for one year from 1st January, 1880, for the sum of £18 10s. a month; occasionally, in wet weather, the use of a brougham."

A carriage was supplied by the plaintiff in accordance with the terms of the agreement, and the defendant used it for six weeks, and then refused to keep it any longer. On the 11th of February, 1880, the defendant wrote the following letter to the plaintiff (and this was the only document signed by the defendant), which was as follows: "You no doubt remember that it was agreed at our interview on the 28th January, that our arrangement as to the hiring of your carriage was at an end, and that you were not to send to me after the end of this month. I now find that I can dispense with your services after this week, and shall be glad to know what deduction you feel inclined to make from my monthly payment, if I agree to give you your carriage on Saturday next." The defendant admitted that he did refer in this letter

to the arrangement, the terms of which were contained in the memorandum of the 1st December, 1879, and it was proved that there was no other arrangement with reference to the hire of a carriage entered into between the parties. The jury found that the agreement was not rescinded, and assessed the damages at £25. The judge did not give judgment, and the case was set down for motion by the plaintiff. The verdict was upheld, *FIELD, J.*, saying: "This was an action tried before *LOPEZ, J.*, who did not give judgment; and the question argued before us on motion for judgment was whether there was a sufficient memorandum in writing signed by the defendant of the agreement sued upon, within the 4th section of the statute of frauds. It is clear that there was an agreement in fact made between the plaintiff and the defendant, on the 1st December, 1879, for the hire by the defendant of a carriage for a year from the 1st January, 1880, upon the terms contained in the memorandum of the 1st December, 1879, which was signed by the plaintiff. The plaintiff supplied a carriage in accordance with the agreement, but an interview which took place between the plaintiff and the defendant on the 28th January, 1880, resulted in the letter which the latter wrote on the 11th February, in which he refers to 'our arrangement as to the hiring of your carriage,' and to 'my monthly payment.' There is abundant evidence that there was an agreement which was not rescinded; but the defendant now contends that he is

this case it will be observed that the letter did not refer to any other writing, nor did it appear that any other writing relating thereto was in existence when the letter was

not liable, because he signed no memorandum in writing of the contract. It has, however, been long settled that the whole of the agreement need not appear on one document, but the agreement may be made out from several documents. The only document signed in this case by the defendant was the letter of 11th February, which does not in itself contain the terms of the contract. In *Dobell v. Hutchinson*, 3 Ad. & El. 355, LORD DENMAN states the law on this subject to be as follows: 'The cases on this subject are not at first sight uniform; but on examination it will be found that they establish this principle, that when a contract or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them.' This letter in question refers to 'our arrangement.' MR. GULLY, in his argument, contended that that might refer to some other and different parol arrangement; but it seems to us that this reference to the former document is sufficient, in accordance with the principle laid down in *Ridgway v. Horton*, *ubi supra*, where 'instructions' were referred to, and it was held that parol evidence might be given to identify the instructions referred to, with certain instructions in writing. This principle was applied in *Baumann v. James*, 16 L. T. Rep. (N. S.) 165, and carried still further in *Long v. Millar*, 41 id. 306, in which BRAMWELL, L. J., says: 'The first question to be considered is, whether there is a contract valid according to the provisions of the statute of frauds, § 4. I think that there is sufficient memorandum. The plaintiff has signed a document containing all the terms necessary to constitute a binding agreement, so that if he committed a breach of it,

he would be liable to an action for damages, or to a suit for specific performance. But the point to be established by the plaintiff is, that the defendant has bound himself, and a receipt was put in evidence, signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt also uses the word "purchase," which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff, so soon as the two documents are placed side by side. The agreement referred to may be identified by parol evidence.' He then goes on to add: 'I may further illustrate my view by putting the following case: Suppose that A writes to B, saying that he will give £1,000 for B's estate, and at the same time states the terms in detail, and suppose that B simply writes back in return, "I accept your offer." In that case there may be an identification of the documents by parol evidence, and it may be shown that the offer alluded to by B is that made by A without infringing the statute of frauds, § 4, which requires a note or memorandum in writing.' Under the circumstances of this case, we think that the two documents of the 11th February and the 1st December are connected. We may exclude the evidence of the defendant as to what was passing in his mind when he wrote the letter, for it is clear on the evidence that there was no other arrangement between the parties other than this particular one. We therefore hold that the defendant's letter is so connected with the former letter of the plaintiff as to make it a note and a memorandum of the contract signed by the defendant, so rendering him liable to fulfil the contract. For these reasons our judgment must be for the plaintiff."

written, and that it did not contain within itself the essential terms of the contract, consequently upon that ground it was insufficient. But where a letter repudiating a contract, or relinquishing one, refers to a *written* memorandum thereof, or is susceptible of being directly connected therewith, it will be operative as a note or memorandum if signed by the party to be charged. Thus, in *Drury v. Young*,¹ the note or memorandum was as follows: "Office of Drury, Ijams & Rankin, Wholesale and Retail Grocers, and Dealers in Flour, Feed, and Fertilizers, cor. Gay and High Streets; E. T. Drury, W. H. Ijams, Jr., S. M. Rankin, Jr.

BALTIMORE, Aug. 27, 1881.

Sold W. H. Young & Co., 2,500 cans, say 5,000 dozen C. C. tomatoes at \$1.10 per dozen, cash; cars at Philadelphia Depot, Baltimore, Md. 5,000 dozen at \$1.10, \$5,500."

Subsequently the defendants sent the plaintiffs a letter as follows: [Same heading as the previous note.]

"BALTIMORE, Aug. 29, 1881.

MESSRS. W. H. YOUNG & Co. — *Gents*: We regret to say it is impossible for the Chase Canning Co. to furnish the 2,500 cases 3c tomatoes purchased of us on the 27th inst., at \$1.10 per dozen. Nor do we think it possible to fill order this season, as the fruit cannot be procured. Hoping this may be entirely satisfactory, we are very respectfully,

DRURY, IJAMS & RANKIN."

The court held that, even though the first paper was not a sufficient note or memorandum, it became so when taken in connection with this letter, which sufficiently refers in its terms to the former note or memorandum.²

SEC. 362. **Letters Written during Dispute as to Terms.**—Letters written during a dispute as to whether a parol contract has been duly performed, in which the purchaser mentions the terms of the contract and the vendor does not repudiate, but constructively assents to the terms as so stated, have been held to constitute a sufficient memorandum.³ So it would seem that a bond of reference to a sur-

¹ *Drury v. Young*, 58 Md. 546; 42 Am. Rep. 343.

² *Fyson v. Kitton*, 3 C. L. R. 705.

³ *Cooth v. Jackson*, 6 Ves. 17.

veyor, the price to depend upon his valuation, would be sufficient.¹ And a receipt for purchase-money, signed by the vendor,² or for a deposit signed by an auctioneer, may, if it contains or refers to documents which contain the terms of the contract, have the effect of an agreement.³ But neither a receipt for purchase-money, nor any other paper writing *which is not signed by the party to be charged*, will take the contract out of the statute, nor will it be aided by a letter written and signed by such party, which only refers generally to an existing contract, but does not by itself or in connection with such receipt, embrace the essential terms thereof.

¹ *Coles v. Trecothick*, 9 Ves. 234.

² *Blagden v. Bradbear*, 12 Ves. 466; *Emmerson v. Heelis*, 2 Taunt. 38; *Gosbell v. Archer*, 2 A. & E. 500; 4 N. & M. 485.

³ *Smith v. Jones*, 66 Ga. 338; 42 Am. Rep. 72. In this case an action was brought to recover the balance due on the alleged purchase of a house and lot. The plaintiff introduced in evidence a receipt for ninety-five dollars paid for the house and lot, but only signed by himself, and not by the defendant, who was the party sought to be charged by the contract and sued in this action for the balance of the money. The receipt set out the price and designated the house and lot sold. The plaintiff also introduced a letter from defendant in regard to some house, but not designating that described in the receipt, or the price to be paid, or any of the terms of the contract. It was written to the wife of plaintiff, and contained these expressions, and these only, on the subject:

"Please ask the Captain if he will let the rent go this year on the payment of the house; if he will, I can make the payment this year, and ask him to please let me know as early as possible, as I have another object in view. I almost know he will, as I have no one to help me, and people are dying out so fast I want the matter settled. Tell him I can send him all the money I have made if he wants it, or if not, send him at Christmas all

I will have up to that time, as I am living very economical. Please let me know very soon, and oblige, very respectfully,

EASTER JONES."

The defendant pleaded that she did not make the contract, and that no note or memorandum of it in writing was made by her, or by any one for her authorized to sign it. The court granted a non-suit on the ground that the case was not taken out of the statute of frauds by the receipt and letter construed together, and the question before the court was whether these papers furnish such a note or memorandum of the contract as will take the case without that statute? JACKSON, C. J., said: "It is clear that the receipt is not such a note or memorandum as will bind the defendant, because it is a paper which she did not sign. Does her letter help or heal the difficulty? We think not. It does not refer to the receipt at all; nor does it otherwise describe the thing bought, nor the price, nor any of the terms of the contract. There is therefore nothing in writing signed by her which complies with the statute so as to bind her, and taking the two papers together, unless the parol testimony be let in to connect them and show that the letter referred to the receipt, there is nothing signed by her to bind her to the contract set out in the receipt. If the parol testimony could show that, away would go the statute, and it might as well be

SEC. 363. **Affidavit.** — In *Barkworth v. Young*,¹ a statement of the terms of the agreement made in an affidavit filed by the party to be charged in another suit, was held to be a sufficient memorandum within the statute. "It can signify nothing," said KINDERSLEY, V. C., "what is the nature or character of the document containing such written statement, provided it be signed by the party sought to be charged, whether it was a letter written by that party to the person with whom he contracted, or to any other person, or a deed or other legal instrument, or an answer to a bill, or an affidavit in chancery, or in bankruptcy, or in lunacy." It is not necessary in such a case to allege that the affidavit was signed, as an affidavit must be signed before it is sworn, and the court will presume that this was done.

SEC. 364. **Contract May Be Collected from Several Writings.** — *A complete binding contract may be made by letters, or other documents relating to one connected transaction, from which the names or descriptions of the parties, the subject-matter of the contract, and its terms, may be collected.*² The same con-

admitted to show the whole contract. And such we understand to be the full current of authority, whether cited by the one or the other side here. The rule should not be relaxed now when the flood-gates are open wide as to the competency of witnesses, and the only breakwater left is the requisition to put this class of contract, and others of similar character, in writing. It is well to observe that the contract was made in 1875; it seems from the parol testimony, and the receipt is dated the 1st of January, 1878, and the letter the July following. Whilst if the trade had been acknowledged in writing afterward, it could make no material difference, yet the subsequent writings appear by their dates not to have been executed to make a note or memorandum of the sale, but the receipt simply to acknowledge the payment of money on it, and the letter seems a proposition to modify or alter its terms in regard to rent. The defendant was not put in possession, and there was

no part performance of the contract by plaintiff so as to take the case without the statute.

Under these views of the law, there could be no recovery for the plaintiff, no matter what was the parol testimony, and the non-suit was properly awarded. The case turned on the single point, do the letter and receipt, without the assistance of parol testimony, show a note or memorandum of the sale signed by the defendant so as to bind her? We think they do not, and the judgment is affirmed."

¹ 4 Drew. 13.

² *Redhead v. Cator*, 1 Stark. 14. The first case (reported) in which a signed paper referring to another writing was held to be sufficient to satisfy the statute was *Saunderson v. Jackson*, 2 B. & P. 238, decided in 1800. In this case, however, the report fails to show the connection between the papers, or how the reference was made. But in 1810, *Allen v. Bennett*, 3 Taunt. 169, was decided, and in that

struction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument, the

case we find an intelligible statement of the facts shows how the reference was made, and what was deemed essential to connect the papers. In that case, the agent of the defendant sold rice to the plaintiff, and entered all the terms of the bargain on the plaintiff's book, but did not mention the plaintiff's name. Subsequently the defendant wrote to his agent, mentioning the plaintiff's name, and authorizing his agent to give credit according to the memorandum in the plaintiff's book, saying, also, that to prevent dispute he sent a "sample of the rice." It was held that the letter referred to the memorandum of the bargain sufficiently to render the two together a signed note of the bargain. In 1812, *Cooper v. Smith*, 15 East. 103, was distinguished from the foregoing case, because the letter offered to prove the contract, as entered on the plaintiff's books, falsified instead of confirming the entry, by stating that the bargain was for delivery within a specified time, a fact denied by the plaintiff. LE BLANC, J., tersely said: "The letter of the defendant referred to a different contract from that proved on the part of the plaintiff, which puts him out of court, instead of being a recognition of the same contract, as in a former case." *Haughton v. Morton*, 5 Ir. C. L. R. 329, where also it is stated by CRAMPTON, J., at p. 342, that since the case of *Jackson v. Lowe*, *supra*, it is for the jury, in case of dispute, to decide whether the signed does or does not refer to the unsigned document. And see on this *McMullen v. Helberg*, 4 L. R. Ir. 94, at p. 104. In *Jackson v. Lowe* and *Lynam*, 1 Bing. 9, the common pleas, in 1822, held it perfectly clear that a contract for the sale of flour was fully proven within the statute by two letters: the first from the plaintiff to the defendants, reciting the contract, and complaining of the defendants' default in not delivering

flour of proper quality; and the second from the defendants' attorney in reply to it, saying that the defendants had "performed their contract as far as it has gone, and are ready to complete the remainder," and threatening action if "the flour" was not paid for within a month. *Richards v. Porter*, 6 B. & C. 437, was decided in the king's bench in 1827, and on the face of the report it is almost impossible to reconcile it with the other decisions on this point. The facts were, that the plaintiff sent to the defendant, by order of the latter, from Worcester to Derby, on the 25th January, 1826, five pockets of hops, which were delivered to the carriers on that day, and an invoice was forwarded containing the names of the plaintiff as buyer and of the defendant as seller. The defendant was also informed that the hops had been forwarded by the carriers. A month later, on 27th February, the defendant wrote to the plaintiff: "The hops (five pockets) which I bought of Mr. Richards on the 23d of last month are not yet arrived, nor have I ever heard of them. I received the invoice. The last was much longer than they ought to have been on the road. However, if they do not arrive in a few days, I must get some elsewhere, and consequently cannot accept them." The plaintiff was non-suited, and the king's bench held the non-suit right, LORD TENTERDEN saying: "I think this letter is not a sufficient note or memorandum in writing of the contract to satisfy the statute of frauds. Even connecting it with the invoice, it is imperfect. If we were to decide that this was a sufficient note in writing, we should in effect hold that, if a man were to write and say, 'I have received your invoice, but I insist upon it the hops have not been sent in time,' that would be a memorandum in writing of the contract sufficient to satisfy the statute."

only difference between them being that a letter or a correspondence is generally more loose and inaccurate in respect

The facts, as reported, certainly are not the same as those used in illustration by Lord Tenterden. No doubt, if the defendant had said, "Our bargain was that you should *send* the hops in time, and you delayed beyond the time agreed on," there would have been no proof of the contract in writing as alleged by the plaintiff. But the report shows that the goods were delivered in due time to the carrier, which, in contemplation of law, was a delivery to the purchaser, and the complaint was not that the goods had not been *sent* in time, but that they did not *arrive* in time; that a previous purchase also was delayed "on the road." The dispute, therefore, does not seem to have turned in the least on the *terms* of the bargain, which were completely proven by the letter and invoice together, but on the *execution* of it. In the case of *Wilkinson v. Evans*, L. R. 1 C. P. 407; 35 L. J. C. P. 224, the judgment in *Richards v. Porter* is said to be reconcilable with the current of decisions, by ERLE, C. J., on the ground "that the letter stated that the contract contained a term, not stated in the invoice; that the term was that the goods should be delivered within a given time." It is difficult to find in the letter, as quoted in the report, the statement said by the learned chief justice to be contained in it. The decision in *Richards v. Porter* seems to be reconcilable with settled principles only on the assumption that there was some proof in the case that the carrier was by special agreement the agent of the vendor, not of the vendee. *Richards v. Porter* seems also irreconcilable with the opinion of the court as expressed by ERLE, C. J., in *Bailey v. Sweeting*, *ante*, but the doctrine as stated in the text is now well established. *Bird v. Blossie*, 2 Vent. 361; Bac. Abr. tit. Agreements (c.), 3; *Coe v. Duffield*, 7 Moo. 252; *Stead v. Liddard*, 8 Moo. 2; *Dobell v. Hutchinson*, 3

Ad. & El. 355; *Jones v. Williams*, 7 M. & W. 493; *Inge v. Birmingham, Wolverhampton & Stour Valley Railway Co.*, 3 D. M. G. 658; *Baumann v. James*, L. R. 3 Ch. 508. If instruments contain in themselves no reference to each other, a connection cannot be shown by parol evidence so as to form a memorandum. *Boardman v. Spooner*, 13 Allen (Mass.) 353. In order that letters may furnish a sufficient memorandum within the statute it must appear that the parties meant to complete the contract by the correspondence. And letters settling the terms of a contract which the parties propose to afterwards draw up formally are insufficient. *Lyman v. Robinson*, 14 Allen (Mass.) 242. *Foster v. Sleeper*, 29 Ga. 294. Where two memoranda of a contract for the sale of goods worth more than fifty dollars are signed, one by each party, and the plaintiff adds a stipulation to the copy signed by him only, the original contract may be enforced by him. *Lerned v. Wannemacher*, 9 Allen, 412. In *Montague v. Hayes*, 10 Gray (Mass.) 609, it was held that a letter of instruction to an attorney signed, dated, and addressed, running as follows: "The agreement between M. and myself is simply this: we have purchased an estate of H. and M., Jr., on Washington Street, which has by mutual consent been conveyed to me (I having paid and secured the purchase-money); whatever disposition is made of the property, the profit and loss is to be divided between us, deducting interest. You will please make such papers as are necessary to carry this agreement into effect," is a sufficient memorandum within the statute of frauds to create a trust in real estate if acted on by the parties. But the principle of this case seems overruled by *Hazard v. Day*, 14 Allen (Mass.) 487, in which it was held that a written contract drawn up for signature, but unsigned, is not a sufficient

of terms, and creates a greater difficulty in arriving at a precise conclusion.¹ In an Illinois case,² a written contract between a railroad company and a telegraph company for the building and operating of a telegraph along the railway, was signed by the telegraph company, and a copy of it sent to the railroad company, *which accepted it by letter of its agent*, but did not sign the contract. The telegraph company made large expenditures under the contract, and for more than a year both parties executed it. It was held that the contract was binding upon the railway company, and that the acceptance of it by the letter before referred to amounted to a sufficient signing to take the contract out of the statute.³ A letter from a person sought to be charged, which merely refers to a parol agreement, without containing the essential terms of the contract, is not sufficient as a memorandum,⁴ and the same rule prevails as to telegrams,⁵ or, indeed, any writings. There is nothing in the statute which requires that the whole terms of the contract should be contained in

memorandum within the statute, although drawn by the written order of the defendant. *Hazard v. Day*, 14 Allen, 487 (1867). See also *Boardman v. Spooner*, 13 id. 353; *Lyman v. Robinson*, 14 id. 242; *Sanborn v. Chamberlin*, 101 Mass. 416.

¹ *Kennedy v. Lee*, 3 Mer. 451, *per Lord Eldon*; and see *Saunderson v. Jackson*, 2 B. & P. 238; *Ogilvie v. Foljambe*, 3 Mer. 53; *Thomas v. Blackman*, 1 Coll. 301; *Greene v. Cramer*, 2 Con. & L. 54, 63; *Fitzmaurice v. Bayley*, 9 H. L. 78; 6 Jur. (N. S.) 1215.

² *Western Union Tel. Co. v. Chicago &c. R. R. Co.*, 86 Ill. 246; 29 Am. Rep. 28. Several writings of different dates may be read in connection to show a memorandum of an agreement, and where a contract was signed by one party and retained by the other, letters subsequently written by the latter, in which the contract was clearly referred to, are sufficient to show his assent, and that he subscribed the contract within the meaning of the statute. *Beckwith v. Talbot*, 2 Col. T. 639. A parol contract, required to be in writing by the stat-

ute of frauds, if treated as obligatory by the parties until it is executed, is not void. A parol contract within the provisions of the statute cannot be made the ground of a defence, nor does part performance of a verbal contract within the statute have any effect at law, to take the case out of its provisions. This can only be done in equity. *Wheeler v. Frankenthal*, 78 Ill. 124. A writing signed by the party sought to be charged, although in the form of a letter addressed to a third party, is held a sufficient "memorandum," if explicit enough as to the terms of the contract. *Moore v. Mountcastle*, 61 Mo. 424. A proposition by letter for the assignment of a judgment, if accepted by letter, and stating the consideration and the names of the contracting parties, is not within the statute of frauds. *Abbott v. Shepard*, 48 N. H. 14.

³ *McConnell v. Brillhart*, 17 Ill. 354; *Cassit v. Hobbs*, 56 id. 231.

⁴ *Waterman v. Meigs*, 4 Cush. (Mass.) 497.

⁵ *Hazard v. Day*, 14 Allen (Mass.) 487; *McElroy v. Buck*, 35 Mich. 434.

one paper. It only makes it necessary there should be, at the time when the action is brought, a complete contract in existence, which is evidenced in writing;¹ and this may be done by several papers, as well as one, and if they contain the *whole* bargain, they form together such a memorandum as will satisfy the statute, provided the contents of the *signed* paper make such reference to the other written paper or papers, as to enable the court to construe the whole of them together, as constituting all the terms of the bargain.² And the same result will follow if the other papers were attached or fastened to the signed paper *at the time of the signature*.³ But if it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the contents of the signed paper to show a reference to, or connection with, the unsigned papers, then the several papers taken together do not constitute a memorandum *in writing* of the bargain so as to satisfy the statute.⁴ But where the reference contained in the signed paper is ambiguous, parol evidence will be admitted to explain the ambiguity and identify the document to which the signed paper must and does refer. Thus, parol evidence was held admissible to identify the documents which were respectively referred to by the following ambiguous expressions: "instructions,"⁵ "terms agreed upon,"⁶ "purchase,"⁷ "our arrangement,"⁸ "purchased."⁹ It is submitted, therefore, that since the decision in *Baumann v. James*, the principle of which case has been adopted in the most recent cases illustrating this subject, the rule as laid down by the earlier authorities must be taken to have been enlarged to the following extent: *it is no longer necessary for the signed paper to refer to any unsigned paper as such; it is sufficient to show that a particular unsigned paper*

¹ *Bill v. Bament*, 9 M. & W. 36; *Pierce v. Corf*, L. R. 9 Q. B. 210; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Gibson v. Holland*, L. R. 1 C. P. 1; *Horton v. McCarty*, 53 Me. 394; *Bird v. Munroe*, 66 id. 337.

² See *Rhoades v. Castner*, 12 Allen, 130, 132; *Johnson v. Buck*, 338, 344, 345.

³ *Tallman v. Franklin*, 14 N. Y. 584.

⁴ *Ridgway v. Ingram*, 50 Ind. 145;

Smith v. Jones, 66 Ga. 338.

⁵ *Ridgway v. Wharton*, 6 H. L. C. 238.

⁶ *Baumann v. James*, 3 Ch. 508.

⁷ *Long v. Millar*, 4 C. P. D. 450, C. A.

⁸ *Cave v. Hastings*, 7 Q. B. D. 125.

⁹ *Shardlow v. Cotterell*, 18 Ch. D. 280; S. C. 20 Ch. D. 90, C. A.

and nothing else can be referred to, and parol evidence is admissible for this purpose. In *Long v. Millar*,¹ the principle was carried still farther, THESIGER, L. J., saying: "When it is proposed to prove the existence of a contract by several document, it must appear upon the face of the instrument signed by the party to be charged, that reference is made to another document, and this omission cannot be supplied by verbal evidence."² In *Ridgway v. Wharton*,³ LORD CRANWORTH

¹ 4 C. P. D. 450.

² See *Beckwith v. Talbot*, 95 U. S. 389; *Cave v. Hastings*, ante; *Jenkins v. Harrison*, 66 Ala. 345; *Thayer v. Luce*, 22 Ohio St. 62; *Lerned v. Wannenmacher*, 9 Allen (Mass.) 416; *Buxton v. Rust*, L. R. 7 Exchq. 279; *Baumann v. James*, 3 Ch. App. 508; *Work v. Cowthick*, 81 Ill. 317; see *Brown v. Whipple*, 58 N. H. 229, in which DOB, J., questions the doctrine expressed by BRADLEY, J., in *Beckwith v. Talbot*, ante. In that case (*Brown v. Whipple*), the plaintiff brought an action against the defendant for not accepting certain lumber. As evidence of the memorandum required by the statute of frauds, the plaintiff introduced, subject to exception, a letter written and signed by the defendant, a memorandum written by the defendant, and a letter written and signed by the plaintiff.

The Defendant's Letter.

"Lancaster, Dec. 21, 1867. J. B. Brown, Esq.—Dear Sir: Can you get 20 M. feet maple, the best quality, the coming winter, saw it in the spring (or winter), and deliver it at the depot at your place in July next? If so, for how much per M.? Please call at my place when you are at Lancaster, and we will talk it over, or write me all the particulars. Respectfully yours,
J. M. WHIPPLE."

The Defendant's Memorandum.

"Rock maple, clear, for J. M. Whipple, 15,000 feet; 10,000 feet 2 inches thick; 5,000 feet 1½ inches thick. To be delivered at the railroad track. Price, \$20 per M."

The Plaintiff's Letter.

"May, 1868. John M. Whipple: The maple lumber which I agreed to get out for you is ready for delivery. Would like to have you call up and take the account of it, as I wish to draw it over to the railroad track.

JAMES B. BROWN."

The plaintiff had a verdict; but it was set aside upon appeal, DOB, C. J., saying: "When one document refers to another, the latter is, for the purpose of such reference, incorporated with the former. 1 Starkie Ev. 359; *Simons v. Steele*, 36 N. H. 73, 83; *Church v. Brown*, 21 N. Y. 315, 330-334. A list of taxes may, by annexation and reference, be made a part of a tax-collector's warrant. *Bailey v. Ackerman*, 54 N. H. 527. In *Tallman v. Franklin*, 14 N. Y. 584, it was held that a document was made a part of a memorandum by being fastened to it by a pin before the memorandum was signed, a blank column of the memorandum being headed 'Terms of sale,' and the annexed document having the same heading, and containing terms of sale. In this case, the letter written by the plaintiff to the defendant is no part of the memorandum required by the statute of frauds, because it is neither signed by the defendant, nor made by annexation or reference, a part of a writing signed by him. 2 Kent Com. 511; *Benjamin on Sales*, §§ 222-237; *Blackburn on Sale*, 46-54; authorities cited in *Morton v. Dean*, 13 Met. 385; *Fitzmaurice v. Bayley*, 9 H. L. Cas. 78; *Skelton v. Cole*, 1 De Gex & J. 587.

³ 3 D. M. G. 693.

said: "The statute is not complied with, unless the whole contract is either embodied in some writing signed by the

If it was held in *Salmon Falls Mfg Co. v. Goddard*, 14 How. (U. S.) 446, and in *Lerner v. Wannemacher*, 9 Allen (Mass.) 412, that, by a writing signed by the plaintiff, not signed by the defendant (the party to be charged), and not made a part of a memorandum signed by the defendant, the plaintiff may prove a fact which the statute requires to be proved by a memorandum signed by the defendant, those cases are in conflict with a mass of authority too great to be overthrown. The soundness of the contrary doctrine was, in the former case, demonstrated in the dissenting opinion of two judges, and was in the latter case substantially admitted.

In *Beckwith v. Talbot*, 95 U. S. 289, 292, it was a question of legal construction, whether the written agreement, signed by the plaintiff, was sufficiently identified and referred to by the defendant, in his letters, to make it a part of a memorandum signed by him. It was held that the general rule is, that collateral papers, adduced to supply the defect of signature of a written agreement, should on their face sufficiently demonstrate their reference to such agreement, without the aid of parol proof. In what was said of an exception, in cases where parol evidence leaves no ground for doubt, we do not concur. Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. *Williams v. Morris*, 95 U. S. 444, 456. *A defective reference can no more be cured by parol than any other defective part of the memorandum.*

The writing, called in this case the defendant's memorandum, is insufficient, because, if it is signed by the

defendant, and if it shows that he bought lumber of some one, it does not show of whom he bought it. The defendant's letter of inquiry is insufficient, because it does not show that he bought or agreed to buy anything of anybody. If the necessary memorandum were described in the statute (Gen. St., Chap. 201, § 14) as a scintilla of proof of the essentials of the bargain, and if the question were, whether, in fact, the plaintiff is the person with whom the defendant contracted, one question of law would be, whether the defendant's memorandum and letter (with or without other evidence) are competent for the consideration of a jury. But the question is, not whether there is an infinitesimal or other amount of circumstantial evidence from which a jury may find the fact not stated in the writings, but whether the court does find, upon a fair legal construction of the writings, that the fact is stated in them. Taken together, with all the meaning that is expressed, and all that can be implied, by the most strained construction, in favor of the plaintiff, the defendant's memorandum and letter state, that at some time the defendant agreed to buy of somebody 15,000 feet of clear rock maple boards of certain dimensions, to be delivered at the railroad track, at \$20 a thousand; and that on the 21st day of December, 1867, the defendant inquired of the plaintiff by letter, whether he could get for the defendant 20,000 feet of the best maple lumber the coming winter, saw it in the winter or spring, and deliver it at the depot at the plaintiff's place the next July, and at what price the plaintiff would do this. We do not think the legal import of this statement is, that the plaintiff is the person with whom the defendant contracted. A memorandum, consisting of one or more writings, may be read, like other documents, in the light of

party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it contained in the signed paper. Thus, a contract to grant a lease on certain specified terms is of course good. So, too, even if the terms are not specified in the written contract, yet if the written contract is to grant a lease on the terms of the lease or written agreement under which the tenant now holds the same, or on the same terms as are contained in some other designated paper, then the terms of the statute are complied with. The two writings in the case I have put become one writing. Parol evidence is, in such a case, not resorted to for the purpose of showing what the terms of the contract are, but only in order to show what the writing is which is referred to. When that fact, which it is to be observed is a fact collateral to the contract, is established by parol evidence, the contract itself is wholly in writing signed by the party."

Where an agreement was made and reduced into writing, but not signed, and the defendant, on being asked by letter to sign the agreement, wrote, saying that "his word should be as good as any security he could give," it was held that this was sufficient to take the case out of the statute.¹ So where the purchaser of an estate wrote to the vendor's solicitor, asking him when he would forward the agreement to be entered into with the vendor, "relative to the purchase I have concluded with him," the solicitor having a memorandum containing the terms of the proposed agreement, as was shown by the evidence, it was held that there was a sufficient agreement within the statute.² So where a memorandum of agreement for a lease for twenty-one years was signed by the intended lessee, but not by the lessor, and named referees, and the lessor's agents prepared a draft lease, and wrote to

the circumstances in which it was written, for the explanation of its latent ambiguities, and the application of its terms to the persons and things sufficiently described in it. *But this rule does not admit parol evidence to supply an essential part of the contract, the omission of which is patent on the face of the memorandum; and the inequitable operation of the statute is not to be avoided by a narrow*

construction of the law, or a liberal construction of the memorandum."

¹ *Tawney v. Crowther*, 3 Bro. C. C. 318. This case, however, was disapproved of by LORD REDESDALE in *Clinan v. Cooke*, 1 Sch. & Lef. 34.

² *Morgan v. Holford*, 1 S. & G. 101; and see *Hamilton v. Terry*, 11 C. B. 954; *Wood v. Scarth*, 2 K. & J. 33; *Alcock v. Delay*, 4 E. & B. 660.

the lessee saying they hoped on a certain day to have the agreement prepared and ready for inspection; and to this the lessee replied by a letter making an appointment, and hoping all would be satisfactorily arranged, it was held that there was an agreement sufficiently signed by the lessor.¹ So also a letter written by the solicitor to the purchaser to the vendor's solicitor, headed with the names of the clients, and agreeing to settle the purchase personally in two months, if that would be satisfactory to the vendor, was held binding on the writer.² But a reference to "the agreement which your client alleges he has entered into," in a signed document, is not a sufficient acknowledgment of the existence of an agreement at all to take a case out of the statute.³

SEC. 365. Insufficient Reference, Rent-Rolls, Abstract, Particulars. — Where A agreed by parol with B for the purchase of lands, and B delivered a rent-roll which was dated and altered in his own handwriting, and showed by the title of it that an agreement had been made between them for the sale of the estate at twenty-one years' purchase; and an abstract of title was also delivered to A, together with the deeds, in order to be compared with the rent-roll; and B also wrote to several of his creditors, informing them that he had contracted with A for the sale of his estate at twenty-one years' purchase, and sent the tenants to treat with A for a renewal of their leases; it was held, nevertheless, that there was no sufficient memorandum.⁴ So where the defendant gave a particular of the property signed by him, which was sent to an attorney with instructions to prepare a conveyance, it was held that there was no agreement of which specific performance could be enforced.⁵

SEC. 366. Recital of Agreement Sufficient. — Where an agreement was produced as follows: "Mr. Hall [the plaintiff] having agreed to purchase of Mr. Betty [the defendant] two leasehold houses, situate, etc., Mr. Betty hereby agrees

¹ Warner v. Willington, 3 Drew. 465; and see Skelton v. Cole, 1 De G. & J. 587.

² Powers v. Fowler, 4 E. & B. 511; and see Baumann v. James, L. R. 3 Ch. 508.

⁴ Whaley v. Bagenal, 1 Bro. P. C. 345.

⁵ Cooke v. Tombs, 2 Ans. 420; and see Cass v. Waterhouse, Prec. Ch. 29.

³ Jackson v. Oglander, 2 H. & M.

to paper and paint, etc.; Mr. Hall to pay £230 at the time of the conveyance, and the remaining £20 on the completion of the painting," it was held that the agreement to purchase, though recited as an existing agreement, was to be considered as forming part of the agreement produced.¹

SEC. 367. Reference must be Clear.—*In order to embody in a memorandum any other document or memorandum or instrument in writing, so as to make it part of a special contract contained in that memorandum, the memorandum must either set out the writing referred to, or so clearly and definitely refer to the writing, that by force of the reference the writing itself becomes part of the instrument it refers to.*² The leading case on this point is *Boydell v. Drummond*.³ There the defendant

¹ *Hall v. Betty*, 4 Man. & Gr. 410; and see *De Porquet v. Page*, 20 L. J. Q. B. 28.

² *Peek v. North Staffordshire Railway Co.*, 10 H. L. C. 473, 568, *per LORD WESTBURY*; and see *Jacob v. Kirk*, 2 Moo. & Rob. 221; *Price v. Griffith*, 1 D. M. G. 80; *Ridgway v. Wharton*, 3 D. M. G. 677; *Boyce v. Green*, Batty, 608. Where there are several writings relating to a transaction, so many of them as of themselves show their relation to each other are treated as together, forming the memorandum. *Wilkinson v. Evans*, L. R. 1 C. P. 407. In *Beckwith v. Talbot*, 95 U. S. 289, the general rule was held to be that collateral papers, adduced to supply the defect of signature of a written agreement under the statute of frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof, is subject to exceptions. Parol proof, if clear and satisfactory, may be received to identify the agreement referred to in such collateral papers. But if the relation between the different papers does not appear from the writings themselves, such relation cannot be established by parol. *Stocker v. Partridge*, 2 Robt. (N. Y.) 193; *Johnson v. Kellogg*, 7 Tenn. 262; *Morton v. Deane*, 13 Met. (Mass.) 385; *Schafer v. Farmer's Bank*, 59 Penn.

St. 144; *Freeport v. Bartol*, 3 Me. 340; *Ridgway v. Ingram*, 50 Ind. 145; *Boardman v. Spooner*, 13 Allen (Mass.) 353; *O'Donnell v. Lehman*, 43 Me. 158; *Johnson v. Buck*, 35 N. J. L. 338; *Wiley v. Roberts*, 27 Mo. 388; *Clark v. Chamberlin*, 112 Mass. 19; *Hinde v. Whitehouse*, 7 East, 558; *Jacob v. Kirk*, 2 M. & R. 221; *Leonard v. Wannemacher*, 9 Allen (Mass.) 412; *Buxton v. Rust*, L. R. 7 Exchq. 279; *Allen v. Bennett*, 3 Taunt. 169; *Peabody v. Speyers*, 56 N. Y. 230; *Ide v. Stanton*, 15 Vt. 685; *Thayer v. Luce*, 22 Ohio St. 62; *Work v. Cowhick*, 81 Ill. 317.

³ 11 East, 142. Any letter or other document that is signed, which refers to other writings, authorizes the reading of such papers: *Rushton v. Whatmere*, 8 Ch. Div. 467; *Buxton v. Rust*, L. R. 7 Exchq. 279; *Williams v. Jordan*, 6 Ch. Div. 517; *Jackson v. Lowe*, 1 Bing. 9; *Laythoarp v. Bryant*, 2 Bing. (N. C.) 735; *Williams v. Morris*, 95 U. S. 444; *DeBeil v. Thompson*, 3 Beav. 469; *Pierce v. Corf*, L. R. 9 Q. B. 210; *Mayer v. Adrian*, 77 N. C. 83; *Scarlett v. Stein*, 40 Md. 512; *Washington Ice Co. v. Webster*, 62 Me. 341. If they were in existence when the writing referring to them was signed: *Wood v. Midgeley*, 5 De G. M. & G. 41; *Briggs v. Munchon*, 56 Mo. 467; *Coles v. Trecothick*, 9 Ves. 224; *Tawney v. Crowther*, 3 Bro. C. C. 318.

was a subscriber to a proposed edition of Shakespeare's plays. The terms of the contract were set out in a printed prospectus which was delivered to the subscribers. This was not signed, but the subscribers' signatures were written in a book entitled, "Shakespeare subscribers—their signatures," and this book did not refer to the prospectus. It was held that the book and prospectus could not be connected so as to take the case out of the statute, as such connection could only be established by parol evidence.¹ In *Cooper v. Smith*,² the defendant wrote a letter recognizing an order entered in the plaintiff's order-book, but insisted that the goods had not been delivered in time, thus introducing a new term, which was denied by the plaintiff, and it was held that the plaintiff could not prove by parol that no such term existed. *LEBLANC, J.*, said: "The letter of the defendant referred to a different contract from that proved on the part of the plaintiff, which puts him out of court instead of being a recognition of the same contract." In *Jackson v. Lowe*,³ the purchaser of flour wrote to the vendors as follows: "I hereby give you notice that the corn you delivered to me in part performance of my contract with you . . . is of so bad a quality that I cannot sell it or make it into saleable bread. The sacks of flour are at my shop, and you will send for them, otherwise I shall commence an action." To this letter the vendors answered by their attorney: "Messrs. Lowe and Lynam consider they have performed their contract with you as far as it has gone, and are ready to complete the remainder, and unless the flour is paid for at the expiration of one month, proceedings will be taken for the amount." It was held that the two letters constituted a sufficient memorandum.⁴ In *Smith v. Surman*,⁵ the owner of trees growing on his land verbally agreed with the defendant to sell him the timber at so much per foot. The vendor's attorney subsequently wrote to the purchaser, requiring payment "for

¹ See also *Allen v. Bennett*, 3 Taunt. 169; *Crane v. Powell*, L. R. 4 C. P. 123; *Llewellyn v. Earl of Jersey*, 11 M. & W. 189.

² 15 East, 103.

³ 1 Bing. 9.

⁴ And see *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Leather Cloth Co. v.*

Hieronimus, L. R. 10 Q. B. 140; *Buxton v. Rust*, L. R. 7 Ex. 279; see the remarks on *Richards v. Porter*, 6 B. & C. 437, in *Benjamin on Sales*, 2d ed. 165.

⁵ 9 B. & C. 561, 570; 4 Mann. & R. 455.

the ash timber you purchased. . . . The value at 1 s. 6 d. per foot amounts to £17 3 s. 6 d. I understand your objection to complete your contract is on the ground that the timber is faulty and unsound, but there is sufficient evidence to show that the same timber is very kind and superior." The purchaser answered: "I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1 s. 6 d. per foot to be sound and good, which I have some doubts whether it is or not, *but he promised to make it so, and now denies it.*" It was held that, *as the purchaser did not in his letter recognize the absolute contract described in the vendor's letter, but stated one condition as to quality*, there was no note in writing to satisfy the statute.¹

¹ And see *Archer v. Baynes*, 5 Ex. 625; *Thornton v. Kempster*, 5 Taunt. 786. If the memorandum *does not* contain enough to make out a completed agreement, the defect cannot be supplied by parol, but the contract will be void *because it is not evidenced by a writing under the hand of the party* to be charged. Thus in *Archer v. Baynes*, *ante*, the defendant verbally agreed to purchase of the plaintiff certain barrels of flour. The defendant afterwards wrote to the plaintiff, stating that he had received some barrels, which were not so fine as the sample, and were not the barrels he had bought, and that he would not have them. In answer the plaintiff wrote as follows: "Annexed you have invoice of the flour sold you last Friday. I am very much astonished at your finding fault with the flour. It was sold to you subject to your examining the bulk; and it was not until after you had examined it, and satisfied yourself both of quality and condition, that you confirmed the purchase. What was forwarded you was the same you saw. Under these circumstances you cannot, therefore, object to fulfil your agreement." The defendant replied as follows: "I beg to say the barrels I have received is not the same I saw. I took a sample with me from the sample I have, and the barrels I saw was quite as fine as

I compared them with, nor was they lumpy. Now the barrels I have received is all very lumpy, and none of them so fine as the same. If you will take them back and pay charges, I will with pleasure send them. There must be some mistake about them." Held, that the letters did not constitute a sufficient note or memorandum in writing of the contract within the 17th section of the statute of frauds. In this case *ALDERSON, B.*, said: "We have no difficulty, therefore, in coming to the conclusion that these letters may be looked at for the purpose of seeing whether or not they contain a sufficient contract to take the case out of the statute; but looking at them, we do not think they do. They do not express all the terms of the contract; and the case is in truth governed by *Richards v. Porter*, which was cited in the course of the argument, and in which *LORD TENTERDEN* gave a similar decision as to a document of a similar nature which was then before him. There is a distinct refusal on the part of the defendant to accept the flour which he had bought of the plaintiff. It is clear from the letters that he had bought the flour from the plaintiff upon some contract or other; but whether he bought it on a contract to take the particular barrels of flour which he had seen at the warehouse, or whether

SEC. 368. Part Only of Documents Referred to, to be Incorporated in Contract.—If a part only of documents referred to are to be incorporated in the contract, the reference must show clearly what part is to be so incorporated. Thus, where an agreement for a lease of a farm referred to a paper containing the terms, a bill for specific performance according to such clauses as had been read to the plaintiff was dismissed.¹

he had bought them on a particular sample which had been delivered to him, on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties is not settled by the contract in writing; and therefore the rule must be discharged." In *Richards v. Porter*, 6 B. & C. 437, the plaintiff sent to the defendant an invoice of hops, and delivered the invoice to a carrier to be conveyed to the defendant. In the invoice the plaintiff was described as the seller, and the defendant as the purchaser, of the hops. The defendant afterwards wrote to the plaintiff as follows: "The hops which I bought of Mr. Richards (the plaintiff) on the 23d of last month are not yet arrived, nor have I heard of them. I received the invoice. The last was much longer than they ought to have been on the road; however, if they do not arrive in a few days, I must get some elsewhere, and consequently cannot accept them"; and it was held that the invoice and letter taken together did not constitute a sufficient note in writing within the statute. Where, however, the vendee, by his letter in answer, recognizes and adopts the terms of a contract specified in the vendor's letter, that is a sufficient memorandum to satisfy the statute: *Jackson v. Lowe*, 1 Bing. 9; *Smith v. Surman*, 9 B. & C. 561. The rule is that a subsequent recognition in writing, of a contract otherwise void under the statute of frauds, for want of a sufficient writing, will be sufficient: *Gale v. Nixon*, 6 Cow. (N. Y.) 445. In *Idé v. Stanton*, 15 Vt. 685, the

writings relied on to satisfy the statute, consisted, as in the principal case, of the correspondence of the parties after the contract had been made; which was decided to be competent as a note in writing, but insufficient because the letters did not state the price. "The statute has never required," said the court, "that the written evidence of the purchase should be created at the time of making the contract. A written admission of a previous verbal contract will satisfy the statute. Neither is it essential that all the written evidence necessary to constitute a sufficient note or memorandum of the bargain should be comprised in a single paper or document. Distinct writings, and of different dates, if signed by the party to be charged, and properly conducing to prove the contract, are competent evidence in this class of cases. But since the whole object of the statute is to guard against the danger of fraud and perjury in proving the contract, it is obviously indispensable that enough should appear in writing to show that a contract of purchase has been concluded, which is legally binding upon the party sought to be charged. The written note or memorandum must therefore, either by its own language or by reference to something else, contain such a description of the contract actually made as shall obviate the necessity of resorting to parol evidence, in order to supply any term of the contract which was essential to give it validity."

¹ *Brodie v. St. Paul*, 1 Ves. Jr. 326; and see *Clinan v. Cooke*, 1 Sch. & Lef.

SEC. 369. **Reference in Case of Letters need not be Express.** — *The reference in the case of letters need not be express, but it will be sufficient if the court can be satisfied that a reference was intended.*¹ Thus, where A, the owner of property, wrote to B on the 5th July in the third person, informing him that C applied for the purchase of the W farm at a certain price, but that if B chose to have the farm at the price mentioned, C would decline the purchase in his favor; and the bill stated that B accepted the terms in a letter, which, however, was not proved, and that A wrote to C on the 11th July, saying: "I have just received yours, and am glad you have determined to purchase the W farm. . . . I will write to Mr. C to inform him you have agreed to purchase the estate," SIR WILLIAM GRANT said: "Determination and agreement upon the part of the plaintiff to purchase does seem necessarily to presuppose some proposal to sell; for it would be absurd to speak of an original proposal from the plaintiff as a determination and agreement bringing the business to such a close, that it only remained to the solicitors to confer upon the title. This letter (of the 11th July) therefore clearly implies an antecedent proposal to which it is an assent. As to the nature of the proposal there is no controversy. It is in A's handwriting, and coupling that with the letter, they amount to an agreement signed by the party to be charged."²

SEC. 370. **Terms of Contract must Appear from Writing.** — *The letters or documents must either definitely state the terms of the contract, or must enable the court to ascertain what the terms of the contract are.*³ "In order," said LORD ELDON,

36; *Vouillon v. States*, 2 Jur. (N. S.) 845.

¹ But see *contra* *Fyson v. Kitton*, 3 C. L. R. 705.

² *Western v. Russell*, 3 V. & B. 187; and see *Verlander v. Codd*, T. & R. 352; *Greene v. Cramer*, 2 Con. & L. 54; *Skinner v. McDouall*, 2 De G. & S. 265.

³ It may be stated as a general rule, that, in order to make a note or memorandum sufficient to take the contract out of the statute, *enough must be stated to enable the court to give effect to it as a contract*, and if it con-

tains sufficient for that purpose, *the court will give effect to it according to the intent of the parties as gathered therefrom, and extrinsic evidence will not be admitted to show a different intent.* *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 852; *Washington Ice Co. v. Webster*, 62 id. 341; 16 Am. Rep. 462; *Horton v. McCarty*, 53 Me. 394; *Jenness v. Mt. Hope Iron Co.*, 53 id. 50; *O'Donnell v. Leeman*, 43 id. 158; *Mason v. Decker*, 72 N. Y. 595; 28 Am. Rep. 190; *Bacon v. Daniels*, 37 Ohio St. 279; *Clark v. N. Y. Life Ins. Co.*, 7 Lans. (N. Y.) 322; *Groat v.*

“to form a contract by letter, I apprehend nothing more is necessary than this; that when one man makes an offer to

Story, 44 Vt. 200; *Stoops v. Smith*, 100 Mass. 63; *Pitcher v. Hennessey*, 48 N. Y. 415; *Taylor v. Riggs*, 1 Pet. (U. S.) 591; *Ford v. Yates*, 2 M. & G. 549; *Ridgway v. Bowman*, 7 Cush. (Mass.) 268; *Carter v. Hamelton*, 11 Barb. (N. Y.) 147; *Lee v. Hills*, 66 Ind. 474. In other words, enough of the contract must be stated so that it can be enforced, and a part of it cannot be shown by the writing, and a part of it by parol. It must be evidence of a completed bargain. *Weeks v. Wright*, 25 N. Y. 153; *Rossiter v. Miller*, L. R. 3; H. L. 1128; *Winn v. Bull*, 7 Ch. Div. 29; *Roberts v. Tucker*, 3 Exchq. 632; *Gaunt v. Hill*, 1 Stark. 20; *Whaley v. Bagnel*, 1 Bro. P. C. 345; *Stratford v. Bosworth*, 2 V. & B. 341; *Symes v. Huntley*, 2 L. T. N. S. 509; *Oakman v. Rogers*, 120 Mass. 214; *Barry v. Coombe*, 1 Pet. (U. S.) 646; *Hazard v. Day*, 14 Allen (Mass.) 487; *Ballingall v. Bradley*, 16 Ill. 373; *Elfe v. Gadsden*, 2 Rich. (S. C.) L. 373; *Merton v. Dean*, 13 Met. (Mass.) 385. For, while the memorandum is said not to be the contract itself, yet it is the only evidence of the contract which the statute permits to be used. *Williams v. Robinson*, *ante*; *Ellis v. Deadman*, 4 Bibb. (Ky.) 466; *Dawes v. Shields*, 26 Wend. (N. Y.) 341; *Buck v. Pickwell*, 27 Vt. 157; *Soles v. Hickman*, 20 Penn. St. 180; *Parker v. Bodley*, 4 Bibb. (Ky.) 466; *Farwell v. Mather*, 10 Allen (Mass.) 322; *Riley v. Williams*, 123 Mass. 506; *May v. Ward*, 134 Mass.; *Hodges v. Howard*, 5 R. I. 149; *Parker v. Tainter*, 123 Mass. 185. And if the real intent of the parties is not expressed therein, yet, if it contains sufficient to enable the courts to carry it out according to a legal intent gathered from the instrument itself, it will, in the absence of fraud, be given effect to, if sufficient upon its face, however much it may conflict with the real intention of the parties. Thus, in a Maine case, *Williams v. Robinson*, *ante*, a memorandum of a

contract was made as follows: “Augusta, June 8, 1880. I hereby agree to furnish M. F. Williams of New Haven (post-office address West Haven) eight hundred to one thousand tons of ice, delivered on board vessels at Augusta, Maine, properly packed for a voyage to New Haven for the sum of two dollars per ton.

Bond Brook Ice Co.,
J. E. Robinson, Augusta, Me.”

The defendant upon the trial claimed, and introduced evidence to prove, that it was agreed that the ice should all be delivered by the last of the next July, and that the plaintiff was to forward a draft for seven or eight hundred dollars immediately upon his return home, and before any ice was shipped, and that the ice was to be shipped by successive shipments at different times, and that the plaintiff was to forward a draft covering the amount of each shipment before any such shipment was made; and upon this proof, asked the court to instruct the jury that, inasmuch as the memorandum did not contain these essential elements of the agreement, it was insufficient. But the court refused so to charge, and the plaintiff had a verdict which was sustained upon appeal, the court holding that, as the memorandum upon its face contained a sufficient enforceable contract, it must be enforced according to its legal intent, without the aid of extrinsic facts. It will be observed that in this case, the party who made the memorandum was the one who sought to invalidate it by showing that it did not contain the actual terms of the agreement, so that no claim of fraud in their apprehension could be made, and upon this ground we believe that the decision is right, and in no wise obnoxious to the rule relating to the introduction of parol evidence to avoid a memorandum upon the ground that it does not contain the terms of the agreement actu-

another to sell for so much, and the other closes with the terms of his offer, *there must be a fair understanding on the part of each as to what is to be the purchase-money, and how it is to be paid, and also a reasonable description of the subject-matter of the bargain.*¹ Where a receipt for the deposit

ally entered into by the parties, as stated *post*, p. 736, or as is held in *Elmore v. Kingscote*, 5 B. & C. 583; *Goodman v. Griffith*, 1 H. & N. 574; *Hussey v. Horner Payne*, 4 App. Cas. 311; *Wake v. Harrop*, 6 H. & N. 768. It would hardly be becoming in a party who drew a memorandum, to set up, when it was sought to be enforced against him, as a defence, that it was void because he had neglected to state *all* the terms of the contract therein, and, if he has stated enough, so that effect can be given to it, he will not be permitted to stultify the instrument upon the ground of his own fraud. Such an objection can only come from the other party.

¹ *Kennedy v. Lee*, 3 Mer. 447. The general rule of determining the question in the majority of instances is furnished by the early case of *Seagood v. Meale*, Prec. Chan. 560, that a letter will never operate as a written agreement so as to satisfy the statute, *unless it distinctly specifies or ascertains the terms of the agreement*; for if it contains only evidence of the existence of an agreement, without fully declaring its purport, the substance of the contract is left to be explored through the medium of verbal testimony, in direct opposition to the statute of frauds. In the case last mentioned, a person had verbally agreed with another to sell him some houses, and in consequence of such agreement had written a note to a mortgagee of the premises, requesting him to deliver the writings relating to the property to the bearer, as he had agreed to dispose of them, it was contended that this letter was a recognition of the contract in *writing*, and ought to be considered as sufficient to answer the intention of the statute; but the court thought other-

wise, grounding its opinion on the want of a proper specification of the terms in the letter; though some doubts may be entertained whether a letter written to a third person, and a stranger to the contract, could, however explicit it might be in describing the terms of the contract, be received as a memorandum or note within the meaning of the statute. It was said by LORD HARDWICKE in *Welford v. Beazely*, 3 Atk. 503, that "there have been cases where a letter written to a man's own agent, setting forth the terms of the agreement as concluded by him, has been deemed to be a signing within the statute." But such an act is supposed to be done with the direct purpose of carrying the treaty into effect, and not as a mere communication by letter. See also *Ayliffe v. Tracy*, 2 P. Wms. 64. In *Seagood v. Meale*, though the letter did not immediately pass between the parties to the contract, it directed something to be done in pursuance of the contract, and preparatory to its accomplishment, and was thus, in effect, a medium of negotiation between the original parties. In *Clerk v. Wright*, 1 Atk. 12, the defendant had verbally agreed to sell an estate to the plaintiff, in confidence of which agreement the plaintiff had been several times to view the premises, and had given orders for conveyances to be drawn and engrossed. The defendant afterwards sent a letter to the plaintiff, informing him, that at the time of his contracting for the sale of the estate, the value of the timber was not known to him, and the plaintiff should not have the estate unless he would give a larger price for it. The bill was brought to have the agreement carried into execution, but the statute of frauds was pleaded, and allowed; the

money did not state what the price was, nor what proportion the deposit bore to the price, it was held to be insufficient.¹

¹ *Blagden v. Bradbear*, 12 Ves. 466; and see *Clerk v. Wright*, 1 Atk. 12; *Elmore v. Kingscote*, 5 B. & C.

583; *Clinan v. Cooke*, 1 Sch. & Lef. 33; *Morgan v. Milman*, 3 D. M. G. 24.

Chancellor observing that the letter could not be sufficient evidence of the agreement, the terms of the agreement not being therein specified. *Jackson v. Titus*, 2 John. (N. Y.) 430; *Abeel v. Radcliff*, 13 John. (N. Y.) 297; *Johnson v. Ronald*, 4 Munf. (Va.) 77.

Upon similar grounds, a letter promising a marriage portion, but not reducing it to any certainty, was considered as insufficient to satisfy the third clause of the 4th section; and a letter written by a father to his daughter, promising to give her £3,000 on her marriage, but which was not shown to the intended husband, was held to afford no foundation for a decree, as having no ingredient of equity. *Ayliffe v. Tracy*, 2 P. Wms. 65. Although, if the intended husband had seen this letter, and had married the daughter on the encouragement it gave him, this would have materially altered the case in respect to the statute; and it has been held that the statute will not prevail where this is the state of the transaction. See *Eq. Ca. Abr.* 49; *Wankeford v. Fotterly*, 2 Vern. 322; *Taylor v. Beech*, 1 Ves. 297. But if a letter contains the terms of an agreement, distinctly set forth, 3 Atk. 503, or refers to another paper which contains the terms of the agreement explicitly stated, even though such prior written document be without a signature, *Tawney v. Crowther*, 3 Bro. C. R. 318, or if it refers to something in itself certain, as to the custom of the country in an agreement for a lease, *Brodie v. St. Paul*, 1 Ves. Jr. 330, the statute has been held to be satisfied. So in a later case, where an order had been given for a quantity of goods, and a bill of parcels delivered at the same time to the buyer, a subsequent letter written and signed by the vendor, referring to the order,

was connected with the bill of parcels, so as to create a sufficient contract in writing within the statute. *Saunderson v. Jackson*, 2 B. & P. 238. But where the parol evidence is to ascertain what is referred to, the subject of the reference being not sufficiently decided and distinct upon the face of the document itself, as where a paper is referred to as containing the terms of a lease, if the certainty does not sufficiently appear by referring to the paper without further evidence, the agreement is not ascertained in writing according to the statute; thus, if parol evidence be necessary to show which of the clauses contained in the paper referred to was read at a meeting between the parties, the statute is in direct opposition to such proofs, and accordingly they cannot be admitted. *Brodie v. St. Paul*, 1 Ves. Jr. 326. Thus, too, if an instrument has been designed as a deed, but from the omission of circumstances requisite to its validity, or from a change in the relative situation of the parties, it is deprived of its specific operation, it will nevertheless be received in equity as an agreement, or as evidence of an agreement; as where a woman, being about to marry, gave bond to her intended husband, with a condition that in case the marriage should take effect, she would convey all her lands to her husband and his heirs; and the marriage having taken effect, the wife died, and then the husband died, and the heir of the husband brought his bill against the heir of the wife to compel a conveyance; it was determined that the bond was a written evidence of the agreement of the party, and that that agreement, being for a valuable consideration, should be executed in equity. *Cannel v. Buckle*, 2 P. Wms. 242. But to be

Where a lessee agreed to grant an underlease, and signed the following receipt: "Received of Mr. Dolling the sum of £10 as part purchase-money of £390, of four cottages (describing them), the lease and counterpart to be paid for by Mr. Dolling"; it was held that the receipt was not a sufficient memorandum to satisfy the statute, as the interest to be granted was not specified.¹ So a letter, from the terms of which the exact quantity of goods said to be contracted for can be ascertained by subsequent measurement, *but from which it cannot be ascertained that the goods are the special goods contracted for*, is not sufficient.² Where the agreement was for a sale according to the valuation of two persons, one to be chosen by each party, or an umpire to be appointed by those two in case of disagreement, a bill for specific performance, praying that the court would appoint a person to make the valuation or otherwise ascertain it, was dismissed. "The only agreement," said SIR WILLIAM GRANT, "into which the defendant entered, was to purchase at a price, to be ascertained in a specified mode. No price ever having been fixed in that mode, the parties have not agreed upon any price. Where, then, is the complete and concluded contract which this court is called upon to execute? The price is of the essence of a contract of sale."³

binding within this statute, *a writing should always import the assent and privity of both the parties in respect to the transaction itself*. A mere entry, therefore, in a steward's book of contracts with the tenants, was not allowed to be evidence itself of an agreement for a lease between a lord and tenant. *Charlewood v. Bedford*, 1 Atk. 497.

¹ *Dolling v. Evans*, 36 L. J. Ch. 474.

² *Carroll v. Cowell*, 1 Jebb. & Sy. 43; and see *Morgan v. Sykes*, cited in *Coats v. Chaplin*, 3 Q. B. 486. A party desiring to purchase goods wrote a letter to his merchant, stating the terms upon which he wished to buy, and offering a certain person as the indorser of his notes; on the back of this letter, the party offered as indorser wrote a note accepting the terms mentioned in the letter, and signed his name to it. The goods

were furnished on the faith of the promise to indorse. Held, that the acceptance of the terms of the letter, *written on the back of it*, was a sufficient writing, within the statute of frauds, to bind the party who thus promised to become indorser. *Orne v. Cook*, 31 Ill. 238; *S. P. Otis v. Hazeltine*, 27 Cal. 80. A dated writing running "received of" J. "fifty dollars in part payment of a house" described. "The full amount is \$1,700. This bargain is to be closed inside of ten days from date hereof," is a sufficient memorandum of sale within the statute. *Hurley v. Brown*, 98 Mass. 545. The officer's return of a sale of an equity of redemption on execution is a sufficient memorandum thereof in writing to bind the purchaser under the statute of frauds. *Sanborn v. Chamberlin*, 101 Mass. 409.

³ *Milnes v. Gery*, 14 Ves. 406; and

Again, an agreement between A, a lessee of a mine, and B, to become partners in the mine, was held not to be sufficiently proved by a receipt signed by A, and given to B for a sum as B's share of the head rent of the mine, although the sum was exactly one-half of the rent. "Though the court," said LORD CRANWORTH, "has struggled to bring within the description of a signed agreement any instrument, however informal, which does in truth disclose what the terms of the contract were, it has never repealed the statute of frauds by holding a writing to be within its meaning which has not that effect; that is to say, *which does not by plain words or reasonable inference disclose what was the contract of the parties.*"¹ In a case where the bill was brought for a specific performance from letters which had passed between the parties, it appeared that a certain number of years' purchase was to be given for the land, but it could not be ascertained whether the rents upon a few cowgates were 5s. or 1s., and although there was no other doubt, LORD HARDWICKE held that such an agreement could not be carried into execution. He said that in these cases it ought to be considered whether at law the party could recover damages; for, if he could not, the court ought not to carry such agreements into execution.² An agreement for a lease which does not state the commencement or duration of the proposed term, is not sufficient,³ even when ratified by the proposed lessee.⁴ Where the plaintiff relied on a letter written by the defendant, in which the defendant agreed to take a house for seven years on certain terms, but in which the day of the commencement of the lease was not mentioned; and on another letter from the defendant, mentioning a day of commencement, and adding terms to which the plaintiff did not agree; it was held that there was no memorandum of an agreement sufficient to satisfy the statute.⁵ But an agree-

see *Wilks v. Davis*, 3 Mer. 507; *Vickers v. Vickers*, L. R. 4 Eq. 529.

¹ *Caddick v. Skidmore*, 2 De G. & J. 56.

² *Lord Middleton v. Wilson*, Sugd. V. & P. 13th ed. 109; and see *Dart V. & P.* 5th ed. 220.

³ *Cox v. Middleton*, 2 Drew. 209; *Gordon v. Trevelyan*, 1 Price, 64;

Davis v. Jones, 25 L. J. C. P. 91; *Clarke v. Fuller*, 16 C. B. (N. S.) 24;

Gardner v. Hazleton, 121 Mass. 494.

⁴ *Bayley v. Fitzmaurice*, 8 E. & B. 679; *Fitzmaurice v. Bayley*, 9 H. L. C. 78.

⁵ *Nesham v. Selby*, L. R. 7 Ch. 406, affg. S. C. L. R. 13 Eq. 191; and see *Beaumann v. James*, L. R. 3 Ch. 508.

ment for a lease at three lives on thirty-one years is not invalid because the agreement does not name the lives, nor provide by whom they are to be nominated, provided the lives nominated by the person seeking specific performance were in existence when the agreement was entered into.¹ So an agreement that a royalty of 6*d.* per ton should be paid on any minerals, and that any mines required to be left by a certain railway company were to be paid for as if gotten, was held to be too uncertain to be enforced, there being no means provided for ascertaining what amount would have to be paid for.² So specific performance of an agreement to purchase one-third of a foundry was refused on the ground of uncertainty; the contract not specifying what portion of the purchase-money was to be left in the business, but only a "large portion," and not stating when it was to be paid, or how to be secured, nor what interest was to be allowed in the meantime.³

In *Wood v. Midgley*,⁴ a memorandum that A had paid to B £50 as a deposit in part payment of £1,000 for the purchase of a house, the terms to be expressed in an agreement to be signed as soon as prepared, was held not to be sufficient. But where the agreement was for the sale of an estate for £3,000, "and the further sum of £20 per cent on any sum the property may realize above that sum at the sale by auction advertised to take place" the next day, it was held that the contract was sufficiently certain, and might be enforced;⁵ and where at the time the contract was entered into, it was agreed that the goods purchased should be paid for by a check on the defendant's brother, it was held that the omission of that stipulation did not vitiate the memorandum.⁶

SEC. 371. Sale by Auction; Memorandum must be Attached to, or Refer to Conditions of Sale. — *Upon a sale by auction, under conditions of sale, the document signed by the auctioneer must either be attached to, or clearly refer to, the conditions, in*

¹ *Fitzgerald v. Vickers*, 2 Dr. & Wal. 298.

² *Williamson v. Wootton*, 3 Drew. 210.

³ *Cooper v. Hood*, 26 Beav. 293.

⁴ 5 D. M. G. 41; and see *Ridgway v. Wharton*, 3 D. M. G. 677.

⁵ *Langstaff v. Nicholson*, 25 Beav. 160.

⁶ *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188.

*order to constitute a valid contract.*¹ The memorandum of an auctioneer of a sale of real estate must describe the estate with such definiteness, that it can be identified without recourse to parol evidence. Thus, a memorandum as follows: "Lot No. 2, 113 acres, W. R. Scales, at \$30 per acre," was held to be insufficient, although a plan having a lot numbered "2" upon it was shown to the bidders.² So on an order of sale issued on a judgment and decree of foreclosure of a mortgage of real estate, an endorsement thereon by the sheriff, "Sold to A B for \$2,400, October 16, 1869, C. D. Sheriff," was held insufficient as a memorandum or note.³ But an indorsement made by an auctioneer upon a mortgage, of the sale of the lands described in, and which were sold by him under it, as follows: "The within property was this day sold by me as agent of G, as administrator of the mortgagee, J, deceased, for \$2,300 at public auction, to E, March 23, 1869," was held sufficient.⁴ While an auctioneer may bind the parties by a memorandum of sale, either of goods or land, *if made at the time of sale*, and after the bid is publicly announced;⁵ yet it seems that this is not the rule when the vendor himself acts as auctioneer, or even when the sale is made by any person who has an interest therein. Thus, a trustee who, at an auction sale, under a deed of trust, acts as his own auctioneer, cannot bind his purchaser by a memorandum of the sale made by himself, because such memorandum is not executed by the "party to be charged" therewith, or some other person by him thereto lawfully

¹ *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Scofield*, 2 B. & C. 945; *Coles v. Trecothick*, 9 Ves. 234; *Riley v. Farnsworth*, 116 Mass. 223; *Tallman v. Franklin*, 14 N. Y. 584.

² *Adams v. Scales*, 57 Tenn. 337. It was also held in this case that where the owner of the property is present at the sale and directing it, the auctioneer engaged merely to cry the bids and knock off the property, had no authority to make a memorandum of the sale. But this would depend upon the circumstances, and ordinarily such a memorandum would be sufficient. *Gill v. Hewitt*, 7 Bush. (Ky.) 10.

³ *Ridgway v. Ingram*, 50 Ind. 145.

⁴ *Lewis v. Wells*, 50 Ala. 198.

⁵ *Walker v. Herring*, 21 Gratt. (Va.) 678. In this case an auctioneer while conducting a sale of real estate entered the name of W in his book as the purchaser of the property. On the following day his partner, who was not present at the sale, entered the name of H as joint purchaser with W. He did this without communicating with H, and without authority from him. Held that H was not bound. *Morton v. Dean*, 13 Met. (Mass.) 385; *Riley v. Farnsworth*, 116 Mass. 223.

authorized," as required by the statute of frauds.¹ The rule with reference to memorandums of such sales is the same as in reference to others, and a memorandum, to be sufficient within the statute of frauds, must set out the contract with such reasonable certainty that its terms may be understood from the writing itself, without recourse to parol proof. The fact that such memorandum is indorsed on the order of sale, *but without any reference to it for the ascertainment of the thing sold*, is no better than if indorsed on any other paper.² A general memorandum entered in a book by the auctioneer at the commencement of an auction sale, showing the name of the person on whose account the sale is made, the nature of the property, the terms of payment, referring to entries following for the names of purchasers and lots struck off to each, and signed by the auctioneer, under which he enters the name of each purchaser, the description of the goods sold, and the price, is a sufficient memorandum of each sale within the statute of frauds. It is not necessary that such general memorandum should be made as often as a parcel of goods is sold, even though the sale is adjourned to and continues on the second day without any repetition of the memorandum.³ It must be one which contains, expressly or by necessary implication, all the material terms of the contract. A draft of a deed poll, to be executed by the grantors, and

¹ Tull v. David, 45 Mo. 444. In Bent v. Cobb, 9 Gray (Mass.) the same rule was adopted where a *guardian* acted as auctioneer.

² Ridgway v. Ingram, *ante*; Johnson v. Buck, 35 N. J. L. 338. In Morton v. Dean, 13 Met. (Mass.) 385, an auctioneer on selling real estate to S D at auction, after exhibiting written conditions of sale made a memorandum as follows: "Sale on account of Messrs. Morton and Dean, assignees of the Taunton Iron Company, of the real estate, nail works, water privilege, buildings, and machinery agreeably to the plans and schedule herewith. Sale to Silas Dean for \$30,300 April 5th, 1843," and it was held not sufficient because it did not contain the essential terms of sale, nor refer to the written conditions of sale with

sufficient certainty. A memorandum sufficient in other respects is not rendered invalid because it omits the middle letter of the vendee's name, as "Benjamin Mussey" when his name was Benjamin B. Mussey, if it is shown by parol that he is known by one name as well as the other. Fessenden v. Mussey, 11 Cush. (Mass.) 127. Where the buyer of real estate at auction then signs an agreement of sale with a stipulation for a deposit in which the amount of deposit announced by the auctioneer has not been inserted, but which is otherwise sufficient, there is a sufficient memorandum to enable the auctioneer to sue for the amount of the deposit. Thompson v. Kelly, 101 Mass. 291.

³ Price v. Durin, 56 Barb. (N. Y.) 647.

which does not contain the purchaser's obligations, is not sufficient; still less is such a draft which is only partly completed at the time when the purchaser revokes his bid. The capacity in which the auctioneer acts should appear, the rule being that to make such an execution of a written contract for the sale of real estate valid and effectual, it must appear from the paper signed by the agent that the agent acted in that capacity, and it must also appear who the principal was.¹ In reference to the requirements of a memoran-

¹ In *Pinckney v. Hagadorn*, 1 Duer. (N. Y.) 89, which was affirmed by the Court of Appeals, it was held that the statute was sufficiently complied with, where the entry by an auctioneer of the sale in which the name of the principal appears, is signed by the auctioneer with his own name, without any reference to his character as agent. The court say: "The auctioneer's entry furnishes the *name of the principal*; and although that name does not appear in the subscription, the intention to bind him, and not the auctioneer personally, is perfectly plain, and makes it the contract of his principal." It will be seen that the name of the principal was incorporated in the memorandum, and the intention was manifest. In *Tallman v. Franklin*, 14 N. Y. 584, the auctioneer attached a letter, signed by the owner, which stated the terms of the sale, on a page of his sale book, then made the residue of the entries requisite to constitute a memorandum of the contract and subscribed his name to it, and it was held that the letter was to be taken as a part of the memorandum subscribed by the auctioneer, and rendered it sufficient within the statute. The name of the principal was here also incorporated in the contract. In *Bush v. Cole*, 28 N. Y. 269, the action was brought by the purchaser against the auctioneers, who sold the house for a less sum than was authorized by the owner, who refused to give title, and it was held that the contract was not binding upon the owner, for the reason among others, that the contract of sale "did

not show who the owner of the premises was."

In *Townsend v. Corning*, 23 Wend. (N. Y.) 435, it was decided that a covenant for a sale of land, as well as a deed passing an interest in land, where the contract is made by an attorney in fact, to be valid, must be executed in the name of the principal by his attorney, and that his own name is not enough. *Bronson, J.*, who delivered the opinion of the court, cites from *Combe's case*, 9 Coke, 76, where the rule is laid down "that when any one has authority, as attorney, to do an act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in his place, and to represent his person; and therefore, the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gives the authority." He also cites from *Bac. Abr.* and numerous cases sustaining this doctrine. If this rule be applicable, then the defendant not being named in any way in the contract, and it being in the name of her husband, she would not be liable for his acts, even if authorized.

In *St. John v. Griffith*, 2 Abb. (N. Y.) 198, there was a part performance of the contract by the defendant and an entire performance by the plaintiff, and it was decided that the defendants would be liable, in an action of this nature, upon the facts presented. It is nowhere decided that an agent or attorney can bind his principal in a contract for the sale of lands where he enters into the contract in his own name, and there is an understanding

dum made by an auctioneer, it may be said that in order to be valid, *it must have been made contemporaneously with the sale,*¹ *must contain the names of the vendor and vendee,*² *a description of*

by the vendee that he was the owner of the premises. He may be liable personally in damages for a failure to fulfil, but to hold that such a contract is binding upon the party not named or referred to in any form, and not known at all as a contracting party, would be in direct violation of the statute of frauds before cited. Where there is nothing in the body of the instrument, or in the form of a party's signature to indicate that the obligation thereby created was intended to be any other than a personal obligation on his part, parol evidence is inadmissible to show that the agreement was in fact the obligation, of third persons, and that such party signed it as their agent. *Babbett v. Young*, 51 Barb. (N. Y.) 466; *Chappell v. Dann*, 21 Barb. (N. Y.) 17; *Williams v. Christie*, 10 How. (N. Y.) 12; *Lincoln v. Crandell*, 21 Wend. (N. Y.) 101.

¹ *Smith v. Arnold*, 5 Mass. (U. S.) 414; *Buckmaster v. Harrop*, 13 Ves. 456; *Gill v. Bickell*, 2 Cush. (Mass.) 355; *Horton v. McCarty*, 53 Me. 394. And it must have been made by the auctioneer or his clerk. If it was made by the vendor or his agent, it has no validity. Thus, in *Bawber v. Savage*, 56 Wis. 110; 38 Am. Rep. 723, it appeared that soon after real property of the plaintiff had been bid off by defendant at an auction sale, the defendant orally agreed with the plaintiff to pay a certain part of the price the next day, and the remainder a few days later. Soon after the sale, also, the plaintiff's agent requested the defendant to make a deposit with him for the plaintiff of some portion of the purchase-money; and upon the defendant's excusing herself from so doing, and promising to make it all right with the plaintiff, he drew up a memorandum of the sale, and signed it for the plaintiff; but this was never delivered to, or accepted, or assented to, by the

defendant. No other memorandum of the sale was made by the auctioneer or any other person. It was held that the sale was invalid under the statute. In *Price v. Durin*, 56 Barb. (N. Y.) 647, the auctioneer's clerk entered the purchaser's name as each lot was knocked off, and at the close of each day's sales signed the book, and it was held to be a memorandum made at the time of sale, within the statute. The time when a memorandum was in fact made may always be shown by parol. *Hewes v. Taylor*, 70 Penn. St. 387. That an auctioneer's memorandum should be made at the time, see, in addition to the cases cited, *Williams v. Bacon*, 2 Gray (Mass.) 387; *Means v. Carr*, 1 H. & N. 484. But this is not the rule as to sales made by sheriffs or other officers upon an execution, and it has been held that it need not in all cases be signed by the identical deputy who made the sale. This would depend upon the provisions of the statute as to who should make the return. *Barclay v. Bates*, 2 Mo. App. 139; *Hanson v. Barnes*, 3 G. & J. (Md.) 359.

² *Knox v. King*, *ante*. See *Walsh v. Barton*, 24 Ohio St. 28; *Grafton v. Cummings*, 99 U. S. 100. Where a pew in a church was sold at auction, and the only memorandum of the sale was an entry made by the auctioneer on a chart or plan of the ground floor of the church, exhibited at the sale, of the name of the purchaser, and of the sum bid by him,—held, that the memorandum was not sufficient within the requirements of the New York statute; although, at the time of the auction, a written or printed advertisement, containing the conditions of sale, was exhibited and read to the purchasers. *Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28. A letter containing the terms of an auction sale was pinned into the auctioneer's book, and entries of purchasers were

*the property sold and the terms of sale,*¹ so that the resort to extrinsic evidence will be unnecessary; and if aid is required from the posters, or advertisements of the sale, they must be referred to in the memorandum or they cannot be regarded as a part thereof or used in evidence. Thus at a sale by auction, the plaintiff was declared the purchaser, and the following memorandum was added to the conditions of sale, and handed to the plaintiff: "The property duly sold to Mr. S., butcher, Pinxton, and deposit paid at close of sale. H.

afterwards made therein and signed by the auctioneer, and it was held that these papers should be taken together as a memorandum of the sale. *Tallman v. Franklin*, 14 N. Y. 584. A vendee of goods under an oral contract signed an order for them on the terms and conditions of a printed memorandum which was delivered by the vendor to the vendee as a statement of the bargain, and which spoke of "this contract." The order mentioned a place for delivery, that the vendee would send his own vessels for the goods, and, taken all together, a contract, a seller, a purchaser, a thing sold, a price, and terms of payment, appeared. A precisely similar paper was signed simultaneously by the vendor, except that it did not contain the name of the vendee. Held, that the two papers might be taken together as a memorandum of the sale so signed by the vendor as to charge him, notwithstanding that both of them contained the words "we will send our own vessels," and that after they were signed the vendor wrote on the back of the one signed by the vendee the words "to be shipped immediately, if vessels are not sent." *Lerner v. Wannemacher*, 9 Allen (Mass.).

¹ *Shied v. Stamps*, 2 Sneed (Tenn.) 172; *Doty v. Wilder*, 15 Ill. 407; *Stafford v. Lick*, 10 Cal. 12; *Nichols v. Johnson*, 10 Conn. 192; *Riley v. Farnsworth*, 116 Mass. 223. In California and Oregon by statute, an entry by an auctioneer of a sale at auction in his sales-book, *at the time of sale*, of the kind of property sold, the

terms of sale, the price, and the names of the purchaser and person on whose account the property is sold, is a good memorandum, and it may be understood that this is the rule as to the elements required in such memorandums in all the States. An imperfect memorandum of the sale of real estate by an auctioneer, and a letter written by the purchaser to the seller, cannot be connected together by parol so as to take the case out of the statute, there being no reference in the one to the other. An auctioneer is the agent of the purchaser of either lands or goods at auction, to sign a contract for him as the highest bidder. And if he signs the memorandum of sale in the name of the purchaser immediately on receiving the bid and knocking down the hammer, this is a sufficient signing of the contract within the statute of frauds. But such memorandum cannot have the effect to take a contract out of the statute where neither the auctioneer, nor his clerk, nor the vendor or vendee has signed the same. A writing, whatever its particular form, will be a sufficient memorandum or note in writing, as required by the statute of frauds, provided it contains the essential terms of the contract, expressed with such certainty that they may be understood from the instrument itself, or from some other writing to which it refers, without recourse to parol proof, and be signed by the party to be charged. If it is a sale of lands, it must state the price. *Adams v. McMillan*, 7 Port. (Ala.) 73.

M., auctioneer." At the same time the auctioneer gave the plaintiff the following receipt: "Received of Mr. S. the sum of £21 as deposit on property purchased at £420, at Sun Inn, Pinxton, on the above date. Mr. C. Pinxton, owner. Received by H. M., 29th March, 1880. H. M." *The conditions contained no description of the property sold.* Posters describing the property to be sold had been previously published, but there was not one of such posters in the room at the sale. In an action by purchaser against the vendor for a declaration that the two documents signed by the auctioneer constituted a contract, and for specific performance, it was held, first, on the authority of *Long v. Millar*,¹ that the two documents signed by the auctioneer might be taken together; second, that the word "property" was not a sufficient description of the thing sold; third, that the poster or parol evidence could not be brought in to supply the description, and the action was dismissed.² Of course, in a memorandum of this character no formality is required. It is not expected that the terms of sale will be set forth with technical precision, but it is sufficient if it contains within itself, or by reference to other writings, the names of the parties, a description of the property, and the essential terms of the sale stated in any form so that they can be ascertained without resort to parol proof thereof,³ and it may be written with ink, a pencil, or anything which intelligibly sets forth the terms of the agreement.⁴ If the sale is of real estate, in those States where the statute requires authority to sign the memorandum to be in writing, neither a sale or memorandum made by an auctioneer has any validity unless authority is conferred upon him in writing, and the matter is not aided by the circumstance that the vendor was himself present at the sale and orally assented thereto. But where no such

¹ 41 L. T. Rep. (N. S.) 306; L. R. 4 C. P. Div. 450.

² *Ogilvie v. Foljambe*, 3 Mer. 58; *Wood v. Scarth*, 26 L. T. Rep. 87; *Sale v. Lambert*, L. R. 18 Eq. 1; *Potter v. Duffield*, id. 4; *Rossiter v. Miller*, L. R. 3 App. Cass. 1140; *Shardland v. Cotterill*, 44 L. T. N. S. 549. The notices of sale, whether posters or newspaper advertisements, cannot be used as a part of the

memorandum unless the memorandum made by the auctioneer refers to them. *O'Donnell v. Leeman*, 43 Met. 58. The purchaser need not sign at an auction sale. *Bleecker v. Franklin*, 2 E. D. S. (N. Y. C. P.) 93.

³ *Daly v. Wilder*, ante.

⁴ *Clason v. Bailey*, 14 John. (N. Y.) 484; *Merritt v. Clason*, 12 id. 102; *Geary v. Physic*, 5 B. & C. 234.

statutory provision exists, both in the sale of real and personal estate, the auctioneer acts as the agent of both parties in the making of the memorandum.¹ An auctioneer is the agent of the vendor alone until the bid is knocked off, when he becomes also the agent of the vendee for the purpose of perfecting the sale, and it is upon the ground of this dual capacity that his memorandum of a sale *made by him at the time thereof, and before this agency ceases*, is binding upon both,² provided, however, that this rule extends only to third persons, acting as auctioneers, either professionally or by authority, and does not extend to sales made by a party himself, or his agent,³ but it does apply to sales made by sheriffs or other public officers, who by law are empowered to sell property at public sale;⁴ and according to the preponderance of authority, this power extends to auctioneer's clerks, and a memorandum of a sale made by them will bind the parties.⁵

In *Pierce v. Corf*,⁶ the plaintiff sent a mare to be sold by auction at the defendant's repository; the defendant advertised the mare for sale by auction on the 28th March, 1872, and circulated a printed catalogue of the horses to be sold at

¹ *Endicott v. Penny*, 22 Miss. 144; *McComb v. Wright*, 4 John. Ch. (N. Y.) 659; *Gill v. Hewitt*, 7 Bush. (Ky.) 10; *Singstack v. Harding*, 4 H. & J. (Md.) 186; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Cleaves v. Foss*, 4 Me. 258; *Smith v. Jones*, 7 Leigh. (Va.) 165; *White v. Proctor*, 4 Taunt. 209; *Parton v. Crofts*, 16 C. B. (N. S.) 11; *Stansfield v. Johnson*, 1 Esp. 101.

² *Episcopal Church v. Wiley*, 2 Hill (S. C.) 584; *Burke v. Haley*, 7 Ill. 614; *Baptist Church v. Bigelow*, 16 Wend. (Mass.) 28; *Smith v. Jones*, 7 Leigh. (Va.) 165; *Bennett v. Carter*, *Dudly* (S. C.) 142; *Anderson v. Chick*, 1 Bail. (S. C.) 118; *Meadows v. Meadows*, 3 McCord (S. C.) 458; *Champlin v. Parrish*, 11 Paige Ch. (N. Y.) 405.

³ *Adams v. Scales*, 1 Baxt. (Tenn.) 337; *Walker v. Herring*, 21 Gratt. (Va.) 678.

⁴ *Brent v. Green*, 6 Leigh. (Va.) 16;

Jenkins v. Hogg, 2 Tread. (S. C.) 821; *Christie v. Simpson*, 1 Rich. (S. C.) L. 407; *Ennis v. Waller*, 3 Blackf. (Ind.) 472; *Conington v. Anderson*, 5 Munf. (Va.) 32; *Robinson v. Garth*, 6 Ala. 204; *Hutton v. William*, 35 id. 503; *Hart v. Woods*, 7 Blackf. (Ind.) 568; *Gordon v. Sims*, 2 McCord (S. C.) Ch. 151.

⁵ *Adams v. McMillan*, 7 Port. (Ala.) 73; *Frost v. Hill*, 3 Wend. (N. Y.) 386; *Christie v. Simpson*, 1 Rich. (S. C.) L. 407; *Doty v. Wilder*, 15 Ill. 407; *Smith v. Jones*, 7 Leigh. (Va.) 165; *Alna v. Plummer*, 4 Me. 258; *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *Coles v. Trecothick*, 9 Ves. 234; *Henderson v. Barnwall*, 1 Y. & J. 387. But this rule has been held not to apply to brokers' clerks. *Johnson v. Mulry*, 4 Rob. (N. Y.) 401; *Henderson v. Barnwall*, *ante*; *Boardman v. Spooner*, 13 Allen (Mass.) 353. But see *Townsend v. Drakeford*, 1 C. & K. 20.

⁶ L. R. 9 Q. B. 210.

his sale, with conditions of sale annexed, in which the plaintiff's mare was described as "lot 49." The defendant had a sale ledger which was headed, "Sales by auction, 28th March, 1872," in which the plaintiff's mare was also numbered 49; but neither the catalogue nor the conditions of sale were annexed to the sales ledger, nor were they referred to therein. On the 28th March, 1872, the lots described in the catalogue were put up by the defendant for sale under the conditions. The plaintiff's mare was put up for sale, and knocked down to M for £33, and thereupon the defendant's clerk wrote in the columns of the sales ledger left blank for this purpose the name of M as purchaser, and the price. M afterwards refused to take the mare. It was held that the catalogue and conditions of sale were not sufficiently connected with the entries in the sales ledger to make a note or memorandum in writing of a contract by M to satisfy the statute. The ground upon which a memorandum made by an auctioneer is made binding is, that he acts as the agent of the parties; therefore it follows that a memorandum in order to be binding, *must be made at the time of the sale*, as when the sale is completed and he has left the premises, his agency, and consequently his authority, is gone.¹ A memorandum made by

¹ Walker v. Herring, *ante*; Mussey v. Fessenden, *ante*. In the case of Simon v. Motivos, 3 Burr. 1921, it appeared that an auctioneer had knocked down a lot to the highest bidder, and put down his name in the usual manner as the purchaser of the goods, and the purchaser came the next day and saw the goods weighed; an objection was made that the contract not being in writing, was void by the statute of frauds; but the court were clearly of opinion that the auctioneer must be considered as the agent for the buyer after knocking down the hammer, as well as for the seller, and that his setting down the buyer's name and the price was sufficient to take it out of the statute. They laid also some stress upon the buyer's coming the next day and seeing the goods weighed; and they inclined generally to think that buying and selling at auctions was not within

the statute of frauds. But in the *nisi prius* case of Stansfield v. Johnson, 1 Esp 107, where the case of Simon v. Motivos was cited, EYRE, C. J., was of opinion that the authority of that case applied only to the sale of goods. The same distinction was recognized by the court of Common Pleas, in Walker v. Constable, 1 B. & P. 306, and in the case of Buckmaster v. Harrop, 7 Ves. Jr. 344, was ratified by the adoption of SIR WILLIAM GRANT, M. R., who observed that whatever is the authority of the case of Simon v. Motivos or Metivier, it has been held not to extend to land. It appears from the cases concerning sales by auction, that the agent's authority need not be in writing, which point was directly determined in Waller v. Hendon, and Cox, Vin. Abr. tit. contract and agreement (H) 45, in which the decree of the Master of the Rolls was affirmed on appeal by Lord Macclesfield, who

the auctioneer must be produced, and it will not be presumed that he made one, as the presumptions in favor of the performance of official duties will not stand for proof that there was a written memorandum.¹

said that, an authority to treat or buy for another may be good without writing, though the contract itself must be in writing. *Wedderburne v. Carr*, in the Exchequer, T. T. 1775, cited in 3 Woddeson's Lect. 427. See *Coles v. Trecothick*, 9 Ves. Jr. 251.

It should be remembered that the ground of the decision of *Simon v. Motivos* was the constructive agency of the auctioneer for the buyer after knocking down his hammer. According to *Payne v. Cave*, 3 T. R. 148, the bidder might retract his bidding at any time before the hammer was knocked down, till which time there was the *locus penitentie*. So that upon a sale of chattels for the price of £10 or upwards, within the 17th section of the statute, if the person making the memorandum of the purchase by the best bidder, is not in a capacity to be considered by law as the agent for both parties, the sale cannot be enforced for want of a memorandum or note in writing, such as the statute requires. Thus in *Symonds v. Ball*, 8 T. R. 151, where the aftermath of land was sold by auction, by the corporation of a borough, and the town clerk, who acted as agent for the sellers, wrote down the name of the purchaser in the printed catalogue, and the price to be given, for which the purchaser at the same time gave his promissory note; the court were clearly of opinion, that neither the memorandum so made by the town clerk, nor the note given by the purchaser, could be deemed a sale or demise in writing to answer the statute, nor could they be coupled together in construction for that purpose. If the inclination of the bench in the above cited case of *Simon v. Motivos* were to prevail, it would reduce all these cases to a level by taking them all out of the operation of the statute. But that case was decided in favor of

the seller, not upon the broad ground of treating it as out of the purview of the statute of frauds, but on the inference of agency in the auctioneer on the part of the buyer as well as the seller, and the validity of his entry of the buyer's name, as a memorandum and signature to satisfy the requisition of the statute in question. The case in the text of *Symonds v. Ball*, it is plain, did not adopt the hint afforded by the judges in *Simon v. Motivos*, of emancipating the case of auctions altogether out of the statute; for the want of a signing by the defendant himself, or by an agent properly authorized by him, was the reason of the judgment of the court in his favor.

These cases, with a distinction between sales of land and goods, suppose the efficacy of the signature of one of the parties, without that of the other to bind the person signing; a doctrine recognized expressly in chancery in the case of *Seton v. Slade*, 7 Ves. Jr. 265. But are we to hold, that the buyer is bound by such entry of his name by the auctioneer, without also understanding that the seller is become bound at such stage of the transaction to the buyer? Or are we warranted in concluding that the name of the seller is sufficiently signed by being printed on the particular of sale? The knot in which these and some other difficulties have entangled this question, may be cut by adopting the opinion of the judges in *Simon v. Motivos*, and understanding it as extending to sales of land as well as of goods; it is not likely to be unloosed by the multiplication of artificial distinctions. A line of some breadth should be taken in deciding questions upon a law framed for the prevention of fraud and perjury, and for promoting honor and certainty in the transactions of property.

¹ *Baltzer v. Nicolay*, 53 N. Y. 467.

SEC. 372. **Sheriff's, Constable's, etc., Returns of Sale on Execution.**—The return of a sheriff or other officer authorized by law to sell property upon *mesne* or final process, properly made and containing the material elements of the sale, is a sufficient note or memorandum thereof to bind the parties under the statute,¹ because in such cases the officer's return becomes a matter of record, and is conclusive upon all the parties thereto.² The certificate required by statute is the proper evidence of a sale of land upon execution, etc., and no other note or memorandum of such sale is required.³

SEC. 373. **Recognition of Contract.**—*Where a contract in writing, or note, or memorandum exists, which binds one party, any subsequent note in writing signed by the other party is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them.*⁴ Thus, where the purchaser of lands by auction signed a memorandum of the contract, indorsed on the particulars and conditions of sale, and referring to them, and afterwards wrote to the vendor complaining of a defect in the title, referring to the contract expressly, and renouncing it, and the vendor wrote and signed several letters, mentioning the property sold, the names of the parties, and some of the conditions of sale, insisting on one of them as curing the defect, and demanding the execution of the contract; it was held that these letters might be connected with the particulars and conditions of sale so as to constitute a memorandum in

¹ Robinson v. Garth, 6 Ala. 204; Stewart v. Garvin, 31 Mo. 36; Nichol v. Redley, 5 Yerg. (Tenn.) 63; Hand v. Grant, 13 Miss. 508; Hanson v. Barnes, 3 G. & J. (Md.) 359; Seecrist v. Twitty, 1 McMull (S. C.) 255; Barney v. Patterson, 6 id. 182; Feunwick v. Floyd, 1 H. & G. (Md.) 182; Elf v. Gadsden, 2 Rich. (S. C.) L. 378. And it has also been held that an entry by a master in chancery of a sale of land at auction by him under a decree is sufficient evidence of the sale, under the statute of frauds, whether made in his regular books or on a separate piece of paper. Gordon v. Sims, 3 McCord (S. C.)

Eq. 151. And also as to an administrator's sale made at auction under leave of the ordinary. Wolfe v. Sharpe, 10 Rich. (S. C.) L. 60. But not if the administrator acted as auctioneer. Smith v. Arnold, 5 Mas. (U. S.) 414. But a memorandum of a sale by a commissioner appointed by the court for that purpose is binding upon the parties. Jenkins v. Hogg, 2 Treadw. (S. C.) Const. 821.

² Bott v. Burnell, 11 Mass. 163.

³ Armstrong v. Vroman, 11 Minn. 220.

⁴ Drury v. Young, 58 Md. 546; 42 Am. Rep. 343.

writing binding the vendor under the statute, though neither the original conditions and particulars, nor the memorandum signed by the purchaser, mentioned or were signed by the vendor.¹

SEC. 374. **Must be Concluded Agreement.** — *Although a contract may be deduced from letters, or from various documents containing the terms, there must be a clear accession on both sides to one and the same set of terms,*² for if it appears that the parties have never got beyond mere negotiation, no relief can be obtained.³ “The court,” said LORD ELDON, “is not to decree specific performance unless it can collect, upon a fair interpretation of the letters, that they import a concluded agreement; if it rests reasonably doubtful whether what passed was only treaty, let the progress towards the confines of agreement be more or less, the court ought rather to leave the parties to law than specifically to perform what is doubtful as a contract. But it is also clear that the court is to put the same interpretation upon correspondence, with reference to this subject, as other persons would, reading the correspondence fairly, with a view to collect the sense of it.”⁴

Where the agent for the purchaser wrote to the agent of the vendor, offering a price for a house, and the vendor wrote across the letter “I agree to sell my house upon these terms,” and thereupon his agent wrote to the purchaser’s agent, “My employer will take your offer,” and added, “Make an appointment to meet and draw the agreements,” it was held that there was a sufficient contract.⁵ When an offer in writing is made to sell on specified terms, and this is unconditionally accepted or acted upon by the party to whom it is made without express acceptance, there is a binding contract, which

¹ *Dobell v. Hutchinson*, 3 Ad. & El. 355; and see *Powell v. Dillon*, 2 Ball & B. 416; *Clinan v. Cooke*, 1 Sch. & Lef. 33; *Blagden v. Bradbear*, 12 Ves. 466; *Allen v. Bennett*, 3 Taunt. 169; *Verlander v. Codd*, T. & R. 352; *Laythorp v. Bryant*, 2 Bing. (N. C.) 735; 3 Sc. 238; *Hammerley v. De Biel*, 12 C. & F. 45; *Ridgway v. Wharton*, 3 D. M. G. 696, *per* LORD CRANWORTH.

² *Thomas v. Blackman*, 1 Coll. 312, *per* KNIGHT BRUCE, V. C.

³ See *Felthouse v. Bindley*, 11 C. B. (N. S.) 869; *Jordan v. Norton*, 4 M. & W. 155; *Hutchinson v. Bowker*, 5 M. & W. 535; *Kennedy v. Lee*, 3 Mer. 451; *Foster v. Rowland*, 7 H. & M. 103.

⁴ *Huddleston v. Briscoe*, 11 Ves. 591; and see *Stratford v. Bosworth*, 2 V. & B. 341; *Ogilvie v. Foljambe*, 3 Mer. 53; *Cheveley v. Fuller*, 13 C. B. 122; *Archer v. Baynes*, 5 Exch. 625.

⁵ *Cowley v. Watts*, 17 Jur. 172.

neither party can vary;¹ but if the terms are not settled, and anything remains to be done, the contract will not be binding.² "If," said LORD WESTBURY, "there has been a final agreement, and the terms of it are evidenced in a manner to satisfy the statute of frauds, the agreement shall be binding, though the parties may have declared that the writing is to serve only as instructions for a formal agreement, or though it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this court requires to make a legally binding contract."³

Where, after negotiations for the purchase of certain tithes, in which the terms were discussed, but not finally settled, the vendor wrote to his solicitor a letter which contained the following passage: "Previously to paying the amount (then followed an illegible word) for tithes, glebe, etc., it would be advisable to have some information as to title," it was held that the letter did not amount to a note or memorandum in writing of a contract for the sale of lands within the statute.⁴

SEC. 375. Additional Terms.—*In order to constitute an agreement, the answer to the written proposal must be a simple acceptance of the terms proposed without the introduction of a new and different term.*⁵ Thus, an offer to grant an under-

¹ Bird v. Blasse, 2 Vent. 361; Bac. Abr. tit. Agreements (c) 3; Honeyman v. Marryat, 21 Beav. 14; 1 Jur. (N. S.) 857; 6 H. L. C. 112; Liverpool Borough Bank v. Eccles, 4 H. & N. 139.

² Wood v. Midgeley, 5 D. M. G. 41; Rummens v. Robins, 3 De G. J. & S. 88.

³ Chinnock v. The Marchioness of Ely, 4 De G. J. & S. 647.

⁴ Savile v. Kinnaid, 11 Jur. (N. S.) 195.

⁵ Routledge v. Grant, 4 Bing. 653; Hyde v. Wrench, 3 Beav. 334; Thornbury v. Beville, 1 Y. & C. C. C. 554. If there is any material discrepancy

between the letters and entries, as if they describe the quality and quantity of the thing sold differently, or vary in the statement of the terms of the contract, and do not recognize the same contract and refer to the same transaction, they will, of course, fail in establishing the bargain. Thus in an action for the price of goods sold, the plaintiff offered in evidence an entry in a book of an order for flour, which had been read over to the defendant, the alleged purchaser, at the time of the booking thereof, and which purported to be a mere general order for forty sacks of flour called thirds, at 58 s. per sack, and this order

lease in reply to a proposal to take an assignment is not sufficient.¹ So, where an offer by letter to supply goods is accepted, but the answer adds a further stipulation to the effect that goods already supplied shall be paid for at the rate contained in the offer, that is a new term in the agreement, and must be shown to be accepted.²

SEC. 376. Immaterial Addition to Acceptance.—*An immaterial addition to an acceptance of an offer will not vitiate a contract.*³ Where a proposal by a purchaser to take the remainder of a lease was answered by a letter which, after acceding to the proposal, added, "We hope to give you possession at half quarter-day," it was held that the addition did not introduce a new term, but that the acceptance was unconditional.⁴

SEC. 377. Conditional Acceptance.—If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement arrived at. But if the agreement is made subject to certain conditions then specified, or to be specified by the party making it or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the court will enforce.⁵ Thus, where the vendors of land, in a

being insufficient as a memorandum for want of signature, the plaintiff endeavored to satisfy the statute by connecting it with a letter signed by the defendant, addressed to him, stating, "Your not sending the flour I agreed with you for, according to time, I am now provided for. I expected yours in the course of a week. If I buy of any man I expect it according to time, or the bargain is void"; but it was held, that the entry and the letter referred to different contracts, the one was evidence of an absolute and unconditional contract of sale, and the other of a qualified and conditional bargain, and that the plaintiff could not avail himself of the letter for one purpose, to bind the defendant within the statute, and renounce it for another purpose; but

that he must take it altogether, and then it was no recognition, but a repudiation of the contract sought to be established by the entry. *Cooper v. Smith*, 15 East, 103; *Richards v. Porter*, 6 B. & C. 437; *Archer v. Baynes*, 5 Exchq. 625; *Smith v. Surman*, 9 B. & C. 561.

¹ *Holland v. Eyre*, 2 S. & S. 194.

² *Heyward v. Barnes*, 23 L. T. 68; and see *Smith v. Surman*, 9 B. & C. 561; 4 Mann. & R. 455.

³ *Gibbins v. North East Metropolitan Asylum District*, 11 Beav. 1.

⁴ *Clive v. Beaumont*, 1 De G. & S. 397.

⁵ *Crossly v. Maycock*, L. R. 18 Eq. 180, *per* JESSEL, M. R. If a memorandum is only to become operative upon a condition, it is not sufficient. Thus, after the defendant had

letter acknowledging the receipt of an offer by intending purchasers, wrote as follows: "Which offer we accept, and now hand you two copies of conditions of sale," and therewith enclosed a formal agreement, with conditions of a special character, it was held that the acceptance was only conditional, and that there was no final agreement of which specific performance could be enforced as against the purchasers.¹ In *Lucas v. James*,² on a treaty for an under-lease, a memorandum of the terms of the intended agreement was prepared, stipulating that the lease should contain all usual covenants, and also the covenants in the leases of the ground landlord; and the proposed lessee signed the memorandum accompanying his signature, with the qualification that he agreed thereto, subject to there being nothing unusual in the leases of the ground landlord. A draft of the proposed lease was afterwards submitted by the lessor's solicitors to the proposed lessee, who made some alterations and returned the draft with a request that the lessor would at once grant the lease so altered, or refuse it. The lessor's solicitors sent the draft back the same day, assenting to all the alterations except one, whereby the proposed lessee had expunged a clause in the draft restraining any assignment or demise by him without the consent of the lessor. It was held that, upon the return of the draft lease, not acceding to all the alterations, and in the absence of any proof that the lessor was previously bound by the terms as to unusual covenants, introduced by the proposed lessee on his signing the memorandum, the contract was incomplete, and the proposed lessee was at liberty to determine the treaty.³

SEC. 378. Parol Acceptance of Written Offer. — *A proposal in writing, containing the terms of the proposed contract, signed*

agreed verbally with the plaintiff's agent to transfer shares in a manufacturing corporation to the plaintiff, and had written a letter to an agent to transfer the shares into the plaintiff's name, and transmit the certificate to the defendant, the plaintiff's agent signed a memorandum, agreeing to pay the defendant the price of the shares when the defendant should furnish the certificate. Held, that there was not a contract in writing on

the part of the defendant, and therefore parol evidence of his contract was not objectionable on that ground. *Tisdale v. Harris*, 20 Pick. (Mass.) 9.

¹ *Crossley v. Maycock*, L. R. 18 Eq. 180; see also *Stanley v. Dowdeswell*, L. R. 10 C. P. 102.

² 7 Hare, 410.

³ And see *Warner v. Willington*, 3 Drew, 523; *Ridgway v. Wharton*, 6 H. L. C. 264; *Smith v. Neale*, 2 C. B. (N. S.) 67.

*by the party to be charged, and accepted by parol, by the party to whom it is made, is a sufficient memorandum or note in writing, to satisfy the statute.*¹ But a parol proposal, however full and explicit, is not taken out of the statute by any acceptance in writing.² In *Warner v. Willington*,³ KINDERSLEY, V. C., said: "I think upon principle, that parol acceptance is sufficient; because when one party has signed a written proposal, and the other expressly accepts it by parol, as if he says in express terms, 'I accept the proposal,' it appears that that reduces it to a case of parol agreement come to between the parties, and a memorandum of the agreement signed by one, in which case it is clear that the signature of one party is sufficient to bind him, although the other has not signed."⁴ In a Massachusetts case⁵ a memorandum as follows: "Will deliver S. R. & Co. best refined iron, 50 tons within 90 days at 5 cents per pound, 4 per cent cash. Plates to be 10 to 16 inches wide and 9 feet to 11 long. This offer good till 2 o'clock, Sept. 11, 1862. J. H. F., J. B. R.," was held sufficient to bind J. H. F., he having signed the same in behalf of a firm of which he was a member, and the plaintiff having orally accepted the same within the time specified.

¹ *Ashcroft v. Morrin*, 4 M. & Gr. 451; *Reuss v. Picksley*, L. R. 1 Exch. 342; *Watts v. Ainsworth*, 3 F. & F. 12; 1 H. & C. 83; *Smith v. Neale*, 2 C. B. (N. S.) 67; *Horsfall v. Garnett*, 6 W. R. 387; *Peck v. North Staffordshire Railway Co.*, 29 L. J. Q. B. 97.

² *Washington Ice Co. v. Webster*, 62 Me. 341. A written offer by the plaintiff, orally accepted by the defendant, cannot be enforced under the statute of frauds. *Smith v. Gowdy*, 8 Allen (Mass.) 566. But a written offer by the defendant, orally accepted by the plaintiff, is a sufficient memorandum within the statute. *Lerned v. Wannemacher*, 9 Allen (Mass.) 412; *Sanborn v. Flagler*, 9 id. 474.

³ 3 Drew, 532.

⁴ And see *Benecke v. Chadwick*, 4 W. R. 687; *Forster v. Rowland*, 7 H. & N. 103; 30 L. J. Ex. 396. In *Liverpool Borough Bank v. Eccles*, 4 H. & N. 139, J. E. & Co. being indebted to the plaintiffs, who were bankers, the defendants by a

writing expressed to be made between the plaintiffs and the defendants, in consideration of the agreement thereafter contained on behalf of the plaintiffs, agreed that they would pay all moneys which then were or at any time should be due from J. E. & Co. to the plaintiffs, not exceeding £35,000 by instalments of £3,000 a year for five years, and two subsequent annual instalments of £10,000; and in consideration of the above the plaintiffs agreed that they would not charge more than five per cent interest to J. E. & Co.; and when all debts of J. E. & Co., except £15,000, should have been paid, would grant them a full release. This agreement was signed by the defendants and handed by them to the plaintiffs who had pressed for it. The plaintiffs had acted upon but never executed it. It was held binding upon the defendants.

⁵ *Sanborn v. Flagler*, 9 Allen (Mass.) 474.

SEC. 379. **Special Acceptance.**—Where a letter contains the entire terms of an agreement, it is not necessary for the plaintiff to prove that he accepted the terms. If it require the plaintiff to supply a term in the agreement, there must be a special acceptance in writing supplying that term, in order to take a case out of the statute.¹

SEC. 380. **Withdrawal of Offer.**—When an offer in writing is made by a vendor to sell on specified terms, and this is unconditionally accepted, there is binding contract, which neither party can vary; but the vendor is entitled, at any time before his offer has been definitely accepted, to withdraw or add any new terms to his proposal. If these be refused the treaty is at an end,² and this, although a time is fixed for acceptance.³

SEC. 381. **Determination of Offer.**—If the person making an offer dies, becomes bankrupt, or sells before acceptance, the contract is at an end.⁴

SEC. 382. **Rejection of Offer.**—Where an agreement has been commenced by letter, but in the course of the treaty an offer made in writing has been verbally rejected, the party who has made the offer is relieved from his liability unless he consents to renew the treaty.⁵ And the party who has rejected an offer cannot afterwards, at his own option, convert the same offer into an agreement by acceptance without a renewed offer from the other party.⁶

SEC. 383. **Acceptance must be in Reasonable Time.**—In order that an offer to sell may be binding upon the person making it, *it must be accepted within a reasonable time*, and if a person communicates his acceptance of an offer within a reasonable time after the offer is made, and if within a reasonable time of the acceptance being communicated no varia-

¹ *Boys v. Ayerst*, 6 Madd. 316; and see *Taylor v. Portington*, 7 D. M. G. 328.

² *Honeyman v. Marryat*, 21 Beav. 14; 1 Jur. (N. S.) 857; 6 H. L. C. 112; *Chinnock v. Marchioness of Ely*, 4 De G. J. & S. 647; 6 N. R. 1.

³ *Martin v. Mitchell*, 2 Jac. & W. 428; *Routledge v. Grant*, 4 Bing. 653; *Lucas v. James*, 7 Hare, 410.

⁴ *Mcynell v. Surtees*, 25 L. J. Ch. 257; 1 Jur. (N. S.) 737.

⁵ *Sheffield Canal Co. v. Sheffield & Rotherham Railway Co.*, 3 Rail. Cas. 121; *Honeyman v. Marryat*, 21 Beav. 14; 6 H. L. C. 14.

⁶ *Sheffield Canal Co. v. Sheffield & Rotherham Railway Co.*, 3 Rail. Cas. 121.

tion has been made by either party in the terms of the offer so made and accepted, the acceptance will be taken as simultaneous with the offer, and both together constituting such an agreement as the court will execute.¹

SEC. 384. Parol Evidence not Admissible to Add to or Vary Memorandum.—Not only is it contrary to the statute of frauds, but to the common law before the statute to add anything to an agreement in writing by parol,² for the court cannot draw distinctions between stipulations that are material and those that are not.³ So parol evidence cannot be adduced by the plaintiff to show that certain stipulations or terms were to come between the parties at the time of making the contract or afterwards, and that they have been omitted from the writing.⁴ Thus, where the written agreement on a contract of hiring and service provided that the servant's salary should be paid yearly, it was held that, there being this precise stipulation for yearly payments, parol evidence was not admissible to show that at or after the time the contract was entered into in writing it was verbally agreed between the parties that the salary should be paid quarterly, and that the fact of the payments having been made quarterly did not vary the rights of the parties under the agreement.⁵ So, in an action for a breach of warranty on the sale of goods upon a written contract, parol evidence is not admissible to show that the seller's agent at the time of the sale represented the goods to be of a particular quality. "The rule is," said MAULE, J., "that where a contract, though completely entered into by parol, is afterwards reduced into writing, we must look at that and at that alone, even though part of the terms previously agreed upon are not inserted in the written contract. But, while parol evidence is not admissible to add to or vary the terms of the memorandum, it is held to be admissible to show that the memorandum is not a

¹ *Kennedy v. Lee*, 3 Mer. 455, *per* LORD ELDON; *Thornbury v. Beville*, 1 Y. & C. C. C. 554; *Williams v. Williams*, 17 Beav. 213; *Powers v. Fowler*, 4 E. & B. 519, n.; *Meynell v. Surtees*, 25 L. J. Ch. 257; 1 Jur. (N. S.) 737.

² *Parteriche v. Powlet*, 2 Atk. 383; *Omerod v. Hardman*, 5 Ves. 722; *Woollam v. Kearn*, 7 Ves. 211.

³ *Marshall v. Lynn*, 6 M. & W. 116; *Emmett v. Dewhirst*, 21 L. J. Ch. 497.

⁴ See, as to admissibility of evidence on behalf of a defendant resisting specific performance, *post*, chapter on Specific Performance.

⁵ *Giraud v. Richmond*, 2 C. B. 835.

record of any antecedent parol bargain because, as was said by LORD SELBOURNE,¹ the statute of frauds is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature if it is not according to the good faith and real intention of the parties. So parol evidence is admissible to show that the memorandum is not a note of the whole bargain, as that a price was agreed upon which is not stated therein, and therefore that the note is invalid.² So that the goods were sold by sample,³ or as being in a certain condition,⁴ or subject to the purchaser's approval.⁵ But this evidence is not admissible to add new terms or conditions to the memorandum, but only to show that it is not a complete and valid memorandum, because it does not embrace the terms of the contract.⁶ Omissions in a memorandum cannot be supplied by parol,⁷ and if it is defective in any essential particular, it is inoperative as a memorandum.⁸ It is by the written contract alone, subject of course to be interpreted by the usages of trade, as in *Syers v. Jonas*,⁹ that the parties are bound, and more especially is that so in a case where as here the contract is one which by the statute of frauds is required to be in writing. The intention of the legislature was that the writing should be the evidence and the only evidence of the contract, and that there should be no occasion to look beyond it."¹⁰ Nor is parol evidence admissible to show the name of the person to whom a guaranty is given.¹¹

SEC. 385. When Parol Evidence Admissible to Prove Stipulations of Contract. — But although where there is a concluded

¹ In *Jervis v. Berridge*, 10 Ch. 360.

² *Acebal v. Levy*, 10 Bing. 376; *Elmore v. Kingscote*, 5 B. & C. 583; *Goodman v. Griffiths*, 1 H. & M. 574.

³ *McMullen v. Helberg*, 6 L. R. Jr. 463; *Boardman v. Spooner*, 13 Allen (Mass.) 353.

⁴ *Pitts v. Beckett*, 13 M. & W. 743.

⁵ *Boardman v. Spooner*, *ante*; *Davis v. Shield*, 26 Wend. (N. Y.) 341.

⁶ *McMullen v. Helberg*, *ante*; *Remick v. Sandford*, 118 Mass. 102; *Pitts v. Beckett*, *ante*.

⁷ *Lee v. Hills*, 66 Ind. 474; *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20; *Dana v. Hancock*, 30 Vt. 616; *Sal-*

mon Falls Mfg Co. v. Goddard, 14 How. (U. S.) 446; *Williams v. Robinson*, 73 Me. 186.

⁸ *Lee v. Hills*, *ante*; *Boardman v. Spooner*, *ante*; *May v. Ward*, 134 Mass. 127.

⁹ 2 Ex. 111.

¹⁰ *Harnor v. Groves*, 15 C. B. 667; 24 L. J. C. P. 53; and see *Boydell v. Drummond*, 11 East, 142; *Fitzmaurice v. Bayley*, 9 H. L. C. 78; *Holmes v. Mitchell*, 7 C. B. (N. S.) 361; 28 L. J. C. P. 301.

¹¹ *Williams v. Lake*, 2 E. & E. 349; 29 L. J. Q. B. 1.

contract between the parties parol evidence is not admissible to add to or vary the terms, if there has been no actual memorandum, but writings are simply offered as evidence of the terms, parol evidence is admissible to show an additional stipulation. Thus in *Ford v. Yates*¹ the contract was as follows: "Of E. Y. 39 pocket Sussex hops, Springett's five pocket, Kenward's 78 J. Springett's to wait orders," it was held in an action for non-delivery of the hops that the contract imported a sale for ready money, and that parol evidence was not admissible to show that by the usual course of dealing between the parties, the hops were sold on a credit of six months. And when the memorandum is silent as to the time of payment or delivery, parol evidence is not admissible to show that a particular time was agreed upon.² The memorandum must contain within itself, or by reference to other written evidence, all the essential elements of the contract, and neither party will be permitted to show that a different contract was in fact made.³ But where the writing is not sufficient as a memorandum under the statute, and the case has been taken out of the statute by a delivery and acceptance of the goods, parol evidence is admissible to supply terms not provided for in the writing. Thus, in *Lockett v. Nocklin*,⁴ on the other hand, the defendant ordered goods by letter which did not mention any time for payment,

¹ 2 Man. & Gr. 549.

² *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352. And if some of the conditions of the contract are omitted from the memorandum, they cannot be supplied by parol proof or relied upon by the defendant: *Remick v. Sandford*, 118 Mass. 102; *Small v. Quincy*, 4 Me. 497; *Cabot v. Winsor*, 1 Allen (Mass.) 546; *Coddington v. Goddard*, 16 Gray (Mass.) 436; *Hawkins v. Chace*, 19 Pick. (Mass.) 502; *Warren v. Wheeler*, 8 Met. (Mass.) 97; *Ryan v. Hall*, 13 id. 523.

³ *Riley v. Farnsworth*, 116 Mass. 223; *Washington Ice Co. v. Webster*, 62 Me. 341; 16 Am. Rep. 362; *O'Donnell v. Lehman*, 43 id. 158; *Horton v. McCarty*, 53 id. 394; *Jenness v. Mt. Hope Iron Co.*, 53 id. 20.

⁴ 2 Ex. 93. In *Jeffcot v. N. Brit-*

ish Oil Co., 8 Ir. Rep. C. L. 17, an action was brought for the non-delivery of oil sold by the defendant to the plaintiff. The contract was for 100 barrels to be delivered as wanted. The plaintiff proved a parol bargain, and, in order to take the contract out of the statute, gave in evidence a memorandum of the alleged contract signed by the defendant's agent. The memorandum was silent as to price, which had been agreed on. Some ten casks of oil were delivered to the plaintiff after the contract was made, and were accepted and paid for, and it was held that, though the memorandum was defective, parol evidence was admissible as to the price, because the statute had been satisfied by the part performance.

the plaintiff sent the goods and an invoice. It was held that parol evidence was admissible to show that the goods were supplied on credit, the letter not amounting to a valid contract within the statute of frauds. Parol evidence is admissible to show the situation of the parties at the time the writing was made, and the circumstances attending the transaction,¹ and to show the meaning which certain words have acquired by usage,² and also to show the time when the bargain was made.³

SEC. 386. Parol Evidence not Admissible to Connect Separate Documents.—*Parol evidence is not admissible to connect separate documents, but they must either be actually attached to each other or they must distinctly refer to each other.*⁴ In *Baumann v.*

¹ *Sweet v. Lee*, 3 M. & G. 466.

² *Bold v. Raynor*, 1 M. & W. 343; *Siewwright*, 17 Q. B. 124; *Stewart v. Eddowes*, L. R. 9 C. P. 311; *Salmon Fall Mfg Co. v. Goddard*, 14 How. (U. S.) 455; *Spicer v. Cooper*, 1 Q. B. 424.

³ *Lobb v. Stanley*, 5 Q. B. 574; *Edmunds v. Downs*, 2 C. & M. 459; *Hartley v. Wharton*, 11 Ad. & El. 934.

⁴ *Tallman v. Franklin*, 14 N. Y. 584; *Kaitling v. Parkin*, 23 N. C. C. P. 569; *Lerner v. Wannemacher*, 9 Allen (Mass.) 417; *Ridgway v. Ingram*, 50 Ind. 145; *Williams v. Bacon*, 2 Gray (Mass.) 391; *Smith v. Arnold*, 5 Mass. (U. S.) 416; *Johnson v. Buck*, 35 N. J. L. 344; *Freeport v. Bartol*, 3 Me. 340; *Knox v. King*, 36 Ala. 367; *Fowler v. Radicon*, 52 Ill. 405; *Moale v. Buchanan*, 11 G. & J. (Md.) 314; *Kurtz v. Cummings*, 24 Penn. St. 35; *Morton v. Dean*, 13 Met. (Mass.) 385; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Rishton v. Whatmore*, 8 Ch. D. 467; *Cave v. Hastings*, 7 Q. B. D. 125; *Long v. Millar*, 4 C. P. D. 450; *Price v. Griffith*, 1 De G. M. & G. 80; *Hinde v. Whitehouse*, 7 East, 558; *Cooper v. Smith*, 15 East, 103; *Kenworthy v. Schofield*, 2 B. & C. 945; *Richards v. Porter*, 6 B. & C. 437; *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188; *Chapman v. Callis*, 9 C. B. (N. S.) 769; 30 L. J. C. P. 241; *Peek*

v. North Staffordshire Railway Co., 10 H. L. C. 473; 32 L. J. Q. B. 241; *Pierce v. Corf*, L. R. 9 Q. B. 210. *Hinde v. Whitehouse*, 7 East, 558, was the case of a sale by auction. The auctioneer had a catalogue, headed, "To be sold by auction, for particulars apply to Thomas Hinde," and wrote down opposite to the several lots on the catalogue the name of the purchaser. The auctioneer also had a separate paper containing the terms and conditions of the sale, which he read and placed on his desk. The catalogue contained no reference to the conditions. Held, that the signature to the catalogue was not sufficient to satisfy the statute, on the ground that it did not contain the terms of the bargain, nor refer to the other writing containing those terms. *Pierce v. Corf*, L. R. 9 Q. B. 210. A few years later the same question came before the same court in *Kenworthy v. Schofield*, 2 B. & C. 945, and was decided in the same way. *HOLROYD, J.*, there said: "It appears to me that you cannot call that a memorandum of a bargain which does not contain the terms of it. The argument for the plaintiff is, that the conditions being in the room were virtually attached to the catalogue; but I think, as they were not actually attached or clearly referred to, they formed no part of the thing signed. In the case put of

James¹ the Lords Justices held that parol evidence was admissible to connect separate documents. In that case a

¹ L. R. 3 Ch. 508.

the separation of the conditions from the catalogue, during the progress of the sale, I should say that the signatures to the latter made after the separation were unavailing. It occurred to me at first that this might be likened to a will, consisting of several detached sheets, when a signature of the last, the whole being on the table at the time would be considered a signing of the whole, but there the sheet signed is a part of the whole. Here the catalogue was altogether independent of the conditions."

This is still the rule, and necessarily must be so long as the statute requires written evidence of the contract. To permit different papers to be connected by parol evidence, they containing no internal evidence of any connection with each other, would result in permitting a contract to be made out by parol evidence, which is the very mischief the statute intended to avoid. In *Saunderson v. Jackson*, 2 B. & B. 238, a bill of parcels was delivered at the time of the bargain, which was in itself a sufficient memorandum, but there was some doubt whether it was seized by the defendant. The court thought the defect was supplied by a letter signed by the defendant and addressed to the plaintiff as follows: "Sir, we wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder; must request you to return our pipes. We are, etc." LORD ELDON, C. J., said: "Although it be admitted that the letter, *which does not state the terms of the agreement*, would not alone have been sufficient, yet as the jury have connected it with something else which does, and the letter is signed by the defendant, there is then no written note or memorandum of the order which was originally given by the plaintiff, signed by the defendants." It is to be regretted that the

report does not more fully state what were the facts which Lord ELDON allowed to go to the jury, as evidence to enable them to connect the letter with the bill of parcels. In *Johnson v. Dodgson*, 3 M. & W. 653, there had been a written memorandum made in a book of the defendant's, signed by the plaintiff's agent, as follows: "Sold John Dodgson 27 pockets Playsted 1836, Sussex, at 103s. The bulk to answer the sample, 4 Pockets Selme Beckleys, at 95s.; samples and invoices to be sent per Rockingham Coach; payment in bankers at two months. Leeds, 19th October, 1836." There was a doubt whether this was signed by the defendant, and the plaintiffs to meet that doubt proved the following letter from the defendant to them:

"LEEDS, Wednesday Evening,
October 19, 1836.

GENTLEMEN:—Please to deliver the 27 pockets Playsted and the 4 pockets Selmes, 1836, Sussex, to Mr. Robert Pearson or bearer to be carted to Stanton's Wharf; 20 pockets of Playsted to be forwarded per first ship and the remaining 11 pockets per the second ship, and you will oblige gentlemen your most obedient,
JOHN DODGSON."

The court were unanimously of opinion that the first paper was signed by the defendant, which disposed of the case; but LORD ABINGER said: "If it depended on the recognition of the contract by the letter, there might be some doubt, though even upon that I should have thought the reference to the only contract proved in the case sufficient." PARKER, B., said: "If the question turned on the recognition by the subsequent letter, I own I should have had very considerable doubt whether it referred sufficiently to the contract. It refers to the subject-matter, but not to the specific contract." In *Allen v. Bennett*, there

tenant applied to his landlord's solicitors as to the renewal of his lease. The solicitors sent him a report by a surveyor, who recommended the granting of a lease at a given rent if certain repairs were done by the tenant. The tenant wrote back assenting to the repairs and rent, but asking for a term

was a note defective from not giving the name of the purchaser; there was also a correspondence between the parties which is not set out in the report. It appears, however, to have shown that there was a contract of sale of some sort between the parties concerning goods of the same sort as those mentioned in the contract note, and to have been in itself defective as a memorandum, and to have made no specific allusion to the contract note. The court held, that the correspondence was sufficiently connected with the note, and supplied its deficiencies. *Jackson v. Lowe*, 1 Bing. 9; *Cooper v. Smith*, 15 East, 103; *Richards v. Porter*, 6 B. & C. 437; *Smith v. Surman*, 9 B. & C. 561. LORD WESTBURY, in *Peck v. North Staffordshire Railway Company*, 10 H. L. Cas. 472, clearly stated the general principle, in a case which arose under a similar clause in the railway and canal traffic act in these words: "In order to embody in the letter any other document or memorandum, or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing, that, by force of the reference, the writing itself becomes part of the instrument it refers to." *Johnson v. Buck*, 35 N. J. L. 338. In *Smith v. Surman*, 9 B. & C. 561, the written memorandum was contained in two letters, one from the vendor's attorney, who wrote to ask for payment "for the ash timber which you purchased of him. . . . The value at 1s. 6d. per foot amounts to the sum of £17 3s. 6d. I understand your objection to complete your contract is on the ground that the timber is faulty and unsound, but there is sufficient evidence to show

that the same timber is very kind and superior." The defendant replied, "I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1s. 6d. per foot to be *sound and good*, which I have some doubts whether it is or not, but he promised to make it so, and now denies it." It was held *that the letters were not consistent*, and did not satisfy the statute, *BAYLEY, J.*, saying: "What the real terms of the contract were is left in doubt, and must be ascertained by verbal testimony. The object of the statute was that the note in writing should exclude all doubt as to the terms of the contract, and that object is not satisfied by the defendant's letter." In *Pierce v. Corf*, L. R. 9 Q. B. 210, an action to recover damages from an auctioneer, for negligence in not making a binding contract for the sale of the plaintiff's mare, the defendant had a sales ledger, which was headed "Sales by auction, 28th March, 1872," in which the plaintiff's mare was numbered 49. A printed catalogue of the horses to be sold, with the conditions of the sale annexed, was circulated, and the plaintiff's mare was therein also numbered 49; *but neither the catalogue nor conditions were annexed to the sales ledger nor referred to therein*. The mare was put up for sale and struck off to Thomas Maguire for thirty-three guineas. Thereupon, the defendant's clerk wrote in the columns of the sales ledger, left blank for that purpose, the name of the purchaser and the price. The purchaser refused to take the mare, and it was held that the catalogue and sales ledger were not sufficiently connected to form a memorandum sufficient to satisfy the statute. *Rishton v. Whatmore*, 8 Ch. Div. 468.

of twenty-one years. No final agreement was come to, but some months afterwards, a negotiation having proceeded between the tenant and the landlord, without the intervention of the solicitor, the landlord wrote a letter promising the tenant a lease for fourteen years, "at the rent and terms agreed upon," to which the tenant wrote back an unqualified acceptance. It was argued on the authority of *Shelton v. Cole*¹ and *Clinan v. Cooke*² that parol evidence was not admissible to connect the report and the tenant's previous letter with the subsequent letters; but the court, on the authority of *Ridgway v. Wharton*,³ admitted the evidence, and held that its being conclusively established that there never had been any other rent or terms agreed upon than those mentioned in the report, there was a sufficient memorandum in writing to satisfy the statute.⁴ It does not appear, however, from the report that any of the cases referred to above were cited to the court, and it is submitted that the case of *Ridgway v. Wharton* is not in fact an authority for admitting

¹ 1 De G. & J. 587.

² 1 Sch. & Lef. 22.

³ 6 H. L. C. 238.

⁴ In *Beckwith v. Talbot*, 95 U. S. 289, *BRADLEY, J.*, said: "It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the statute of frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. *If there is ground for any doubt in the matter*, the general rule should be enforced. But where there is no doubt, its enforcement would aid instead of discouraging fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent. On the following day the latter writes to the party who signed it, as follows: 'My son informs me that you yesterday executed our proposed agreement as

prepared by J. S. I will write this to let you know that I recognize and adopt it.' Would not this be a sufficient recognition, especially if the parties should act under the agreement? And yet, parol evidence would be necessary to show what agreement was meant." *Jenkins v. Harrison*, 66 Ala. 345; *Work v. Cowhick*, 81 Ill. 317; *Thayer v. Luce*, 22 Ohio St. 62; *Lerned v. Wannemacher*, 9 Allen (Mass.) 410; *Buxton v. Rust*, L. R. 7 Exchq. 279. *Doe, C. J.*, criticises the doctrine expressed by *BRADLEY, J.*, *supra*, in *Brown v. Whipple*, 58 N. H. 229 (see *ante*, page 705, for full statement of case and opinion), as follows: "In what was said (in *Beckwith v. Talbot*) of an exception in cases where parol evidence leaves no room for doubt, we do not concur." But the drift of authority, especially in the English courts, is the other way. See also *Mead v. Parker*, 115 Mass. 413; *Hurley v. Brown*, 98 id. 545; *Scanlan v. Geddes*, 112 id. 15. But see *Farwell v. Mather*, 10 Allen (Mass.) 322.

parol evidence to connect separate papers *which do not refer to each other*. All that was decided in that case was that if there is a signed paper which, though agreeing to do something, leaves the subject-matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together so as to constitute a valid contract.

SEC. 387. Parol Evidence Admissible to Explain Imperfect Reference. — Parol evidence is admissible to explain an imperfect reference in one document to another.¹ Thus, where an agreement refers to a plan as the plan agreed upon, parol evidence is admissible to *identify* it.² But if the memorandum does not refer to any plan, but describes the property as lot "No. 2," it cannot be shown by parol that a plan was used by the vendor at the sale to show the location of the lot in question for the purpose of identifying the land.³

SEC. 388. Cases where Parol Evidence not Admissible. — Parol evidence is not admissible to show a waiver of or alteration in any of the stipulations in a contract,⁴ nor to prove that a portion of the price agreed to be paid for goods was, in consideration of an undertaking to deliver them at a specified time, fixed above the market price;⁵ nor to prove a parol agreement for extending the time for delivery of goods,⁶ or for changing the place of delivery of goods, nor, where the memorandum is silent in that respect, to show that a particular time for payment and delivery was agreed upon,⁷ nor

¹ *Saunderson v. Jackson*, 2 B. & P. 238; *Clinan v. Cooke*, 1 Sch. & Lef. 33; *Monro v. Taylor*, 8 Hare, 56; *Bolckow v. Seymour*, 17 C. B. (N.S.) 117; *Jackson v. Oglander*, 2 H. & M. 472.

² *Horsfall v. Hodges*, 2 Coop. C. C. 115 n. (a.)

³ *Harvey v. Grabham*, 5 Ad. & El. 61.

⁴ *Brady v. Oastler*, 3 H. & C. 112, *per* POLLOCK, C. B., and BRAMWELL and CHANNELL, B. B., *diss.* MARTIN, B.

⁵ *Stead v. Dawber*, 10 Ad. & El. 57; *Marshall v. Lynn*, 6 M. & W. 109; *Noble v. Ward*, L. R. 1 Ex. 117; *ib.* 2 Ex. 135, in error.

⁶ *Moore v. Campbell*, 10 Ex. 323.

⁷ In *Williams v. Robinson*, 73 Me. 186; 41 Am. Rep. 352, an action was brought upon a contract as follows:

"AUGUSTA, June 8, 1880.

I hereby agree to furnish Mr. F. Williams, of New Haven (post office address West Haven), eight hundred to one thousand tons of ice, delivered on board vessels at Augusta, Me., properly packed, for a voyage to New Haven, for the sum of two dollars a ton.

Bond Brook Ice Company,

J. E. ROBINSON.

Augusta, Me."

Upon the trial the defendant insisted that by the terms of the con-

where the number or quantity of articles to be furnished under the contract is indefinite, is parol evidence admissible to show what number or quantity was agreed upon. Thus, a memorandum by which a party agreed to send "the balance of twelve carloads of sheet iron" was held to be insufficient, because it did not state the number of carloads to be sent, and parol evidence was held not to be admissible to supply the defect.¹ Where the day for the completion of

tract as agreed upon the ice was all to be delivered by the last of July, also that the sum of seven or eight hundred dollars was to be forwarded by the plaintiff immediately on his return home, and that, as the memorandum contained none of these stipulations, the memorandum relied on was insufficient and did not take the contract out of the statute. The plaintiff had a verdict, which was sustained upon appeal, the court holding that as the memorandum on its face was sufficient to ascertain the rights of the parties, parol evidence was not admissible to vary or change its terms, *VIRGIN, J.*, saying: "When a memorandum is made and signed and delivered between the parties as and for a complete memorandum of the essential terms of a contract, and it is capable of a clear and intelligible exposition, it is conclusive between the parties, and parol evidence is incompetent to contradict or vary its terms or construction; and if in fact some of the conditions actually made be omitted from it, the party defendant cannot avail himself of them. *Small v. Quincy*, 4 Me. 497; *Coddington v. Goddard*, 16 Gray (Mass.) 436; *Hawkins v. Chace*, 19 Pick. (Mass.) 502; *Ryan v. Hall*, 13 Metc. (Mass.) 523; *Warren v. Wheeler*, 8 id. 97; *Cabot v. Winsor*, 1 Allen (Mass.) 546, 551; *Remick v. Sandford*, 118 Mass. 102.

Such is the general rule governing written contracts; and the statute of frauds leaves it together with its exceptions as it found them. *Benj. Sales*, §205. By the enactment of this statute, the legislature interposed

a few safeguards against mistakes and frauds in certain kinds of contracts, by making certain additional things indispensable to the remedy. The security thereby afforded makes the remedy depend upon proof which shall not rest upon the recollection or integrity of witnesses, but upon something reliable, to which the parties may resort for a solution of all their doubts and disputes, the signature thereto serving, *inter alia*, to identify the evidence by which the signer is to be bound. And when a memorandum, like the one now before us, has been deliberately made, executed, and delivered in conformity with the statute, and its terms are sensible and free of all ambiguity, it cannot be varied as to its substance by parol; otherwise the great purpose of the legislature would be thwarted. Applying these principles to the case at bar, and the exceptions, so far as the question of consideration and the three requested instructions are concerned, must be overruled.

The jury must have found under the charge that the memorandum was made, signed and unconditionally delivered by the defendant to the plaintiff, as and for a complete memorandum of the contract, so far as the matters contained in the request go, and that the consideration was proved. Its terms are clearly expressed, and contain all the elements necessary to give it legal effect as a written contract."

¹ *May v. Ward*, 184 Mass. 127. But see *Rhoades v. Castner*, 12 Allen (Mass.) 136, where a written order to ship "cargo loc. Mtn. W. A. Stove

the purchase of an interest in land is inserted in a written contract, it cannot be waived by oral agreement and another day substituted in its place, "for to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a subsequent oral agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land, partly in writing signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the statute of frauds."¹ Most of the foregoing cases were discussed in *Hickman v. Haynes*,² where LINDLEY, J., said: "The result of these cases appears to be that *neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing*, and required to be so by the statute of frauds."

So also parol evidence is not admissible to show a verbal agreement between the parties that the vendee should waive his right to a good title as to one of several lots of land sold under an agreement in writing.³

SEC. 389. Parol Evidence Admissible to Show that No Contract was Intended, or that It was Conditional.—A document purporting to be a contract signed by the parties is not necessarily so; and it is competent for either of the parties to show by parol evidence that it was not their intention in signing

coal, price \$6.90 per ton, water 9½ feet," accepted in writing, signed and dated, was held to be a sufficient memorandum; and that the amount of coal designated might be shown by parol. But see *Smith v. Gowdy*, 8 Allen (Mass.) 566, in which A wrote to B as follows: "Say how many white, colored and woollen rags you have on hand, and your prices for them." B replied: "I have about a ton each, white and colored rags, and my prices are three and one-half cents for colored and seven cents for white." A replied: "I will take the rags at the price you name," and it was held that there was no written contract. A memorandum of sale of a certain

number of pounds of "copper, 24½ a 9 mos. from delivery," sufficiently shows that the price was twenty-four and a half cents per pound, to be paid in nine months. *Coddington v. Goddard*, 16 Gray (Mass.) 436. So a memorandum of sale of real estate at "9½ cts." is not insufficient for want of allegation that the price was nine and a half cents for each square foot. *Gowen v. Klous*, 101 Mass. 454.

¹ *Stowell v. Robinson*, 3 Bing. (N. C.) 928; 5 Sc. 212.

² L. R. 10 C. P. 598, 605; *Plevins v. Downing*, L. R. 1 C. P. D. 220.

³ *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Harvey v. Grabham*, 5 Ad. & El. 74.

that it should operate as a contract, and that the real contract between them was not in writing,¹ or to show that the contract was only to bind upon the happening of a certain event.²

SEC. 390. Or that the Agreement does not State Contract.— So, although parol evidence is not admissible to add to or vary the written agreement, it is admissible on the part of the defendants to show that the writing only contains some of the terms of the contract. Thus, where a sample of wool was left at a broker's for sale, and on the sale it was stipulated by the purchaser that the wool should be delivered in good dry condition, and on the same day the broker sent the vendor a sold note of the contract, which, however, omitted all mention of the stipulation that the wool was to be in good dry condition, and no note of it was sent by the broker to the purchaser, parol evidence was admitted to show the omission of the stipulation.³ And where a term is not expressly contained in a contract, but is implied in it, upon the assumption of an intention in the parties not declared in the written instrument, parol evidence, with reference to such a term introduced into the contract from an assumed intention of the parties, of extrinsic facts to negative or qualify such intention, is admissible.⁴

SEC. 391. To Prove that Price was Agreed Upon.— Again, where on a sale of goods the price is not stated, parol evidence is admissible to show that a price was in fact agreed upon, the result of which is to invalidate the contract; for it is one of the requisites to the validity of the memorandum that the price if agreed upon should be stated.⁵

SEC. 392. Whether Admissible to Show Abandonment of Contract.— It is not quite clear whether parol evidence is

¹ *Rogers v. Hadley*, 2 H. & C. 227; and see *Bolckow v. Seymour*, 17 C. B. (N. S.) 120.

² *Pym v. Campbell*, 6 E. & B. 370; 25 L. J. Q. B. 277; *Furness v. Meek*, 27 L. J. Ex. 34.

³ *Pitts v. Beckett*, 13 M. & W. 743. See further, *post*, chapter on Specific Performance. But see *Williams v. Robinson*, 73 Me. 186.

⁴ *Burges v. Wickham*, 3 B. & S. 669, *per* COCKBURN, C. J.; and see *Clapham v. Langton*, 34 L. J. Q. B. 46.

⁵ *Elmore v. Kingscote*, 5 B. & C. 583; *Goodman v. Griffiths*, 1 H. & N. 574; 26 L. J. Ex. 145; *Acebal v. Levy*, 10 Bing. 376.

admissible to show a verbal agreement that a contract in writing shall be abandoned.¹ *If the parol agreement is invalid under the statute*, it will not affect an implied rescission of the contract in writing. "Where," said WILLES, J., "parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing right."² In equity it is a well settled

¹ See *Bell v. Howard*, 9 Mod. 305; *Goss v. Lord Nugent*, 5 B. & Ad. 64; *Harvey v. Grabham*, 5 A. & E. 61; *Price v. Dyer*, 17 Ves. 356; *Sanderson v. Graves*, L. R. 10 Ex. 234.

² In *Noble v. Ward*, L. R. 1 Ex. 117, it appeared that the plaintiff was a manufacturer, and the defendants merchants at Manchester. On the 12th August, 1864, the defendants gave to the plaintiff's agent an order for 500 pieces of 32-inch gray cloth at 38 s. 9 d., and 1,000 pieces of 35-inch gray cloth at 42 s. 1½ d., the deliveries to commence in three weeks, and to be completed in eight to nine weeks. On the 18th of the same month a second order was given by the defendants for 500 pieces of 32-inch gray cloth at 39 s. and 100 pieces of 35-inch gray cloth at 42 s. 3 d., to be delivered "to follow on after order given 12th instant, and complete in ten to twelve weeks." The plaintiff, on the 10th and 19th September, made a first and second delivery on account of the first order. Considerable discussion ensued, both as to the time of delivery and as to the quality of the goods delivered; and eventually, on the 27th September, the plaintiff had an interview with the defendants, at which it was agreed that the goods delivered under the first order should be taken back, that that order should be cancelled, and that the time for delivering the goods under the second order should be extended for a fortnight. Goods were tendered to the defendants by the plaintiff in time either for the fulfilment of the agreement of the 18th August or that of the 27th September; but the defend-

ants refused to accept them on various grounds — amongst others, on the ground that they were not of the stipulated quality. The plaintiff thereupon brought this action. The declaration was framed so as to fit either the agreement of the 18th August or that of the 27th September. The judge directed a non-suit to be entered, being of opinion that the contract of the 18th August was no longer in existence, the parol agreement of the 27th September having rescinded it; and that the latter agreement could not be resorted to, not being in writing, in accordance with the statute. Upon a rule to set aside the non-suit, it was set aside.

BRAMWELL, B., said: "This case was tried before me at Manchester, and the plaintiff was non-suited. The case comes before us on a rule to set aside that non-suit. I think it was wrong, at least on the ground on which it proceeded. The action was for not accepting goods on a sale by the plaintiff to the defendants. The defendants pleaded, among other things, that the contract had been rescinded, and that the plaintiffs were not ready and willing to deliver. The facts were, that a contract for the sale and delivery of goods from the plaintiff to the defendants, at a future day, was entered into on the 12th of August, which may be called contract A; that another contract for sale and delivery by the plaintiff to the defendants, also at a future day, was entered into on the 18th of August, say contract B; that before any of the days of delivery had arrived the plaintiff and defendants agreed, verbally, to

rule that a contract required to be in writing to satisfy the statute may be rescinded by a parol agreement, and such

rescind, or do away with, contract A, and to extend for a fortnight the time for the performance of contract B; that is to say, the plaintiff had a fortnight longer to deliver, and the defendants a fortnight longer to take and pay for those goods. This, on principle and authority, was a third contract, call it C. It was a contract in which all that was to be done and permitted on one side was the consideration for all that was to be done and permitted on the other. See *per PARKE, B.*, in *Marshall v. Lynn*, 6 M. & W. 117. It remains to add that the declaration would fit either contract B or contract C, and that goods were tendered by the plaintiff to the defendants in time for either of those contracts. My notes, and my recollection of my ruling are that contract B was rescinded, and contract C not enforceable, not being in writing. I think that was wrong. Either contract C was within the statute of frauds or not. If not, there was no need for a writing; if yes, it was because it was a contract for the sale of goods, and so within the 17th section of the statute. That says that no contract for the sale of goods for the price of £10 or upwards shall be allowed to be good, except there is an acceptance, payment, or writing. The expression 'allowed to be good' is not a very happy one, but, whatever its meaning may be, it includes this at least, that it shall not be held valid or enforced. But this is what the defendant was attempting to do. He was setting up this contract C as a valid contract. He was asking that it should be allowed to be good to rescind contract B.

It is attempted to say that what took place when contract C was made was twofold. First, that the old contracts were given up; secondly, a new one was made. But that is not so. What was done was all done at once — was all one transaction, one bar-

gain; and had the plaintiff asked for a writing at the time, and the defendants refused it, it would all have been undone, and the parties remitted to their original contracts.

I think, therefore, that on principle it was wrong to hold that the old contract was gone. *Moore v. Campbell*, 10 Ex. 323; 23 L. J. Ex. 310, is an authority to the same effect. It is true that case may be distinguished on the facts, namely, that there what was to be done under the new arrangement in lieu of the old was to be done at the same time, so that it might well be the parties meant, not that the new thing should be done, but if done it should be in lieu of the old. Such an argument could not be used in this case. But it was not the ground of the judgment there, which is that the new agreement was void. The cases of *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Stead v. Dawber*, 10 Ad. & El. 57, and others, only show that the new contract C cannot be enforced, not that the old contract B is gone. I think it was not. Inconvenience and absurdity may arise from this. For instance, if the defendants signed the new contract, and not the plaintiff, the plaintiff would be bound to the old and the defendants to the new. Or, if in the course of the cause a writing turned up, signed by the plaintiff, then they could first rely on the old and afterwards on the new contract. But this is no more than may happen in any case within the 17th section, where there has been one contract only.

But then it was said before us that the plaintiff was not ready and willing to deliver under contract B. Probably not, and he supposed contract C was in force. In answer to this the plaintiff contended before us that this point was not made at the trial, to which the defendants replied neither was the point that the old contract was in force. My recollec-

rescission would be a sufficient defence to an action by either party for a specific performance.¹

SEC. 393. Parol Evidence Admissible to Explain Latent but not Patent Ambiguity.—Parol evidence is admissible to explain a latent but not a patent ambiguity in a written agreement. Thus, where to an action for not accepting cotton which the defendant bought of the plaintiff, “to arrive ex Peerless from Bombay,” the defendant pleaded that he meant a ship called the “Peerless,” which sailed from Bombay in October, and the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the “Peerless,” which sailed from Bombay in December, it was held that the plea was a good answer to the action.² But where an agreement for a lease of a farm referred to a paper containing the terms, and a bill was filed for specific performance according to such clauses as had been read over to the plaintiff, it was held that parol evidence was not admissible to show what were the clauses.³

SEC. 394. Parol Evidence Admissible to Explain Omission in Bought and Sold Notes.—Parol evidence has been admitted to show, in an action of trover for goods, that by the mistake of a broker the bought and sold notes were so worded as not to include stock in trade and materials, which were intended to be included by both the plaintiff and the defendant, and which the plaintiff had taken possession of.⁴

SEC. 395. To Show Situation of Parties.—So also parol evidence has been admitted to show the situation of the

tion is so,—that the case was opened and maintained as on the new contract,—but I agree with Mr. Mellish, that a non-suit ought to be maintained on a point not taken at the trial only when it is beyond all doubt. I cannot say this is. Consequently, I think the rule should be absolute.” And see *Moore v. Campbell*, 10 Ex. 323; see further *Ogle v. Earl Vane*, L. R. 2 Q. B. 275; *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Plevins v. Downing*, L. R. 1 C. P. D. 220.

¹ *Marsh v. Bellew*, 45 Wis. 36; *Stevens v. Cooper*, 1 John. Ch. (N. Y.) 425; *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233; *Phelps v. Seely*, 22 Gratt. (Va.) 573.

² *Raffles v. Wichelhaus*, 2 H. & C. 906; and see *Stokes v. Moore*, 1 Cox, 221; and as to the admissibility of parol evidence to explain a latent ambiguity in a guaranty, see *Haigh v. Brooks*, 10 A. & E. 309; *Butcher v. Stewart*, 11 M. & W. 857; *Goldshede v. Swan*, 1 Exch. 154.

³ *Brodie v. St. Paul*, 1 Ves. Jr. 326.

⁴ *Steele v. Haddock*, 10 Ex. 643.

parties at the time the writing was made and the circumstances, *e.g.* to show the trades carried on by the plaintiff and defendant, in order to prove that the relation of buyer and seller existed;¹ to explain the meaning of abbreviations used in the written agreement;² to prove that a written contract for the sale of goods purporting to be made between a vendor and purchaser was on the part of the alleged purchaser made by him only as agent for a third party;³ to prove facts material to the construction of the agreement;⁴ to show that, according to mercantile usage, apparent variances between bought and sold notes are in fact immaterial, and not such as would deceive merchants.⁵

SEC. 396. To Explain Subject-Matter.—Upon the same principle, *parol evidence is admissible to identify the subject-matter of the contract,*⁶ *e.g.* to explain the meaning of the

¹ *Newell v. Radford*, L. R. 3 C. P. 52.

² *Sweet v. Lee*, 3 Man. & G. 466; 4 Sc. (N. R.) 77; and see *Bainbridge v. Wade*, 16 Q. B. 99; *Stoops v. Smith*, 100 Mass. 63.

³ *Wilson v. Hart*, 7 Taunt. 295.

⁴ *Monro v. Taylor*, 8 Hare, 56.

⁵ *Bold v. Rayner*, 1 M. & W. 343; *Sievwright v. Archibald*, 17 Q. B. 103; *Rogers v. Hadley*, 2 H. & C. 227; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J. Ex. 191.

⁶ *Stoops v. Smith*, 100 Mass. 63; *Caulkins v. Hellman*, 14 Hun (N. Y.) 330; *Pike v. Fay*, 101 Mass. 134; *Sweet v. Shumway*, 102 id. 367; *Hart v. Hammett*, 18 Vt. 127. But this class of evidence is admissible only when the writing does not distinctly define the property so as to enable its identity to be seen on its face, and is confined to the question of identity in kind, and will not be extended to comparisons in degree or quality. *Pike v. Fay*, *ante*. Such evidence has been admitted to show what house was owned by a vendor "on Church Street," where the memorandum only described it as "a house on Church Street." *Mead v. Parker*, 115 Mass. 413; *Scanlan v. Geddes*, 112 id. 15; *Slater v. Smith*, 117 id. 96; *Hurley v.*

Brown, 98 id. 545. But such evidence is only admissible when the memorandum affords within itself the means of identifying the property beyond a doubt.

Where the following receipt was given: "Received of James Henderson \$300 in part payment of a certain tract of land, being my own head-right, lying on Rush Creek, in cross timbers, this 23d March, 1859." Held, that it was a sufficient memorandum under the statute of frauds, and the consideration could be proved by parol. *Fulton v. Robinson*, 55 Tex. 401. In this case it will be observed that the identity of the lot must be shown by parol. In *Farwell v. Mather*, 10 Allen (Mass.) 322, a memorandum in writing, agreeing to give a certain sum "for the whole property, from cellar to top, including lease, press, boiler and engine, type, fixtures, furniture," etc, and to "pay the ground rent," is not sufficient to avoid the statute, even if a lease containing a sufficient description of the land be admitted as a part thereof, for want of description of the title to be passed. But the doctrine of this case seems to have been overruled by the cases cited *ante* in this note.

As previously stated, the memo-

words "for iron received" in a guaranty;¹ to ascertain the number of acres "to be let" in an agreement for a lease;² to prove the amount of a debt guaranteed,³ the locality over which a covenant in restraint of trade extends,⁴ or what is "the lease" referred to in an agreement to obtain a lease.⁵ So parol evidence of a conversation between the plaintiff's and defendant's agents has been admitted to show what was meant by the expression "your wool" in a letter written by defendant's agent to the plaintiff, upon which letter the contract was based;⁶ and where the vendor of leasehold premises wrote a letter to his solicitor, stating, "I have closed with Mr. W for this place," it was held that parol evidence was admissible to show what "this place" was.⁷

SEC. 397. To Show Trade Usage.—So parol evidence has been held to be admissible to show that by the custom of the hop trade the following contract, "sold 18 pockets Kent

random must point so clearly to the property, and the parol evidence be of such a character as to leave no doubt as to what property was meant to be sold. Thus a written agreement to convey "a piece of land in" W. S., not otherwise describing the land, is void under the statute, *it appearing that the promisor had other land in W. S.* *Whelan v. Sullivan*, 102 Mass. 204. But if the evidence shows that the party had no other land in the town or street named, the memorandum is good, because the identity is established beyond a doubt. *Hurley v. Brown*, 98 Mass. 545; *Mead v. Parker, ante*; *Scanlan v. Geddes, ante*. In a receipt for the purchase-money of land, dated at "Memphis," a description failing to show in *what county or State* the land was situated, was held not to satisfy the requirement of the statute of frauds, as in such a case the identity of the land cannot be shown by parol. *Holms v. Johnston*, 12 Heisk. (Tenn.) 156. So a memorandum dated and signed, "Received of J. \$300 on town lot," is insufficient to establish a sale of land. *Johnson v. Granger*, 51 Tex. 42. So where the only description in a memorandum of the sale of land was "lot

adjoining," it was held that the memorandum did not satisfy the statute of frauds. *Scarritt v. St. John's M. E. Church*, 7 Mo. App. 174. Because in these cases the memorandum furnishes no data which enable the identity of the land to be established beyond a doubt. But the writing relied upon to establish such a contract for the sale of land need not describe the lands which are the subject of the sale, otherwise than by a reference therein to some extrinsic fact or instrument by means of which the land can be known with sufficient certainty. *Washburn v. Fletcher*, 42 Wis. 152.

¹ *Colbourn v. Dawson*, 10 C. B. 765.

² *Shannon v. Bradstreet*, 1 Sch. & Lef. 73.

³ *Bateman v. Phillips*, 15 East, 272; *Shortrede v. Cheek*, 1 Ad. & El. 57.

⁴ *Mumford v. Gething*, 7 C. B. (N. S.) 305.

⁵ *Horsey v. Graham*, L. R. 5 C. P. 9.

⁶ *Macdonald v. Longbottom*, 1 E. & E. 977; *affd. Exch. Ch. ib.* 987.

⁷ *Waldron v. Jacob*, 5 I. R. Eq. 131.

hops at 100 s.;" a pocket containing more than a cwt. meant a sale at 100 s. per cwt.,¹ and generally, it may be said that, where a well-known custom or usage exists in reference to a particular business, which is reasonable, and such as the law will recognize and uphold, it may be shown as well to affect contracts affected by the statute, as ordinary contracts in writing,² as it will be presumed that the parties contracted in reference thereto.³

SEC. 398. To Prove Alterations in Articles Ordered.—Where an executory contract was entered into for the fabrication of goods, parol evidence of alterations and additions ordered by the purchaser in the course of manufacture was admitted, *GASLEE, J.*, saying that "otherwise every building contract would be avoided by every addition."⁴

SEC. 399. To Prove Date.—Where a written instrument contains no date, parol evidence is admissible to show when it was written,⁵ or from what date it was intended to operate.⁶

SEC. 400. That Contract Signed by Agent in Own Name was Signed for Principal.—When a contract is signed by an agent

¹ *Spicer v. Cooper*, 1 Q. B. 424; and see as to commercial usages *Wiglesworth v. Dallison*, 1 Sm. L. Cas. 546.

² *Johnson v. Roylton*, 7 Q. B. Div. 438; *Brown v. Foster*, 113 Mass. 136; *Smyth v. Ward*, 46 Iowa, 339; *Haskins v. Warren*, 115 Mass. 535; *Morse v. Brackett*, 98 id. 209; *Boardman v. Spooner*, *ante*; *Swift v. Gifford*, 2 Low. (U. S.) 110. If by an oral contract goods are sold subject to the purchaser's approval of them on delivery, a broker's written memorandum of the sale which omits that stipulation is insufficient to take the case out of the statute; nor, in such case, can the vendor be allowed to prove a usage of trade that sales of such goods are subject to the purchaser's approval of them on delivery, in order to supplement the memorandum. *Boardman v. Spooner*, 13 Allen (Mass.) 353.

³ *Harris v. Tunbridge*, 83 N. Y. 92; *Bailey v. Bencsley*, 87 Ill. 556; *Dick-*

inson v. Gay, 7 Allen (Mass.) 29; *Clark v. Baker*, 11 Met. (Mass.) 186; *Snelling v. Hall*, 107 (Mass.) 134; *Marshall v. Perry*, 67 Me. 78; *Barker v. Borzone*, 48 Md. 474; *Mears v. Waples*, 4 Houst. (Del.) 62; *Converse v. Harzfeldt*, 11 Brad. (Ill.) 173; *Coffman v. Campbell*, 87 Ill. 98; *Doane v. Dunham*, 71 id. 131; *Lyon v. Culbertson*, 83 id. 33; *White v. Fuller*, 67 Barb. (N. Y.) 267; *Polhemrs v. Heilman*, 50 Cal. 438; *Swift & Co. v. U. S.*, 105 U. S. 691; *Swift's Iron & Co. v. Dewey*, 37 Ohio St. 242; *Branch v. Palmer*, 65 Ga. 210. As to *what* usages are admissible and when, see a very excellent treatise on that subject. *CLARKE'S BROWNE ON USAGES AND CUSTOMS.*

⁴ *Hoadly v. McLaine*, 10 Bing. 482.

⁵ *Edmunds v. Downes*, 2 C. & M. 459; *Hartley v. Wharton*, 11 Ad. & El. 934; 3 P. & D. 529; *Lobb v. Stanley*, 5 Q. B. 574,

⁶ *Davis v. Jones*, 25 L. J. C. P. 91.

in his own name, parol evidence, upon an action brought to charge the principal, may be adduced to prove that the contract was signed by the agent on behalf of the principal. "Parol evidence," said LORD DENMAN, C. J., "is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."¹ But it is not admissible on behalf of the agent for the purpose of showing that he merely acted as agent.² Where the defendant, a broker, signed a note as broker as follows: "Sold this day for (plaintiff's broker) to our principals," etc., and the note did not disclose the name of the principal, parol evidence of a custom in the trade that where a broker purchased without disclosing the name of his principal he was liable to be looked to as purchaser was admitted, as the evidence did not contradict the written instrument, but only explained its terms.³ An agent may, however, show by parol evidence that the contract by mistake described him as principal.⁴

SEC. 401. To Prove Assent to Alterations in Memorandum. — Parol evidence is admissible to prove, when alterations have been made in a document signed by one of the parties, that they were assented to by the other; for as there never was a contract till such assent on his part, the effect of the evidence is not to vary a written contract, but merely to show what was the condition of the document when it became a contract.⁵

¹ *Trueman v. Loder*, 11 Ad. & El. 646; *Fleet v. Murton*, L. R. 7 Q. B. 589, 594; see also *Lindus v. Bradwell*, 126; *Hutchinson v. Tatham*, L. R. 8 5 C. B. 583; *Edmunds v. Bushell*, L. C. P. 482.
R. 1 Q. B. 97.

² *Higgins v. Senior*, 8 M. & W. 1 H. & C. 202; 30 L. J. Ex. 273; 31 834; *Fawkes v. Lamb*, 31 L. J. Q. B. L. J. Ex. 451; see further notes to 98; *Cropper v. Cook*, L. R. 3 C. P. *Thompson v. Davenport*, 2 Sm. & C. 194; *Calder v. Dobell*, L. R. 6 C. P. 486. 7th ed. 377; *Benj. on Sales*, 2nd ed. 159.

³ *Humfrey v. Dale*, 7 E. & B. 266; ⁴ *Wake v. Harrop*, 6 H. & N. 768; *affd. in Exch.* Ch. E. B. & E. 1004; ⁵ *Stewart v. Eddowes*, L. R. 9 C. P. 311.
Mollett v. Robinson, L. R. 5 C. P. 311.

SEC. 402. To Prove Assent of Principal.—When a memorandum is signed by an agent the assent of the principal thereto may be proved by parol,¹ and a written notice to an agent to conclude a sale on certain terms, and a written agreement by a purchaser subscribed thereon to purchase upon those terms constitutes a sufficient memorandum within the statute of frauds to bind the purchaser.²

SEC. 403. Parol Variation of a Written Contract affected by the Statute of Frauds. Effect of upon Remedies of the Parties.—It appears to be quite well settled that the terms of a written contract falling within the statute of frauds cannot be altered or varied by parol³ in any essential respect so as to give a right of action to either party upon the contract *as varied*.⁴ In an early case,⁵ a contrary doctrine was held, LORD ELLENBOROUGH proceeding upon a distinction between the contract, which the statute requires to be in writing, and the *performance* of it, to which the statute has no application; and, in that case, under a written contract for the delivery of goods, at certain specified times, a verbal change in the time of delivery was made, and it was held that a recovery could be had upon the contract as varied.⁶ But the doctrine, at least in England, is quite well settled that no verbal changes, in a written contract affected by the statute of frauds, can be made, which are binding upon the parties, and this, whether the change relates to the *performance* of the contract, or of its essential terms. Thus, in *Goss v. Lord Nugent*,⁷ by agreement in writing, A contracted to sell B several lots of land, and to make a good title to them; and a deposit was paid. It was afterwards discovered that a good title could not be made to one of the lots, and it was then

¹ *Himrod Furnace Co. v. Cleveland & C. R. R. Co.*, 22 Ohio St. 451.

² *Forbes v. Shattler*, 2 Cin. (Ohio) 95.

³ *Marshall v. Lynn*, 6 M. & W. 109; *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Harvey v. Grabham*, 5 Ad. & El. 61; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68; *Grafton Bank v. Woodward*, 5 N. H. 99; *Dana v. Hancock*, 30 Vt. 616; *Bryan v. Hunt*, 5 Sneed. (Tenn.) 543.

⁴ *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Harvey v. Grabham*, 5 Ad. & El. 61; *Stead v. Dawber*, 10 id. 57; *Noble v. Ward*, L. R. 1 Exchq. 117; *Sander-son v. Graves*, 10 id. 234.

⁵ *Cuff v. Penn*, 1 M. & S. 21.

⁶ This case was overruled by *Stead v. Dawber*, *ante*.

⁷ *Goss v. Lord Nugent*, 5 B. & Ad. 58.

verbally agreed between the parties, that the vendee should waive the title as to that lot. The vendor delivered possession of the whole of the lots to the vendee, which he accepted. In an action brought by the vendor to recover the remainder of the purchase-money, the declaration stated that the defendant agreed to deduce a good title to all the lots except one, and that the vendee discharged and exonerated him from making out a good title to that lot, and waived his right to require the same. It was held that oral testimony was not admissible to show the waiver of the vendee's right to a good title as to that lot, inasmuch as the effect of such waiver was to substitute a different contract for the one in writing; and by the statute of frauds, in every action brought to charge a person on a contract for the sale of lands, the *agreement* must be in writing. LORD DENMAN, C. J., said: "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. And if the present contract was not subject to the control of any act of parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained. . . . But we think the object of the statute of frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only."

In *Marshall v. Lynn*,¹ it appeared that on the 15th of

¹ *Marshall v. Lynn*, 6 M. & W. 109.

December, 1838, the plaintiff and defendant entered into a written contract, as follows:—

“WISBECH, 15th December, 1838.

Bought of Mr. Thomas Marshall, as many potatoes as will load his brig the Kitty, Captain William Scott, say from sixty to seventy lasts, to be shipped on board the above vessel on her arrival here the next time—say what pink kidneys he has at 4 s. 6 d. per sack, and the round, white, and blue ones at 4 s. 6 d. per sack, of fifteen ounces net merchants' ware, free on board the said ship—payment, cash on delivery.

(For William Lynn),
ROBERT LYNN.

Witness:

T. MARSHALL.”

On the 25th of December, the Kitty arrived at Wisbech, that being the next arrival after the making of the contract, and on the following day, the plaintiff's son informed the defendant that the Kitty would be ready to take in the potatoes on the 28th, when the defendant requested that the plaintiff would let the vessel go to Lynn and load a cargo of potatoes which he had purchased there, and for which he could not obtain a vessel, and take them to London; and he then promised the plaintiff to take the plaintiff's potatoes the next time the Kitty came to the port of Wisbech. This proposal was agreed to, on the understanding that the plaintiff's potatoes should be taken the next time the Kitty came. In pursuance of this arrangement, the Kitty sailed to Lynn, and, after proceeding to London, and there discharging her cargo, she returned to Wisbech, and arrived there on the 7th of February. On the 8th of February the vessel was ready to receive the potatoes, of which the defendant had full notice, and was requested to take them; but the defendant said he could not take them then, nor did he know when he could; and he ultimately declined taking them. They were afterwards shipped to London, and there sold by the plaintiff, who brought this action to recover the loss sustained by the defendant's non-performance of the contract. It was contended at the trial, on the part of the defendant, that the alteration in the time fixed by the terms of the original con-

tract for shipping the potatoes, was a variation of it in a material part, and ought to have been in writing. The judge directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to enter a non-suit. This verdict was set aside and a non-suit ordered. "It seems to me," said PARKE, B., "to be unnecessary to inquire what are the *essential* parts of the contract, and what not, and that *every* part of the contract, in regard to which the parties are stipulating, must be taken to be material; and perhaps, therefore, the latter part of the judgment in *Stead v. Dawber* may be considered as laying down too limited a rule. Every thing for which the parties stipulate as forming part of the contract must be deemed to be material. Now, in this case, by the original contract, the defendant was to accept the goods, provided they were sent by the first ship: the parties afterwards agreed by parol that the defendant would accept the goods if they were sent by the second ship, on a subsequent voyage: that appears to me to be a different contract from what is stated before. Such was my strong impression, independently of any decision on the point: but the case of *Stead v. Dawber* is precisely in point with the present, and on looking at the judgment, it does not appear to proceed altogether upon the time being an *essential* part of the contract, but on the ground that the contract itself, whatever be its terms, if it be such as the law recognizes as a contract, cannot be varied by parol. It has been said that the adoption of this rule will produce a great deal of inconvenience; I am not, however, aware of much practical inconvenience that can result from it, and none that furnishes any reason for altering the rule of law in respect of these mercantile contracts. They frequently vary in terms, and admit of some latitude of construction, but the expressions used in them generally indicate the intention of the parties sufficiently well; there is a sort of mercantile short-hand, made up of few and short expressions, which generally expresses the full meaning and intention of the parties. On the whole, it appears to me that no reasonable distinction can be made between this case and that of *Goss v. Lord Nugent*. This is a new contract, incorporating new terms, and I think it cannot be enforced by action, unless there is a note in writing, expressing those

new terms distinctly, or in the mercantile phraseology which, as I have already said, admits of some latitude of interpretation. This action, therefore, cannot be maintained, and a non-suit must be entered.”¹

But the original contract remains, and if the plaintiff can show his readiness to perform according to the contract, it can be sued upon the same as though no parol change had been attempted.² From what has been said it will be seen that

¹ A contrary doctrine is held in Massachusetts, where the parol agreement relates merely to the *performance* of the contract. *Cummings v. Arnold*, 3 Met. (Mass.) 486; *Stearns v. Hall*, 2 Cush. (Mass.) 31; *Norton v. Simonds*, 124 Mass. 19. See also, to the same effect, *Gault v. Brown*, 48 N. H. 183; *Buell v. Miller*, 4 id. 196; *Richardson v. Cooper*, 25 Me. 450; *Knibs v. Jones*, 44 Md. 396; *Negley v. Jeffers*, 28 Ohio St. 90; *Raffensburger v. Cullison*, 28 Penn. St. 426. But holding the doctrine of the principal case, see *Schultz v. Bradley*, 57 N. Y. 646; *Ladd v. King*, 1 R. I. 224; *Dana v. Hancock*, 30 Vt. 616; *Swain v. Seamans*, 9 Wall. (U.S.) 224; *Emerson v. Slater*, 22 How. (U.S.) 42; *Musselman v. Storer*, 31 Penn. St. 265; *Espy v. Anderson*, 14 Penn. St. 308; *Hickman v. Haynes*, L. R. 10 C. P. 598; *Williams v. Robinson*, 73 Me. 186.

² *Noble v. Ward*, L. R. 1 Exchq. 117; *Ogle v. Earl Vane*, L. R. 3 Q. B. 272; *Hickman v. Haynes*, L. R. 10 C. P. 598. But not otherwise: *Plevin v. Downing*, 1 C. P. Div. 220; *Tyers v. Rosedale Iron Co.*, L. R. 10 Exchq. 195. Although neither party can avail himself of a parol agreement to vary or enlarge the time of performance, yet, if the seller has postponed delivery at the verbal request of the buyer, or the buyer has forborne to claim delivery at the verbal request of the seller, neither the seller in the former, nor the buyer in the latter, case is precluded from afterwards suing on the original contract. In *Ogle v. Earl Vane*, *ante*, the defendant contracted to sell to the plaintiff 500

tons of iron, delivery to extend to the 25th of July, 1865. Owing to an accident to the defendant's furnaces, he had delivered none of the iron *by that date*. Afterwards negotiations passed between the parties, but eventually, in February, 1866, the plaintiff went into the market. The price of iron had risen since July, and the plaintiff sought to recover from the defendant the difference between the contract and the market price in February. The defendant paid into court the difference between the contract and the market price in July. The judge at the trial left it to the jury to say whether on the evidence they thought that the defendant had held out that he should be able to deliver the iron, and that the plaintiff had waited accordingly, in which case they might return a verdict for damages beyond the amount paid into court. The jury returned a verdict for the full amount claimed. Upon the argument of a rule to enter the verdict for the defendant, on the ground that there was no evidence to go to the jury, of then plaintiff being entitled to more damages than were represented by the sum paid into court, it was objected, on behalf of the defendant, that any agreement for postponement ought to have been in writing to satisfy the statute of frauds; but it was held by the Court of Queen's Bench, and affirmed by the exchequer chamber, first, that there was evidence from which the jury might infer that the plaintiff's delay in going into the market was at the defendant's request; and, secondly, that as the evidence

parol evidence is not admissible to change *any* of the terms of the contract, *all* the terms, about which the parties have

went to show, not a new contract, but simply a forbearance by the plaintiff at the request of the defendant, the statute of frauds did not apply. The cases bearing upon this point are considered in the judgment of the Court of Common Pleas in *Hickman v. Haynes, ante*. The contract was for the sale by the plaintiff to the defendants of 100 tons of pig-iron by monthly deliveries of twenty-five tons, in March, April, May, and June, 1873. Seventy-five tons of iron were delivered during the months of March, April, and May, respectively, in accordance with the contract, but early in June the defendants verbally requested the plaintiff, and the plaintiff consented, to postpone delivery of the remaining twenty-five tons. Upon the expiration of the contract time the plaintiff tendered the residue of the iron, but the defendants then refused to accept it. In an action for damages for breach of contract the plaintiff was held entitled to succeed. It was contended, on behalf of the defendants, that a new agreement for the delivery and acceptance of the remaining twenty-five tons of iron had been substituted for the original written contract, and that this new agreement, being verbal, could not be enforced; but the court held that the original contract still subsisted, and that the plaintiff could maintain an action upon it; that the assent to the defendants' request to give time was not a valid agreement binding the plaintiff, but a *voluntary forbearance* on his part; and the same distinction was drawn between a substitution of one agreement for another, and a voluntary forbearance to deliver at the request of another, which had already been recognized in *Ogle v. Earl Vane*. In *Plevins v. Downing, ante*, the plaintiffs contracted to deliver 100 tons of pig-iron, "25 tons at once, and 75 tons in July next." By the end of July the plaintiffs had delivered, and the

defendant had accepted, 75 tons in all. There was no evidence that the defendant had requested the plaintiffs, *before the end of July*, to withhold delivery of the remaining 25 tons; but there was evidence that in *October* the defendant verbally requested the plaintiffs to forward 25 tons, which, when forwarded, he declined to accept. Held, that the plaintiffs could not sue on the original contract, inasmuch as they were unable to prove that they were ready and willing to deliver the 25 tons at the end of July, and had only withheld delivery at the defendant's request; neither could they rely upon the request to deliver made to them by the defendant in October, as that would have been to substitute a parol for a written agreement. "It is true," said BRETT, J., in delivering the judgment of the court, "that a distinction has been pointed out and recognized between an alteration of the original contract in such cases and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect in favor of either to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words, it can be enforced. The question is, what is the test in such an action as the present, whether the case is within the one rule or the other. Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time, in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver, and the vendee refuses to accept, the vendor can recover damages . . . but if the alteration of the period of delivery were made at the request of the vendor,

seen fit to contract, being regarded as material.¹ But the inconvenience of this rule has led even the English courts to look about for means to evade it, and it is held that, while parol evidence is not admissible to prove a substituted contract, yet, *when performance under the contract is completed, evidence of a substituted mode of performance is admissible.*² Thus where by the contract goods were to be forwarded to Ostend, but they were in fact forwarded to Rotterdam, evidence was admitted to show that the purchaser by his conduct had assented to such substituted mode of performance.³ MR. BENJAMIN, in his work on sales,⁴ says: "The following propositions may fairly be deduced from the authorities where, in contracts for the delivery of goods by instalments, there have been applications for postponement of deliveries by seller or purchaser, and a subsequent tender of or request for delivery: A. Where the tender or request is *within the contract time*. 1. The defendant is bound to accept or deliver, although there has been postponement at the plaintiff's request. 2. It has not yet been decided whether the defendant

though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, *he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract*. The statement shows that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do, so as to enforce his claim. This seems to be the result of the cases which are summed up in *Hickman v. Haynes*." In *Tyers v. The Rosedale Iron Co.*, *ante*, the defendants were the sellers, and the plaintiffs the purchasers, of iron, deliverable in monthly quantities over 1871. The defendants withheld delivery of various monthly quantities at the plaintiffs' request. Afterwards, in December, 1871, *the last month* fixed in the contract for delivery, the plaintiffs demanded im-

mediate delivery of the whole of the residue of the iron deliverable under the contract. The defendants refused to deliver any more than the monthly quantity for December. In an action by the plaintiffs for non-delivery, it was held by the exchequer chamber, reversing the decision of the majority of the Court of Exchequer, that the defendants were not entitled to refuse to deliver more than the monthly quantity.

¹ PARKE B., in *Marshall v. Lynn*, 6 M. & W. 116. But see *Hoadley v. McLean*, 10 Bing. 489, where changes made in a laundalet which the plaintiff was manufacturing for the defendant under a written contract, *made by the direction of the purchaser*, were permitted to be shown to have been made by the purchaser's direction, as an excuse for not making it according to the contract.

² *Hoadley v. McLean*, 10 Bing. 489.

³ *The Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140.

⁴ Benjamin on Sales, § 217.

is bound to accept or deliver all the quantities within the contract time, or only within some reasonable time afterwards, though the latter appears to be the better opinion.¹ B. Where the tender or request is *after the contract time*. 1. If the postponement has taken place at the *defendant's* request, he is estopped from denying that the plaintiff was ready and willing to deliver or accept within the contract time.² 2. If the postponement has taken place at the *plaintiff's* request, he cannot maintain his action *on the original contract*, because he cannot prove that he was ready and willing to deliver or accept pursuant to the contract.³ 3. In the last case, if suing on a *substituted contract*, such contract must have been reduced to writing in order to satisfy the statute of frauds."⁴ The contrary *dictum* of MARTIN, B., in *Tyers v. Rosedale Iron Co.*,⁵ must, it is submitted, be considered as overruled in *Plevins v. Downing*. Proof of approval, *after performance* of a substituted mode of performance, is a different thing from proof of a substituted contract, and may be given by parol.⁶ And it may be said that these rules, or exceptions, do not contravene the statute, and seem to be justified both in principle and reason. But any parol change in any of the terms of the contract as they exist in the writing, opens the door to all the mischiefs which the statute was intended to prevent. Because if, after a contract has been reduced to writing so as to avoid the statute, it can be varied by parol, the statute can always be evaded by the very fraud and perjury which the statute was designed to avoid. Where a written contract has been varied by parol, *and the parol variation has been performed*, equity will enforce the parol modification of the original contract. Thus a purchaser of land under a written contract, which provided that he should build a saw-mill on the land to be conveyed, afterward obtained oral permission from the vendor to erect the mill on an adjoining piece of land not mentioned in the contract, and

¹ *Tyers v. Rosedale Iron Co.*, L. R. 10 Ex. 195, in Ex. Ch., reversing S. C. L. R. 8 Ex. 305.

² *Ogle v. Earl Vane*, L. R. 3 Q. B. 272, in Ex. Ch., affirming S. C. L. R. 2 Q. B. 275; *Hickman v. Haynes*, L. R. 10 C. P. 598.

³ *Plevins v. Downing*, 1 C. P. D. 220.

⁴ *Plevins v. Downing*, 1 C. P. D. 220.

⁵ L. R. 8 Ex., at p. 319.

⁶ *The Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140.

the purchaser agreed to pay at a certain rate for the additional land. The mill having been built, it was held that equity would enforce the oral modification of the original contract.¹

SEC. 404. **Lost Memorandum.**—The question whether, where a memorandum answering the requirements of the statute has once been made, but is lost before action brought, or the trial, its contents can be proved by parol, is of considerable importance. In a Wisconsin case,² where it was shown that A sent by mail a letter, making a proposal for a contract with B, and B deposited in the post-office, prepaid, a letter addressed to A at his proper post-office address, accepting such proposal, it was held that the contract was thereby completed, although A never received the letter of acceptance. But it will be observed that in this case, the proof only went to the *execution* of the contract, *and did not involve parol proof of any of its terms*. And as the object of the statute seems to be to require *proof in writing of the terms of the contract*, it is difficult to understand how parol proof can be admitted as a substitute, *except possibly, where there is no conflict in the evidence as to what the terms of the lost instrument really were*; and where there is any conflict in that respect, although the paper lost is only one of several, going to make up the completed memorandum, it will prevent a recovery.³

¹ *Marsh v. Bellew*, 45 Wis. 36. In *Phelps v. Seeley*, 22 Gratt. (Va.) 573, it was held that a written contract, although under seal, may be rescinded by a subsequent parol agreement fully carried out. See, also, *Marsh v. Bellew*, 45 Wis. 36, where it was held that a person might waive a provision of a written contract by parol. In *Arrington v. Porter*, 47 Ala. 714, it was held that a parol contract for the

rescission of a sale of land, the purchase-money not having been paid, accompanied by a return of the possession to the vendor, is not within the statute.

² *Washburn v. Fletcher*, 42 Wis. 152. See also *Ryan v. Salt*, 3 U. C. C. P. 83; *Davis v. Robertson*, 1 Mill. (S. C.) 71; *Jelks v. Barrett*, 52 Miss. 315.

³ *Ballingall v. Bradley*, 17 Ill. 373.

CHAPTER XIV.

THE SIGNATURE TO THE MEMORANDUM.

SECTION.

- 405. Need be Signed only by Party to be Charged.
 - 406. Approval of Draft of Agreement.
 - 407. By Agent.
 - 408. Alteration of Draft of Agreement.
 - 409. What is a Sufficient Signature.
 - 410. Signature as Witness.
 - 411. By Partner.
 - 412. May be by Pencil, Stamp, or Printed.
 - 413. Mark or Initials Sufficient.
 - 414. Instructions for Telegram.
 - 415. Place of Signature not Material.
 - 416. Signature at Beginning.
 - 417. Signature upon Goods in Catalogue or Order-Book.
 - 418. Signature in the Third Person.
 - 419. Rule in *Caton v. Caton*.
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SECTION 405. Memorandum need only be Signed by the Party to be Charged.—The fourth section of the statute of frauds requires that the note or memorandum shall be signed “by the party to be charged,” and the seventeenth “by the parties to be charged.” The object of the statute is to afford protection against fraud and perjury, and the means employed are requiring a written memorandum and preventing a recovery by mere oral proof. *The end and object of the statute are attained by written proof of the obligation of the defendant.* He is the party to be charged with a liability, and the one intended to be protected against the dangers of false oral testimony. To say that the plaintiff or the party seeking to enforce a contract is himself a party to be *charged* therewith is a perversion of language. The term “parties” is used in connection with the words “*to be charged thereby*,” and does not include *all* the parties to the contract. It is, on the contrary, limited and restricted by the qualifying words to such only of those parties as are to be bound or held

chargeable, and legally responsible on the contract, or on account of a liability created by or resulting from it. If to include all the parties had been intended, those words "to be charged thereby" would have been unnecessary and superfluous. The appropriate language to express such intention would have been that the note or memorandum should be subscribed "by all the parties thereto," or "by the parties thereto," or some such general terms. *Mutuality of obligation is not essential to render a party liable upon a contract.* If there is a consideration for his undertaking, he is bound; and the fact that the contract may not be enforceable against one party, because not subscribed by him, is no defence to the other, by whom it is subscribed.¹ Under both these sections it has long been well settled that *an agreement signed by one party only is sufficient to charge him within the statute*, and therefore, upon a contract for the sale of land or of goods, if the purchaser alone has signed the contract, he cannot refuse to execute the conveyance or to accept the goods upon the ground that the purchaser has not signed also.² And *it is no objection that the party signing can*

¹ Justice v. Lang, 42 N. Y. 493.

² Shirley v. Shirley, 7 Blackf. (Ind.) 452; Crutchfield v. Donathan, 49 Tex. 691; Anderson v. Harold, 10 Ohio, 399; Davis v. Shields, 26 Wend. (N. Y.) 341; Douglass v. Spiers, 2 N. & M. (S. C.) 207; Fenly v. Stewart, 2 Sandf. (N. Y.) 101; Morin v. Murtz, 13 Minn. 191; McCrea v. Purmort, 16 Wend. (N. Y.) 460; Rhodes v. Castner, 12 Allen (Mass.) 130; Penniman v. Hartshorn, 13 Mass. 87; Gartnell v. Stafford, 12 Met. 545; Smith v. Smith, 8 Blackf. (Ind.) 208; Worrall v. Munn, 5 N. Y. 229; Ivory v. Murphy, 36 Mo. 534; Mason v. Decker, 72 N. Y. 595; Newby v. Rogers, 40 Ind. 9; Lent v. Paddleford, 10 Mass. 236; Barstow v. Grey, 3 Me. 409; Justice v. Lang, 52 N. Y. 423; Lowry v. Mehaffey, 10 Watts (Penn.) 503; De Cordova v. Smith, 9 Tex. 129; Himrad Furnace Co. v. Cleveland R. R. Co., 22 Ohio St. 451; Western Union Tel. Co., 86 Ill. 246; Griffin v. Rembert, 2 S. C. 410; Thayer v. Luce, 22 Ohio St. 62; Lowber v. Connit, 36

Wis. 176; Waul v. Kirkman, 27 Miss. 823; Stewart v. Eddowes, L. R. 9 C. P. 311; Brettel v. Williams, 4 Exchq. 623; Bird v. Blossie, 2 Vent. 361; Marquize v. Caldwell, 48 Miss. 23; Williams v. Robinson, 73 Me. 186; 42 Am. Rep. 352; Getchell v. Jewett, 4 Me. 350. It is well settled that under this statute the agreement need only be signed by him who is to be charged by it. Seton v. Slade, 7 Ves. 265; Fowle v. Freeman, 9 id. 351; Martin v. Mitchell, 2 Jac. & W. 426; Laythoarp v. Bryant, 2 Bing. N. C. 735; Ballard v. Walker, 3 Johns. Cas. (N. Y.) 60; Clason v. Bailey, 14 Johns. (N. Y.) 484; McCrea v. Purmort, 16 Wend. (N. Y.) 460; Penniman v. Hartshorn, 13 Mass. 87; Thayer v. Luce, 22 Ohio St. 62; Justice v. Lang, 42 N. Y. 493; 1 Am. Rep. 576; Lowber v. Connit, 36 Wis. 176. KENT, CH., in Clason v. Bailey, ante, said that the weight of the argument was in favor of the construction that the agreement concerning lands should be mutually binding, and the

enforce the contract while the other cannot; ¹ for, if it is said that unless the plaintiff also signs there is a want of mutual-

same views were expressed by VERPLANK, Senator, in the court of errors in *Davis v. Shields*, 26 Wend. 362, but both agreed that the law was well settled the other way both in this country and England. A change to conform to the views of CHANCELLOR KENT was afterward recommended by the revisers of the New York statutes, but the legislature rejected the alteration and adhered to the old words. See Willard's Eq. 267, 8. The same objection was made in the case of *Laythoarp v. Bryant*, *ante*, where it was said that unless the agreement was signed by both parties there would be a want of mutuality; but the chief justice said, "Whose fault is that? The defendant might have required the plaintiff's signature, but the object of the statute was to secure the defendant's. The preamble runs 'for prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury,' and the whole object of the legislature is answered when we put this construction upon the statute. Here, when the party who has signed is the party to be charged, he cannot be subject to any fraud. And there has been a little confusion in the argument between the consideration of an agreement and the mutuality of claims. I find no case nor any reason in saying that the signature of both parties is that which makes the agreement." It is sufficient if the contract or memorandum thereof is signed by the party to be charged, that is, by the vendor. *Hatton v. Gray*, 2 Ch. Ca. 164; *Seton v. Slade*, 7 Ves. 264; *Fowle v. Freeman*, 9 Ves. 351; *Western v. Russell*, 3 V. & B. 187; *Egerton v. Matthews*, 6 East, 307; *Boys v. Ayerst*, 6 Madd. 316; *Owen v. Thomas*, 3 My. & K. 353; *Field v. Bolland*, 1 Dru. & Wal. 37; *Liverpool Borough Bank v. Eccles*, 4 H. & N. 139; *Reuss v. Picksley*, L. R. 1 Exchq. 342; *Beer v. Lon-*

don & Paris Hotel Co., L. R. 20 Eq. 423.

¹ In *Williams v. Robinson*, *ante*, VIRGIN, J., says: "The memorandum need be signed only by one of the parties, *the party to be charged*: *Barstow v. Gray*, 3 Me. 409; *Getchell v. Jewett*, 4 id. 350; or by both: *Atwood v. Cobb*, 16 Pick. (Mass.) 227; or counterpart memoranda may be made and signed by the respective parties: *Sewall v. Quincy*, 4 Me. 497. So that if a mutual oral executory contract valid at common law be made, and one of the parties obtain from the other the note or memorandum thereof contemplated by the statute, *but does not give a corresponding one, he may enforce it*, although the other cannot, the former having secured while the other has not the evidence which the statute has made indispensable to its enforcement. *Rogers v. Saunders*, 16 Me. 92; *Laythoarp v. Bryant*, 2 Bing. (N. C.) 469;" and in *Old Colony R. R. Co. v. Evans*, 9 Gray (Mass.) 25, it was held that *a written contract signed by one party and acted upon by both* may be enforced in equity against the signer by one who has not signed. *Dressel v. Jordon*, 104 Mass. 407; *Slater v. Smith*, 117 id. 96. In *Mizell v. Burnett*, 4 Jones (N. C.) L. 249, it was held that under the statute of frauds a contract in writing, to sell land, signed by the vendor, is good against him, although the correlative obligation of the buyer to pay the price is not in writing, and cannot be enforced against him. Where an action is brought upon a note given by a vendee, although it may not be such a note or memorandum as satisfies the statute, the maker cannot avoid the note which he has given, because he has omitted to bind the vendor. *Rhodes v. Starr*, 7 Ala. 347. In *Crutchfield v. Donathan*, 49 Tex. 691, the defendant executed to the plaintiff a negotiable note which stated that the consideration was land

ity, the answer is that the defendant might have required the plaintiff's signature to the contract; or, that if he has not done so it is his own fault; the object of the statute was to secure the defendant's.¹ The party signing may, it appears, require the other to accept or refuse the contract in writing, and if this is not done may himself rescind it,² at least before the other has done some act to bind himself.³ Where articles of association contained a clause entering into a contract required by the statute to be in writing, and the articles were signed by seven members of the company, but no contract was entered into under the seal of the company, it was held that the articles were a contract between the shareholders *inter se*, and did not create any contract between the plaintiff, who was not a party, and the company, and that the signatures to the articles which were affixed, *alio intuitu*, were not signatures to a memorandum of the contract within the statute, so as to bind the company.⁴

SEC. 406. Approval of Draft Agreement or Conveyance by Parties, Whether Sufficient Signature.—It seems to be doubtful whether the signature, by way of approval, of a draft agreement or conveyance, by a party to be bound, is a sufficient signature within the statute.⁵ Where a draft agreement had on the back of it the following memorandum, "We approve of the within draft," and this was signed by the parties, it was argued that this draft, though not of itself an

sold him by the plaintiff. In an action thereon it was held that the action was upon the note and not upon the contract, and that it was enforceable as a note, although not sufficient as a memorandum under the statute because not signed by the vendor. *McGowen v. West*, 7 Mo. 569; *Gillespie v. Battle*, 15 Ala. 276; *Allen v. Bennett*, 3 Taunt. 169; *Lord Ormund v. Anderson*, 2 Ball & B. 370; *Thornton v. Kempster*, 5 Taunt. 786.

¹ *Laythoarp v. Bryant*, 2 Bing. (N. C.) 743, *per* TINDAL, C. J. See as to alterations made after signature by one of the parties, *Stewart v. Eddowes*, L. R. 9 C. P. 311.

² *Lord Ormund v. Anderson*, 2 Ball & B. 371; *Williams v. Williams*, 17 Beav. 213, 216.

³ *Martin v. Mitchell*, 2 Jac. & W. 428. The foregoing cases overrule dicta in *Lawrenson v. Butler*, 1 Sch. & Lef. 13; and *O'Rourke v. Perceval*, 2 Ball & B. 58. As to when a covenantee may sue for a breach of covenant, although he has not executed the deed, see *Wetherell v. Langston*, 1 Ex. 634; *Pitman v. Woodbury*, 3 Ex. 4; *Swatman v. Ambler*, 8 Ex. 72; *British Empire Mutual Life Assurance Co. v. Browne*, 12 C. B. 723; *Morgan v. Pike*, 14 C. B. 473; *Taylor on Evid.* 6th ed. 904.

⁴ *Eley v. The Positive Assurance Co.*, L. R. 1 Ex. D. 20. But see *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314, holding a contrary doctrine.

⁵ *Parker v. Smith*, 1 Coll. 608.

agreement, was evidence of an agreement. But the court held the contrary, LORD TENTERDEN, C. J., saying that the words in question did not import an agreement, for if they did there would not have been any necessity for any other instrument.¹ "Where the parties themselves, not being professional persons, sign such a memorandum, it is a question to be decided in each case whether they signed in that form as simply approving of the draft as such, or whether they intended to give validity to it as an agreement."²

SEC. 407. **By Agent.** — It seems that the written approval by a professional agent of a draft agreement, or conveyance, which recites the agreement, is not sufficient, the signing being *alio intuitu*.³ Where, the defendant having proposed to take a lease of certain premises for the term of seven years, a draft lease was prepared to which the defendant made some objections, and ultimately took it away to be settled by his solicitors, who returned it to the plaintiff's solicitors with the following letter: "We have seen our client, and have altered the draft lease in accordance with his instructions. We trust there will be no impediment to prevent an early completion, and shall be glad to receive the draft as soon as you can, that we may engross the counterpart"; and the plaintiff's solicitors replied, returning the draft and engrossment of the lease and counterpart, stating that, according to the practice where there is no stipulation on the subject, the lessor's solicitor invariably prepares both lease and counterpart, it was held that there was no evidence of any contract binding the defendant to take the lease, and no memorandum of any contract sufficient for that purpose within the statute.⁴

SEC. 408. **Alteration of Draft Conveyance by Party to it.** — The alteration of a draft conveyance by one of the parties in his own hand is not a sufficient signature, even though the

¹ Doe v. Pedgriph, 4 C. & P. 312.

² Sugd. V. & P. 14th ed. 144; and see Foligno v. Martin, 22 L. J. Ch. 502.

³ Dart. V. & P. 5th ed. 234, citing Lady Thynne v. Earl of Glengall, 2 H. L. C. 131; Lord Townshend v.

Bishop of Norwich, 1 Rop. H. & W.

by Jac. 308, n.; Jackson v. Oglander, 2 H. & M. 472; and see Thornbury v. Bevell, 1 Y. & C. C. C. 554; Card v. Jaffray, 2 Sch. & Lef. 374.

⁴ Forster v. Rowland, 7 H. & N. 103.

seller afterwards executes it, and causes it to be registered,¹ nor will it be sufficient if the whole conveyance is drawn by the defendant if not signed, for the statute has made signing absolutely necessary for the completion of the contract,² and the mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement for a lease will not constitute a signature within the statute.³ The rule therefore appears to be that the mere approval or alteration of a draft agreement or conveyance by one or both of the parties, or by a professional agent, unless with the intention to contract, is not a sufficient signing within the statute. In *Shippey v. Derrison*,⁴ the defendant had entered into a parol agreement for a lease, and a draft was prepared and sent to him on which he endorsed and signed a memorandum requesting the plaintiff to relet the premises, and it was held that this was a sufficient signature. The ground of decision was that the defendant admitted that he had entered into the agreement.

SEC. 409. What is a Sufficient Signature.— It is not enough to identify: there must be a signing, that is to say, either an actual signature of the name or something intended by the writer to be equivalent to a signature, such as a mark by a marksman. Thus a letter from a mother to her son, beginning “My dear Robert,” and concluding “your affectionate mother,” was held not signed so as to constitute a binding contract within the intention of the statute.⁵

SEC. 410. Signature as Witness.— It appears that *a person, whether principal or agent, signing an agreement as witness with knowledge of its contents, and with the intention of authenticating the instrument, will be bound.*⁶ In one case,⁷ LORD ELDON said that “where a party principal, or person to be bound, signs as what he cannot be, a witness, he cannot be understood to sign otherwise than as principal.” Where, however, an auctioneer’s clerk, whose signature is on behalf

¹ *Hawkins v. Holmes*, 1 P. Wms. 770.

² *Ithel v. Potter*, 1 P. Wms. 771.

³ *Stokes v. Moore*, 1 Cox, 219; *Caton v. Caton*, L. R. 1 Ch. 137; *affd.* L. R. 2 H. L. 127.

⁴ 5 Esp. 190.

⁵ *Selby v. Selby*, 3 Mer. 2; and see *Skelton v. Cole*, 1 De G. & J. 587.

⁶ *Welford v. Beazley*, 3 Atk. 504;

1 Ves. 6; *Symons v. Symons*, 6 Madd. 207.

⁷ *Coles v. Trecothick*, 9 Ves. 251.

of the vendor would have bound him, attested the purchaser's signature to a written memorandum of the contract, it was held that this was not sufficient to bind the vendor. And LORD DENMAN, C. J., said that "he thought the above remark of LORD ELDON open to much observation; that no such decision had been actually made; and that if it had, he should pause, unless he found it sanctioned by the very highest authority, before he held that a party attesting was bound by the instrument."¹

SEC. 411. By Partner.—One of a partnership firm may bind the other partners, on a purchase of goods required by the firm in the course of their business, by signing the usual style of the firm.²

SEC. 412. Signature may be in Pencil, by a Stamp, or Printed.—The signature may be written in pencil instead of ink, for signature in pencil is not necessarily deliberative,³ or

¹ *Gosbell v. Archer*, 2 Ad. & El. 500; 5 N. & M. 485; and see *Doe v. Burdett*, 9 Ad. & El. 971; S. C. 6 M. & Gr. 386; and *Bult v. Morrell*, 12 Ad. & El. 745. Upon these cases LORD ST. LEONARDS remarks, Sugd. V. & P. 13th ed. 116, that "there appears to be no foundation for the doubt thus thrown upon the dictum of LORD ELDON, for he confines his observation to the case where the person to be bound signs as, *what he cannot be, a witness*, and must therefore be considered to sign in his proper character. By the rule as expressed by LORD ELDON, the person signing is assumed to be really the contracting party. In the case put by way of objection there would be no real contract by the party to sign."

² *Norton v. Seymour*, 2 C. B. 792.

³ *Geary v. Physic*, 5 B. & C. 234; 7 D. & R. 653; *Lucas v. James*, 7 Hare, 410; *Draper v. Pattina*, 2 Speers (S. C.) 292; *Clason v. Bailey*, 14 John. (N. Y.) 484; *Merritt v. Clason*, 12 id. 102; *McDowell v. Chambers*, 1 Strobbh. (S. C.) Ch. 347. The question as to whether a name stamped or printed on a paper was intended as and for a signature is a

question of fact, in view of all the circumstances the principal of which are the purpose for which the writing was stamped, and also whether the stamp had been adopted as a signature. *Boardman v. Spooner*, 13 Allen (Mass.) 353; *Drury v. Young*, 58 Md. 543. See *Zachrisson v. Poppe*, 3 Bos. (N. Y.) 171, for instance in which a *printed* signature was held not sufficient. Where the name of a party is written at the commencement of a contract, as "J S hereby agrees, etc.," and is also signed at the end thereof, but the signature is marked off, it cannot be treated as a signed contract by reason of the name at the commencement, nor by reason of the actual signature, unless it is shown that the contract was signed for the purpose of perfecting the contract, and that it became a valid contract. *McMillen v. Terrell*, 23 Ind. 163. A memorandum of a sale of land written by the vendor in his own memorandum book, and signed by him and by the agent of the vendee, is valid, and not open to variance by parol proof, *Wierner v. Whipple*, 53 Wis. 298; but an entry made by the vendor in his memorandum book of the name of the pur-

it may be made by means of a stamp.¹ The ordinary mode of affixing a signature to a document is not by the hand alone, but by the hand coupled with some instrument, such as a pen or a pencil, and there is no distinction between using a pen or a pencil and using a stamp, where the impression is put upon the paper by the proper hand of the party signing. In each case it is the personal act of the party, and to all intents and purposes a signing of the document by him.² So also the signature may be printed if recognized by the party to be charged, and appropriated by him to the particular contract.³ Thus, in *Saunderson v. Jackson*, it was held that a bill of parcels in which the vendor's name was printed, delivered to the vendee at the time of order given for the future delivery of goods, was a sufficient memorandum of the contract within the statute; and at all events, that a subsequent letter written and signed by the vendor referring to the order might be connected with the bill of parcels so as to take the case out of the statute. In a Maryland case,⁴ the court say: "It is therefore a sufficient signing *if the name be in print*, and in any part of the instrument, *provided that the name is recognized and appropriated by the party to be his*. . . . "It is for the jury to determine the question whether the printed names were adopted and appropriated by the defendants as theirs."⁵

chaser and of the terms of the contract of sale, which was read to the agent of the vendee, who made the purchase, and assented to by him as correct, is not sufficient, *it not being signed by the party to be charged, or by his agent*. *Bailey v. Ogden*, 3 Johns. (N. Y.) 399. See also *Barry v. Law*, 1 Cr. (U. S. C. C.) 77. But where a person who has sold land or goods to another, and renders an account to him in which the price thereof is charged, and he *signs* the account, it is held a sufficient memorandum; otherwise not. *Denton v. McKenzie*, 1 Dessau (S. C.) 289.

¹ *Bennett v. Brumfitt*, L. R. 3 C. P. 28; *Brayley v. Kelly*, 25 Minn. 160; *Boardman v. Spooner*, 13 Allen (Mass.) 353.

² *Bennett v. Brumfitt*, L. R. 3 C. P. 28, *per Bovill*, C. J.

³ 2 B. & P. 238; and see *Schneider v. Norris*, 2 M. & Sel. 286; *Drury v. Young*, 58 Md. 546.

⁴ *Drury v. Young*, *ante*.

⁵ The civil law did not require the signature of a party to a written contract of sale if the contract was in his own handwriting. "With regard to those contracts of sale and purchase which are perfected by writing, we have ordained," observes the emperor in the Institutes, "that they shall not be valid and binding unless they be written by the contracting parties, or signed by them if written by another." Lib. iii. tit. 24. But by the common law, if the defendant has written the whole contract with his own hand, without signing it as a concluded agreement, this is not sufficient, as the statute has made signing absolutely necessary for the com-

SEC. 413. **Mark or Initials Sufficient.**—It is not necessary that the name of the party to be charged should be actually written by him, but it is sufficient if the memorandum is authenticated by him by means of a mark, or it would appear by his initials, and parol evidence is admissible to apply them.¹ In *Hubert v. Moreau*,² BEST, C. J., said: "Undoubtedly a signing by a mark would satisfy the meaning of the statute; but here there is nothing intended to denote a signature." Where an agent, being unable to write, held the top of the pen while another person wrote his name to the agreement, it was held that there was a sufficient signature.³

SEC. 414. **Instructions for Telegram.**—The signature to instructions for a telegram is sufficient to bind the person signing, so as to render him liable on a contract accepted by the telegram, whether as principal or agent.⁴

pletion of the contract. *Ithel v. Potter*, cited 1 P. Wms. 771. A party may, under certain circumstances, be bound by his signature, although he subscribed in form as a witness. *Welford v. Beazley*, 1 Ves. 6; *Goshell v. Archer*, 2 Ad. & El. 508. "What, within the legal intent of the statute, will amount to a signing, is the same question in equity as at law." *Morrison v. Turnour*, 18 Ves. 183. In the case of contracts for the sale and purchase of goods and chattels and movables it has been held, that if a man writes his name against an entry or memorandum in a book or ledger, or endorses his name on printed particulars of sale, printed handbills, or printed descriptions, or on packages containing goods, with intent to denote that he has purchased the contents, this is a sufficient signature, and the name may, as previously mentioned, be written in pencil as well as in ink. *Geary v. Physic*, 5 B. & C. 234; *Hodgson v. Le Bret*, 1 Camp. 283; *Jeffrey v. Walton*, 1 Camp. 267. A man may sign also by his initials, or by his mark: *Jacob v. Kirk*, 2 M. & R. 221; *Hubert v. Moreau*, 12 Moo. 219; *Hyde v. Johnson*, 2 Bing. (N. C.) 780; *Phillmore v.*

Barry, 1 Camp. 513; and it is quite immaterial upon what part of the paper the mark or signature is to be found. *But the signature must of course be made with a view of authenticating the document as a concluded contract, and not with a view merely of altering or settling a draft, or approving of propositions and proposals not finally arranged and decided upon.* *Coldham v. Shawler*, 3 C. B. 320; *Hawkins v. Holmes*, 1 P. Wms. 770.

¹ *Sanborn v. Flagler*, 9 Allen (Mass.) 474; and as to initials, see *Phillmore v. Barry*, 1 Camp. 513; *Hyde v. Johnson*, 2 Bing. (N. C.) 776; *Jacob v. Kirk*, 2 Moo. & Rob. 221; *Sweet v. Lee*, 4 Sc. (N. R.) 77; *Gorrie v. Woodley*, 17 Ir. C. L. R. 221; *Chichester v. Cobb*, 14 L. T. (N. S.) 433; *Parker v. Smith*, 1 Coll. 608.

² 12 Moo. 216; 2 C. & P. 528; *in re Field*, 3 Curties, 752; *Selby v. Selby*, 3 Mer. 2; *Jackson v. Van Dusen*, 5 John. (N. Y.) 144; *Schneider v. Norris*, 2 M. & S. 286; *Taylor v. Denning*, 3 M. & P. 228; *Hubert v. Moreau*, 2 C. & P. 528.

³ *Helshaw v. Langley*, 11 L. J. Ch. 17.

⁴ *Godwin v. Francis*, L. R. 5 C. P. 295; *McBlain v. Cross*, 25 L. T. (N. S.) 804.

SEC. 415. Place of Signature Immaterial.—It does not matter in what part of the instrument the signature of the party to be charged is found, whether on one side of the paper or the other; *provided it is inserted in such a manner as to have the effect of authenticating the instrument*, the requisition of the act with respect to signature is complied with.¹ The purposes of the statute are met if the names of the parties and the terms of the contract are authenticated by written evidence, and this is done when the name of the person sought to be charged is inserted in the instrument in such a way as to indicate that he intended it to stand for his signature.² In New York, the statute requires that the note or memorandum shall be “*subscribed*” by the person sought to be charged, and in that State the name of the party to be charged is required to be signed at the end of the instrument.³

SEC. 416. Signature at Beginning.—Thus an agreement beginning “I, A B,” though not further signed, is good within the statute.⁴ So, where the traveller of the plaintiffs agreed with the defendant for the sale to him by sample of goods, and the defendant wrote in his own book, which he kept, a memorandum of the transaction, commencing “Sold John Dodgson,” and this memorandum was signed by the traveller on behalf of the plaintiffs, it was held that there was a sufficient memorandum of the contract. “The cases have decided,” said LORD ABINGER, C. B., “that although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury whether the party, not having signed

¹ *Ogilvie v. Foljambe*, 3 Mer. 53; *Coldham v. Showler*, 3 C. B. 312; *Hammersley v. De Biel*, 12 C. & F. 63; *Bleakley v. Smith*, 11 Sim. 150; *Hawkins v. Chase*, 19 Pick. (Mass.) 502; *Ogilvie v. Foljambe*, 3 Mer. 53; *Western v. Russell*, 3 V. & B. 187; *Penniman v. Hartshorn*, 13 Mass. 87; *Morrison v. Surman*, 18 Ves. 187; *Yerby v. Grigsby*, *ante*; *Kronheim v. Johnson*, 7 Ch. D. 60. But see *contra*, *Higdon v. Thomas*, 1 H. & G. (Md.) 139.

² *Coddington v. Goddard*, 16 Gray (Mass.) 444; *Argenbright v. Campbell*, 3 H. & M. (Va.) 144; *Fessenden*

v. Mussey, 11 Cush. (Mass.) 127; *Batturs v. Sellers*, 5 H. & J. (Md.) 117; *Salmon Falls Mfg Co. v. Goddard*, 14 How. (U.S.) 446; *Anderson v. Harold*, 10 Ohio, 399; *Penniman v. Hartshorn*, 13 Mass. 87.

³ *Viele v. Osgood*, 8 Barb. (N. Y.) 130; *Davis v. Shields*, 24 Wend. (N. Y.) 322.

⁴ *Knight v. Crockford*, 1 Esp. 190; *Taylor v. Dobbins*, 1 Str. 399; *Morrison v. Turnour*, 18 Ves. 183; *Drury v. Young*, 58 Md. 546; *Lemayne v. Stanley*, 3 Lev. 1; *Yerby v. Grigsby*, 9 Leigh. (Va.) 387.

it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and recognized by him. I think in this case the requisitions of the statute are fully complied with. The written memorandum contains all the terms of the contract; it is in the defendant's own handwriting, containing his name, and it is signed by the plaintiffs through their agent."¹ But the mere circumstance that the instrument is in the handwriting of a party, will not dispense with his signature,² even though his name is inserted in some part of the instrument, unless it is in such part of the instrument as to authenticate it, and shows an intention on his part to admit his liability under it.³

SEC. 417. Signature upon Goods or in Catalogue or Order-Book.—A purchaser's signature upon particular goods, denoting that he has purchased them,⁴ or opposite lots in a printed catalogue,⁵ or in an order-book, the goods being specified in the book, and the signature being made for the purpose of authorizing the vendor to send the goods,⁶ may be sufficient to bind him.

SEC. 418. Signature in Third Person.—So also the signature is enough if the agreement is in the third person and written by the person to be charged himself, though there is no other signature.⁷

Where articles of agreement containing the terms of a contract purporting to be made between certain persons whose names were stated at the commencement of the arti-

¹ *Johnson v. Dodgson*, 2 M. & W. 653; see also *Saunderson v. Jackson*, 2 B. & P. 238; *Schneider v. Norris*, 2 M. & Sel. 286; *Holmes v. Mackrell*, 3 C. B. (N. S.) 789; *Durrell v. Evans*, 1 H. & C. 174.

Stokes v. Moore, 1 Cox, 219; *Hubert v. Turner*, 4 Scott, 486.

⁴ *Hodgson v. Le Bret*, 1 Camp. 233.

⁵ *Phillimore v. Barry*, 1 Camp. 513; and see *Emmerson v. Heelis*, 2 Taunt. 38.

² *Wade v. Newbern*, 77 N. C. 460; *Anderson v. Harrold*, 10 Ohio, 399; *Barry v. Law*, 1 Cr. (U. S. C. C.) 77; *Bawdes v. Amhurst*, Finch, P. C. 402;

⁶ *Sarl v. Bourdillon*, 1 C. B. (N. S.) 195; 26 L. J. C. P. 78; *Newell v. Radford*, L. R. 3 C. P. 52.

Bailey v. Ogden, 3 John. (N. Y.) 399; *Hawkins v. Holmes*, 1 P. Wms. 770.

⁷ *Western v. Russell*, 3 V. & B. 187; *Propert v. Parker*, 1 R. & M. 625; *Bleakley v. Smith*, 11 Sim. 150;

³ *Walker v. Walker*, 1 Mer. 503; *Cabot v. Haskins*, 3 Pick. (Mass.) 95;

Lobb v. Stanley, 5 Q. B. 574.

cles, and who were described as the contracting parties, concluded "as witness our hands," without being followed by any name or signature, it was held that they were not sufficiently signed within the statute.¹

SEC. 419. Rule in *Caton v. Caton*.—In *Caton v. Caton*,² previously to a marriage, the intended husband and wife agreed, by a memorandum drawn up in the husband's handwriting, that the husband should have the wife's property for life, paying her £80 a year for pin-money, and that she should have it after his death: and he gave instructions for a settlement upon that footing. The settlement was accordingly prepared, when they agreed that they would have no settlement, the husband promising as the wife alleged, that he would make a will giving her all her property. The name of the husband appeared in various parts of the memorandum. It was held that though it is not necessary that the signature of a party should be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate every material and operative part of the instrument; and where therefore, the name of the party against whom specific performance was sought to be enforced appeared in different parts of the paper, but only in such a way that in each case it merely referred to the particular part where it was found, and that part was in the form of reference or description, and not of promise or undertaking, the signature was not sufficient. **LORD WESTBURY** said:³ "What constitutes a sufficient signature has been described by different judges in different words. In the original case upon this subject, though not quite the original case, but the case most frequently referred to as of earliest date, that of *Stokes v. Moore*,⁴ the language

¹ *Hubert v. Treherne*, 3 M. & Gr. 743; S. C. nom. *Hubert v. Turner*, 4 Sc. (N. R.) 486.

² L. R. 2 H. L. 127, affg. S. C. L. R. 1 Ch. 137.

³ L. R. 2 H. L. 127.

⁴ 1 Cox, 219; *Salmon Falls Manuf. Co. v. Goddard*, 14 How. (U. S.) 456. In *Saunderson v. Jackson*, 2 B. & P. 238, the plaintiff, on giving to the defendants an order for goods, re-

ceived from them a bill of parcels. The heading of the bill was printed as follows: "London: Bought of Jackson & Hanson, distillers, No. 8 Oxford Street"; and then followed in writing, "1,000 gallons of gin, 1 in 5 gin, 7s., £350." There was also a letter signed by the defendants, in which they wrote to the plaintiff, about a month later, "We wish to know what time we shall send you

of the learned judge is, that *the signature must authenticate every part of the instrument.* Or again, that it must give authen-

a part of your order, and shall be obliged for a little time in delivery of the remainder. Must request you to return our pipes." LORD ELDON said: "The single question is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the statute of frauds." Thus far the case would not amount to much as an authority on the point under discussion. His lordship went on to say: "It has been decided in *Knight v. Crockford*, 1 Esp. 190 (see also, *Lobb v. Stanley*, 5 Q. B. 474; *Durrell v. Evans*, 1 H. & C. 174, and 31 L. J. Ex. 337), that if a man draw up an agreement in his own handwriting, beginning 'I, A B, agree,' and leave a place for signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until further signed. This last case is stronger than the one now before us, and affords an answer to the argument that this bill of parcels was not delivered as a note or memorandum of the contract." This last sentence refers to the argument of LENS, SERJT., who admitted that the printed name might have amounted to a signature, if the bill of parcels had been intended to express the contract, *quà* contract, but contended that this was not the intention.

In *Schneider v. Norris*, 2 M. & S. 286, the circumstances were the same as in *Saunderson v. Jackson*, *ante*, except that the name of the plaintiff as buyer was written in the bill of parcels rendered to him in the defendant's own handwriting, and all the

judges were of opinion that this was an adoption or appropriation by the defendant of the name, printed on the bill of parcels, as his signature to the contract. LORD ELLENBOROUGH said: "If this case had rested merely on the printed name unrecognized by and not brought home to the party as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it would not have been intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged, by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written 'Norris & Co.' with his own hand. He has by his handwriting, in effect said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the written contract." LE BLANC, J., compared the case to one where a party should stamp his name on a bill of parcels. BAYLEY, J., put his opinion on the ground that the defendant had signed the plaintiffs' names as purchasers, and thereby recognized his own printed name as that of the seller. And DAMPIER, J., on much the same idea, that is, that the defendant, by writing the name of the buyer on a paper in which he himself was named as the seller, recognized his name sufficiently to make it a signature. In *Johnson v. Dodgson*, 2 M. & W. 653, the defendant wrote the terms of the bargain in his own book, beginning with the words, "Sold John Dodgson," and required the vendor to sign the entry. The court held this to be a signature by Dodgson, LORD ABINGER saying that, "The cases have decided that though the signature be in the begin-

ticity to every part of the instrument. Probably the phrases 'authentic' and 'authenticity' are not quite felicitous, but their meaning is plainly this, that *the signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument.* The language of SIR WILLIAM GRANT, in *Ogilvie v. Foljambe*¹ is (as his method was) much more felicitous. He says *it must govern every part of the instrument. It must show that every part of the instrument emanates from the indi-*

ning or middle of the instrument, it is as binding as if at the foot; the question being always open to the jury whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it." PARKE, B., concurred, on the authority of *Saunderson v. Jackson* and *Schneider v. Norris*, which he recognized and approved. In *Durrell v. Evans* in the exchequer chamber, 1 H. & C. 174; 32 L. J. Ex. 337, the cases of *Saunderson v. Jackson*, *Schneider v. Norris*, and *Johnson v. Dodgson*, were approved and followed. *Beckwith v. Talbot*, 95 U. S. 289. In *Touret v. Cripps*, 48 L. J. Ch. 567, under the 4th section, a letter containing proposed terms of a contract between the defendant and the plaintiff, written out by the defendant upon paper bearing a printed heading, "Memorandum from Richard L. Cripps," and sent by him to the plaintiff, was held to be a sufficient note in writing to charge the defendant.

In *Hubert v. Treherne*, 3 M. & G. 743, which arose under the 4th section, it appeared that an unincorporated company, called The Equitable Gas Light Company, accepted a tender from the plaintiff for conveying coals. A draft of agreement was prepared by the order of the directors, and a minute entered as follows: "The agreement between the company and Mr. Thomas Hubert for carrying our coals, etc., was read and approved, and a fair copy thereof directed to be forwarded to Mr. Hubert." The

articles began by reciting the names of the parties, Thomas Hubert of the one part, and Treherne and others, trustees and directors, etc., of the other part; and closed, "As witness our hands." The articles were not signed by anybody, but the paper was maintained by the plaintiff to be sufficiently signed by the defendants, because the names of defendants were written in the document by their authority. On motion to enter nonsuit, all the judges held that the instrument on its face, by the concluding words, showed that the intention was that it should be subscribed, and that it was not the meaning of the parties that their names written in the body of the paper should operate as their signatures. MAULE, J., said: "The articles of agreement do not seem to me to be a memorandum signed by anybody. Before the statute of frauds no one could have entertained a doubt upon that point. Since the statute the courts, anxious to relieve parties against injustice, have not unfrequently stretched the language of the act. . . . If a party writes I, A B, agree, etc., with no such conclusion as is found here 'as witness overhand,' it may be that this is a sufficient signature within the statute to bind A B. . . . But it would be going a great deal farther than any of the cases have hitherto gone to hold that this was an agreement signed by the party to be charged. This is no more than if it had been said by A B, that he *would* sign a particular paper."

¹ 3 Mer. 53.

vidual so signing, and that the signature was intended to have that effect. It follows, therefore, that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute, and to give authenticity to the whole of the memorandum. . . . An ingenious attempt has been made at the bar to supply that defect (of signature) by fastening on the antecedent words 'In the event of marriage the under-named parties,' and by the force of these words of reference to bring up the signature subsequently found and treat it as if it were found with words of reference. My Lords, if we adopted that device we should entirely defeat the statute. You cannot by words of reference bring up a signature and give it a different signification and effect from that which the signature has in its original place in which it is found. What is contended for by this argument differs very much from the process of incorporating into a letter or memorandum signed by a party another document which is specially referred to by the terms of the memorandum so signed, and which by virtue of that reference is incorporated into the body of the memorandum. There you do not alter the signature, but you apply the signature, not only to the thing originally given, but also to that which, by force of the reference is by the very context of the original, made a part of the original memorandum. But here you would be taking a signature, intended only to have a limited and particular effect, and by force of the reference to a part of that document you would be making it applicable to the whole of the document, to which the signature in its original condition was not intended to apply, and could not, by any fair construction, be made to apply."

CHAPTER XV.

CONTRACTS BY AGENTS.

SECTION.

420. Appointment of Agent.
421. Contracting Party cannot be Agent for the Other.
422. Auctioneer at Public Sale.
423. Authority may be Negatived.
424. When Agency for Purchaser Begins.
425. Evidence to Prove Agency.
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429. Broker is Agent for Both Parties.
430. Signed Entry in Books.
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SECTION 420. Appointment of Agent.—An agent, whether for the purchase or sale of lands or goods, may be appointed by parol,¹ unless, as is the case in some of the States, agents

¹ *Stansfield v. Johnson*, 1 Esp. 101; *Rucker v. Cammeyer*, 1 Esp. 104; *Emmerson v. Heelis*, 2 Taunt. 38; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Coles v. Trecothick*, 9 Ves. 234; *Mortlock v. Buller*, 10 Ves. 292, 311; *Dyas v. Cruise*, 2 J. & Lat. 460; *Else v. Barnard*, 28 Beav. 228; *Heard v. Pilley*, L. R. 4 Ch. 549. Except where the statute otherwise provides, the agent may be appointed and his authority established by parol. *Lawrence v. Taylor*, 5 Hill (N. Y.) 107; *Ulen v. Kittredge*, 7 Mass. 232; *Worrall v. Munn*, 5 N. Y. 229; *Johnson v. Dodge*, 17 Ill. 433; *Hawkins v. Chase*, 19 Pick. (N. Y.) 502; *Curtis v. Blair*, 4 Cush. (Mass.) 309; *McWhorten v. McMahon*, 10 Paige Ch. (N. Y.) 386; *Yerby v. Grigsby*, 9 Leigh. (Va.) 387; *Codman v. Bailey*, 4 Bibb. (Ky.) 297; *Johnson v. McGruder*, 15 Mo. 365; *Talbot v. Bowen*, 1 A. K. Mar. (Ky.) 436; *Graham v. Musson*, 5 Bing. (N. C.) 603; *Montlock v. Buller*, 10 Ves. 292. The question of authority is one of fact, and must cover the act of signature. *Taylor v. Merrill*, 55 Ill. 52; *Coleman v. Garignes*, 18 Barb. (N. Y.) 60; *Rutenberg v. Main*, 47 Cal. 213; *Edwards v. Johnson*, 3 Houst. (Del.) 435; *Rice v. Rawlings*, Meigs (Tenn.) 496; *Glen gal v. Barnard*, 1 Keen, 769; *Dixon v.*

for the sale of lands are by the statute required to be authorized in writing,¹ but in any case such an appointment is, of course, inexpedient.² Thus, in the case last cited where a memorandum was written by the clerk of the plaintiffs, in the presence of the defendant, stating that the defendant had called to say that he would be responsible for the plaintiff, it was held that there was not a sufficient undertaking within the statute. But in *Watkins v. Vince*,³ evidence that the son of the defendant, a minor, had in several instances signed bills of exchange for his father was held sufficient in an action against the father on a guaranty in the handwriting of the son.

SEC. 421. Contracting Party cannot be Agent for Other.—

*One of the parties to a contract cannot sign the name of the other as his agent so as to bind him within the statute; the signature as agent must be by a third person and not the other contracting party.*⁴ Thus, where the plaintiff wrote a memo-

Bromfield, 2 Chitty, 205. But it may be shown by parol ratification *after* the signature, although no authority to sign existed when the act was done. *Hawkins v. Baker*, 46 N. Y. 666; *Holland v. Hoyt*, 14 Mich. 238; *Maclean v. Dunn*, 4 Bing. 722. Except where the memorandum is to be sealed, in which case authority under seal is required. *Blood v. Hardy*, 15 Me. 61. Where the authority of an agent to sell land is required by the statute of frauds to be evidenced by a writing, that requirement is not fulfilled by letters written by the owner of the property to his son, showing merely that a certain real-estate agent was employed by him to solicit and negotiate for prices, nor by a telegram to such agent to "hold on," in reply to one from him asking if he would take a certain price. *Albertson v. Ashton*, 102 Ill. 50.

¹ 1 Dart. V. & P. 5th ed. 183.

² *Dixon v. Broomfield*, 2 Chit. 205.

³ 2 Stark, 368.

⁴ *Wright v. Dannah*, 2 Camp. 203; and see *Farebrother v. Simmons*, 5 B. & Ald. 333; *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Johnson v. Buck*, 35 N. J. L. A memorandum made by one

having authority from both parties to effect a sale, is sufficient to charge both parties. *Sale v. Darragh*, 2 Hilt. (N. Y. C. P.) 184. The printed signature of the broker who makes the sale is not a sufficient signing within the statute. *Zachrisson v. Poppe*, 3 Bosw. (N. Y.) 171. Signing by initials: *Salmon Falls Manuf. Co. v. Goddard*, 14 How. (U. S.) 443; *Sanborn v. Flagler*, 9 Allen (Mass.) 474; *Phillimore v. Barry*, 1 Camp. 513; *Barry v. Coombe*, 1 Pet. (U. S.) 640. As to entry in a book, see *Barry v. Law*, 1 Cr. C. C. (U. S.) 77; *Champion v. Plummer*, 5 Esp. 240; *Graham v. Musson*, 5 Bing. (N. C.) 603. By agent: *Higgins v. Senior*, 8 M. & W. 834; *Minard v. Mead*, 7 Wend. (N. Y.) 68; *Soames v. Spencer*, 1 D. & R. 32; *Stackpole v. Arnold*, 11 Mass. 27. In *Hawkins v. Baker*, 40 N. Y. 453, one R., a broker for the sale of certain kinds of goods, and known to defendants as such, offered ten casks of goods, which they orally agreed to take. R. then purchased the ten casks of plaintiffs, and signed a memorandum of the sale, and took from plaintiffs a warehouse delivery order. He delivered his order to defendant,

randum of the contract, in which the defendant's name appeared as purchaser, the defendant having overlooked the plaintiff while writing, it was argued that the defendant had made the plaintiff his agent for the purpose of signing the memorandum by overlooking, and approving of what he had written; but LORD ELLENBOROUGH said that the agent must be some third person, and could not be the other contracting party.¹

SEC. 422. Auctioneer at Public Sale is Agent for Both Parties.—An auctioneer at a public sale is, during the continuance of the sale, by implication, an agent duly authorized to sign a contract for both parties, whether for the purchase of real estate, or of goods; and his writing down the name of the highest bidder in the auctioneer's book is a sufficient signature to satisfy the statute. In *Emmerson v. Heelis*,² MANSFIELD, C. J., said: "By what authority does he write down the purchaser's name? By the authority of the purchaser? These persons bid, and announce their biddings loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser."³ It follows, therefore, that

who received and retained it, and requested R. to sell the goods for them if he could get a profit. Afterward defendants went and examined the goods, and when called upon by the plaintiffs did not deny liability, but asked for lenity. The warehouse order showed that it came from plaintiffs. Held, that R. was defendants' agent by adoption, and his signing the memorandum of sale was sufficient to bind them. The delivery of the warehouse receipt and separation of the ten casks from a larger quantity at the warehouse was a sufficient delivery. The agent of the vendor of real estate sold at auction cannot bind the purchaser by a memorandum thereof made and signed by him for the vendor alone, after the sale by the auctioneer, and not in any way assented to by the purchaser. *Bam-*

ber v. Savage, 52 Wis. 110; 38 Am. Rep. 723.

¹ *Wright v. Dannah*, *ante*.

² 2 Taunt. 38.

³ And see *Hinde v. Whitehouse*, 7 East, 558; *White v. Proctor*, 4 Taunt. 209; *Kemeys v. Proctor*, 1 Jac. & W. 350; *Farebrother v. Simmons*, 5 B. & Ald. 333; *Kenworthy v. Schofield*, 2 B. & C. 945; *Walker v. Constable*, 1 B. & P. 306; *Durrell v. Evans*, 1 H. & C. 174; 31 L. J. Ex. 337. An auctioneer is an agent for both parties, and can bind them by a memorandum made by him at a public sale, and made at the time. *Horton v. McCarty*, 53 Me. 394; *Alna v. Plummer*, 4 id. 258; *Flintoft v. Elmore*, 18 N. C. C. P. 274; *Gill v. Bicknell*, 2 Cush. (Mass.) 355; *Harvey v. Stevens*, 43 Vt. 655; *Cleaves v. Foss*, 4 Me. 1; *Anderson v. Chick*, 1 Bai. (S. C.) Eq. 118; *Hart v.*

an auctioneer signing the defendant's name by his authority cannot maintain an action against him upon such a contract.¹

But the rule does not apply to a private sale, for the auctioneer then is only the agent of the seller, and the signature of the seller or his agent cannot bind the buyer.²

SEC. 423. Authority may be Negated by Facts of Case.—The implied authority given to an auctioneer at a public sale, to act as the agent of the purchaser, may be negated by the facts of the particular case. Thus, where a party to whom money was due from the owner of goods sold by auction agreed with the owner before the auction that the goods which he might purchase should be set against the debt, and became the purchaser of goods, and was entered as such by the auctioneer, it was held that he was not bound by the printed conditions of sale, which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery; *DENMAN, C. J.*, saying: "We do not overrule the former cases, but we consider them inapplicable."³

SEC. 424. When Agency for Purchaser Begins.—Although the auctioneer at a public sale may become the agent of the purchaser for the purpose of signing a memorandum of the agreement, his agency does not commence until the bidding

Woods, 7 Blackf. (Ind.) 568; *O'Donnell v. Sehman*, 43 Me. 158; *Craig v. Godfrey*, 1 Cal. 415; *Smith v. Arnold*, 5 Mass. (U. S.) 414; *Jenkins v. Hogg*, 2 Tread. (S. C.) 821; *Linn Boyd Tobacco Warehouse Co. v. Terrill*, 13 Bush. (Ky.) 413; *Adams v. McMillen*, 7 Port. (Ala.) 73; *Bent v. Cobb*, *ante*; *Burke v. Haley*, 7 Ill. 614; *Gordon v. Sims*, 2 McCord (S. C.) Eq. 164; *Brent v. Green*, 6 Leigh. (Va.) 16; *Pike v. Balch*, 38 Me. 302; *Pugh v. Chesseldine*, 11 Ohio, 109; *White v. Crew*, 16 Ga. 416; *McComb v. Wright*, 4 John. Ch. (N. Y.) 659; *Kenworthy v. Schofield*, 2 B. & C. 945; *Hinde v. Whitehouse*, 7 East, 558; *Farebrother v. Simmons*, 5 B. & Ald. 333; *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 id. 209; *Walker v. Constable*, 1 B. & P. 306; *Mews v. Carr*,

1 H. & N. 484; *Rossiter v. Miller*, 46 L. J. Ch. 228; *Beers v. London & Co. Hotel Co.*, L. R. 20 Eq. 412; and the same rule, under peculiar circumstances, prevails as to a memorandum made by an auctioneer's clerk. *Bird v. Boulter*, 4 B. & Ald. 443; *Johnson v. Buck*, 35 N. J. L. 338; *Norris v. Blair*, 39 Ind. 90; *Fiske v. McGregory*, 34 N. H. 414; *Gill v. Bickell*, 2 Cush. (Mass.) 355; *Meadows v. Meadows*, 3 McCord (S. C.) 418; *Cothcart v. Kernahan*, 5 Strobb. (S. C.) 129.

¹ *Farebrother v. Simmons*, 5 B. & Ald. 333.

² *Mews v. Carr*, 1 H. & N. 484; 26 L. J. Ex. 39.

³ *Bartlett v. Purnell*, 4 A. & E. 792; and see *Lord Glengall v. Barnard*, 1 Keene, 769.

is accepted and until the hammer is knocked down. Both the bidder and the vendor are free and may retract if they choose to do so. Therefore, when the owner of a mare sent her to the defendants with instructions to sell her by auction without reserve, and the plaintiff was the highest *bona fide* bidder, but the mare was knocked down to the owner, who made a higher bid, it was held that the plaintiff could not maintain an action against the defendant on the ground that he was his agent and was bound to complete the contract on his behalf.¹

SEC. 425. Evidence to Prove Agency.—Except in those States where the statute expressly requires that authority to sign a note or memorandum for another, shall be conferred by writing, as is the case in some of the States as to the note or memorandum relating to the leasing and sale of lands,² the note or memorandum may be signed by an agent of the party to be charged, as well as by the party himself, and such agency as in other cases may be proved by parol,³ and may be shown by the same class of evidence necessary to establish agency in other cases, that is, by proof of express authority, or subsequent ratification.⁴

¹ Warlow v. Harrison, 28 L. J. Q. B. 18; 29 L. J. Q. B. 14; and see Payne v. Cave, 3 T. R. 148.

² Michigan, Montana, New Nevada, Hampshire, New York, Ohio, Oregon, Pennsylvania, Vermont, Utah, and Wisconsin.

³ The authority of an agent to sign a memorandum may be proved by parol. Rutenberg v. Main, 47 Cal. 213. In the case of a memorandum made by an agent, any letter signed by the principal, referring to the agent's authority to make the contract and adopting it, will render the contract valid. Newton v. Bronson, 13 N. Y. 587. If a contract is signed by an agent in his own name, it may be shown that he signed as agent. Washburn v. Washburn, 4 Ired. (N. C.) Eq. 306.

⁴ Eggleston v. Wagner, 46 Mich. 610; Hawkins v. Chace, 19 Pick. (Mass.) 502; McWhorter v. McMa-

hon, 10 Paige Ch. (N. Y.) 386; Newton v. Bronson, 13 N. Y. 587; Long Hartwell, 34 N. J. L. 116; Johnson v. Dodge, 17 Ill. 433; Tomlinson v. Miller, 1 Sheld. (N. Y.) 197; Yourt v. Hopkins, 24 Ill. 236; Doty v. Wilder, 15 id. 407; Shaw v. Nudd, 8 Pick. (Mass.) 9; Blacknall v. Pariah, 6 Jones (N. C.) Eq. 70; Alna v. Plummer, 4 Me. 258; Blood v. Hardy, 15 id. 61; Worrall v. Munn, 5 N. Y. 229; Goshell v. Archer, 2 Ad. & El. 500; Fitzmaurice v. Bayley, 6 E. & B. 868; Graham v. Musson, 7 Scott, 769; Heard v. Pilley, L. R. 4 Ch. App. 548; Rucker v. Cammeyer, 1 Esp. 105; Acebal v. Levy, 10 Bing. 378; Harrison v. Jackson, 7 T. R. 207; Durrell v. Evans, 1 H. & C. 174. An agent does not require, in the first instance, authority to sign the note; and in Maclean v. Dunn, 4 Bing. 722, it was decided that in this, as well as in other cases of agency, a subsequent

A clerk or traveller cannot bind his principal without express authority.¹ Where a contract for the sale of goods

¹ *Blore v. Sutton*, 3 Mer. 237.

ratification was equivalent to a previous authority. The fact of agency may be established, and any person may be proved to be an agent for this purpose, in the same manner, and subject to the same rules, as in cases of agency for any other purpose. It has, indeed, been decided that the one party cannot be an agent for the other, but this is very doubtful law. It is quite right and proper that such an unusual thing as intrusting the other with authority should be clearly proved; but if it be clearly proved, there is nothing either in the statute or in reason to make it void.

In *Wright v. Dannah*, 2 Camp. 203, the plaintiff had, in the presence of the defendant, written down the defendant's name, the goods, and the price. The defendant looked it over, and said one of the figures was wrong. It seems clear that this was no memorandum; for the plaintiff's name did not appear, and the proof of agency was of the most meagre description. LORD ELLENBOROUGH non-suited the plaintiff, and is reported to have said "that the agent must be some third person, and could not be the other contracting party."

In *Farebrother v. Simmons*, 5 B. & Ald. 334, the King's Bench decided that an auctioneer, who had taken down the highest bidder's name, could not use this as a signature when suing in his own name; and *ABBOTT, C. J.*, on the authority of *Wright v. Dannah*, said "that the agent contemplated by the legislature, who is to bind a party by his signature, must be some third party, and not the other contracting party on the record." In *Wright v. Dannah*, LORD ELLENBOROUGH seems to have been speaking of the difficulty of establishing such an agency in fact; but in *Farebrother v. Simmons* it was supposed to be impossible in law. The case was much questioned in *Bird v.*

Boulter, 4 B. & Ald. 443, but it has not yet been overruled.

When an agent is authorized to make a contract of sale, he has by implication authority to make it effectually, by signing the note of it; but there is no reason why a special authority should not be given to sign a particular contract, without giving any authority to make a contract, or to vary from the particular one already made. The distinction between the two sorts of agency is material; for if an agent, having authority to make a contract, makes a mistake in reducing it to writing, neither he nor his principal can show that the true contract was different, for that would be contradicting the written agreement; but if the agent had only a special authority to sign a particular contract, it is open to the principal to show that the agent has not pursued his authority.

Sharman v. Brandt, L. R. 6 Q. B. 720; *Graham v. Musson*, *ante*; *Graham v. Fretwell*, 5 Bing. (N. C.) 603; *Bambier v. Savage*, 62 Wis. 110; *Bent v. Cobb*, 9 Gray (Mass.) 387; *Johnson v. Buck*, 30 N. J. L. 338; *Smith v. Arnold*, 5 Mass. (U. S.) 414. In *Durrell v. Evans*, 1 H. & C. 174, it appeared that, on the 19th of October, the defendant, J. C. Evans, called on Messrs. Noakes and asked to see samples of the plaintiff's hops, which were shown to him. Upon asking the price, Mr. J. T. Noakes replied that he was instructed by the plaintiff not to sell under £18 per cwt. The defendant, J. C. Evans, said that was too high a price for them, and he should not give so high a price for them. He then left Messrs. Noakes's premises. On the afternoon of the same day, Friday (October 19), the plaintiff happened to be in the borough, and met the defendant, J. C. Evans. A conversation took place

was in the presence and at the desire of the buyer written and signed by the seller's traveller in a book belonging to

between them with reference to the plaintiff's hops. Mr. J. C. Evans offered the plaintiff £16 16 s. per cwt., which the plaintiff refused, but ultimately both parties went to Messrs. Noakes's counting-house and saw Mr. J. T. Noakes on the subject. Some further conversation took place as to the purchase of the hops, which ended in Mr. J. C. Evans refusing to give any more than £16 16 s. per cwt. The plaintiff (in the presence and hearing of Mr. Evans) asked Mr. J. T. Noakes whether he would recommend him (the plaintiff) to accept Mr. Evans's offer. Mr. Noakes advised him to do so, and the plaintiff agreed to sell the hops at that price. Mr. Noakes then wrote out a sale-note in duplicate.

By the custom of the hop trade, hops are payable on the Saturday week following the day of the sale. This transaction took place on Friday, the 19th day of October, and the money would consequently have become payable, in due course, on Saturday, October 27. Mr. Noakes, therefore, drew out the following memorandum, and dated it the 19th day of October, whereupon Mr. Evans requested him to alter the date to the 20th, in order that he might have another week's time for payment. The plaintiff and Mr. Noakes consented to this, and the alteration was accordingly made by Mr. Noakes, who then gave the said memorandum so altered to Mr. J. C. Evans, who took the same away with him, and he has never yet returned it. The said memorandum was torn from a book which contained a counterfoil, and which was filled up in the following form, and retained by Messrs. Noakes.

The following is a copy of the memorandum first referred to:—

"Messrs. Evans.

Bought of J. T. & W. Noakes.
Bags. Pocks. T. Durrell. }
Ryarsh & Addington. } £16 16 s.

20th

Oct. 19th, 1860."

The following is a copy of the counterfoil above referred to:—

"Sold to Messrs. Evans.

Bags. Pocks. D. Durrell. }
Ryarsh & Addington. } £16 16 s.
20th

Oct. 19th, 1860."

No note or memorandum (except as aforesaid) was signed or given by the defendants or any person on their behalf; nor was there any writing relating to the contract, except as above. Upon the trial, the defendant insisted that he had never signed or authorized the signing of his name to bind the bargain. The plaintiff insisted that the name "Messrs. Evans & Co.," written on the counterfoil, was so written by Noakes as the defendant's agent; that if written by himself, it would have been a sufficient signature according to the authority of *Johnson v. Dodgson, ante*, and that he was as much bound by the act of his agent in placing the signature there as if done by himself. The Court of Exchequer were unanimously of opinion that Noakes, throughout, had acted solely in behalf of the vendor, and that the request of the defendant, that the memorandum should be changed from the 19th to 20th, was to obtain an advantage from the vendor, but in no sense to make Noakes the agent of the purchaser. They, therefore, made absolute a rule for a non-suit, for which leave had been reserved at the trial. The Court of Exchequer Chamber, with equal unanimity, distinguished the case from *Graham v. Musson, ante*, and held that there was evidence to go to the jury that Noakes was the agent of the defendant, as well as of the plaintiff, in making the entries; and if so, that the writing of the defendant's name on the counterfoil was a sufficient signature according to the whole current of authority. The grounds for distinguishing the case from *Graham v. Musson, ante*, were stated by the different judges. CROMPTON, J.: "I cannot agree with my

the former, as follows: "Of North and Co., 30, Mats Maurs, at 71s.; cash two months. Fennings Wharf (signed) Joseph

brother WILD and Mr. LUSH that the document in question was merely an invoice, and that all that the defendant did was simply taking an invoice, and asking to have it altered; and if the jury had found that, a non-suit would have been right. But, on the contrary, I think that there was plenty of evidence to go to the jury on the question whether Noakes, the agent, was to make a record of a binding contract between the parties, and that there was at least some evidence from which the jury might have found in the affirmative." The learned judge then pointed out that the memorandum was in duplicate,—one "sold," the other "bought,"—made in the defendant's presence; that the latter took it, read it, had it altered, and adopted it; all of which facts he considered as evidence for the jury that Noakes was the agent of both parties. BYLES, J.: "What does the defendant do? First of all he sees a duplicate written by the hand of the agent, and he knows it is a counterpart of that which was binding on the plaintiff. He knew what was delivered out to him was a sale-note in duplicate, and accepts and keeps it. The evidence of what the defendant did, both before and after Noakes had written the memorandum, shows that Noakes was authorized by the defendant." BLACKBURN, J.: "The case in the court below proceeded on what was thrown out by my brother WILDE, and I agree with the decision of that court, if this document were a bill of parcels, or an invoice in the strict sense, viz., a document which the vendor writes out, not on the account of both parties, but as being the account of the vendor, and not a mutual account. But in the present instance I cannot, as a matter of course, look at this instrument as an invoice, a bill of parcels; as intended only on the vendor's account. Perhaps I should draw the inference that it was, but it

is impossible to deny that there was plenty of evidence that the instrument was written out as *the* memorandum by which, and by nothing else, both parties were to be bound. There certainly was evidence, I may say a good deal of evidence, that Noakes was to alter this writing, not merely as the seller's account, but as a document binding both sides . . . In *Graham v. Musson*, the name of the defendant, the buyer, did not appear on the document. The signature was that of Dyson, the agent of the seller, put there at the request of Musson, the buyer, in order to bind the seller; and, unless the name of Dyson was used as equivalent to Musson, there was no signature by the defendant; but in point of fact, 'J. Dyson' was equivalent to 'for or *per pro* North & Co., J. Dyson.'" In *Murphy v. Boese*, L. R. 10 Ex. 126, decided in 1875, it appeared that the plaintiff brought an action for the price of clocks sold by him to the defendant; and the plaintiff's traveller, when he took the order for the goods, wrote out, in the presence of the defendant, upon printed forms, two memoranda of it, putting the defendant's name upon them, and handing one of the papers to the defendant, who kept it; and it was held (distinguishing *Durrell v. Evans*) that there was no evidence that the plaintiff's traveller signed the memoranda as agent of the defendant, so as to bind him within § 17 of the statute of frauds. POLLOCK, B., said: "I think *Durrell v. Evans* can only be supported if it decides that the agency did not commence till after the memorandum was written out, and that will distinguish it from the facts before us. It might be said that the direction given by the defendant to Noakes, the factor, to alter the instrument, was an adoption of his act in preparing it, or a recognition *ab initio* of the whole document as containing the contract. Or one

Dyson"; it was held that this was not a sufficient note or memorandum of the bargain to satisfy the statute, Dyson not appearing on the evidence to be authorized to sign it as an agent for the buyer.¹

But where in an action to recover the price of goods sold by the plaintiff to the defendant, it appeared that the plaintiff's traveller when he took the order for goods wrote out in the presence of the defendant upon printed forms two memoranda of it, putting the defendant's name upon them, and handing one of the papers to the defendant who kept it, it was held, distinguishing *Durrell v. Evans*, *ante*, that there was no evidence that the plaintiff's traveller signed the memoranda as agent of the defendant, so as to bind him within the statute. The bare entry of a steward in his lord's contract book with his tenants is not evidence of itself that there was an agreement for a lease between the landlord and tenant.²

SEC. 426. Ratification of Agent's Acts.—*A subsequent ratification by a principal of a contract by an agent is equivalent to a previous authority.*³ Where, therefore, a broker made a contract in writing for the sale of goods, not being authorized by his principals at the time, and the latter afterwards assented to the contract, it was held that the broker was an agent duly authorized to bind his principals under the statute, at the time the contract was entered into.⁴ So where by an agreement a father and son, as mortgagees with power of sale, agreed to sell to the plaintiff all their estate and interest in a certain piece of land adjoining other land belonging to the plaintiff, and this agreement was signed by the plaintiff and by the son for himself and his father, and subsequently

might go farther and say that, from the nature of the transaction, and the meeting of the parties at the office, it might be thought that Noakes should act as the scribe of both parties in drawing up the memorandum. But here there is an entire absence of any act of recognition by the defendant of the traveller as his agent."

¹ *Graham v. Musson*, 7 Sc. 769; 5 Bing. (N. C.) 603; and see *Graham v. Fretwell*, 4 Sc. (N. R.) 25; 3 Man. & Gr. 368.

² *Murphy v. Boese*, L. R. 10 Ex. 126.

³ *Charlewood v. Duke of Bedford*, 1 Atk. 497.

⁴ *Maclean v. Dunn*, 1 Moo. & P. 761; and see *Acebal v. Levy*, 4 M. & Sc. 217; 10 Bing. 376; *Gosbell v. Archer*, 2 Ad. & El. 500; 4 N. & M. 485; *Fitzmaurice v. Bayley*, 6 E. & B. 868; 9 H. L. C. 78; *London & Birmingham Railway Co. v. Winter*, Cr. & Ph. 57.

the father and son sold the land to a third party who had notice of the agreement, it was held that though the evidence was insufficient to show any antecedent authority in the son to bind the father, yet the latter had by his subsequent conduct ratified the contract.¹

An agent cannot delegate his authority to another person. But if he does so, the act may be ratified by the principal.² Where the vendor of goods employed a broker for the purpose of selling them, and an intending purchaser authorized the broker's salesman to offer a certain price, who, in consequence, brought the parties together, and the parties, having concluded the contract in the absence of the salesman, dictated the terms of it to him, and he made an entry of the terms in his master's book, but did not sign it, and afterwards communicated the circumstances to the broker, who directed a clerk to enter and sign the contract in his book, and sent a sale note signed by himself to the vendor, but no sale note was sent to the purchaser, it was held that there was no note or memorandum in writing signed by an agent duly authorized to satisfy the statute.³

SEC. 427. Signature by Clerk of Auctioneer.—A signature by an auctioneer's clerk is sufficient to bind the purchaser. "It is certainly irregular," said LITTLEDALE, J., "that the contracting parties should act as each other's agent, but it is very different where the contract is signed by an individual who is not either of the contractors. Were it to be held otherwise, no broker could maintain an action in his own name, for the breach of a contract signed by him; and at every auction, if the auctioneer or his clerk were not allowed to be the agent of the contracting parties, at every bidding each purchaser would have to come to the table and sign his own name."⁴

¹ *Bigg v. Strong*, 4 Jur. (N. S.) 983; and see *Dyas v. Cruise*, 2 J. & Lat. 460; *Norris v. Cooke*, 7 Ir. C. L. R. 37.

² *Blore v. Sutton*, 3 Mer. 237.

³ *Henderson v. Barnewall*, 1 Y. & J. 387.

⁴ *Bird v. Boulter*, 1 Nev. & M. 316; 4 B. & Ad. 443; but see *Peirce v. Corf*, L. R. 9 Q. B. 210; *Harvey v.*

Stevens, 43 Vt. 653. But the question as to whether he has authority or not must depend upon the circumstances of each case. *Cormack v. Masterton*, 3 S. & P. (Ala.) 411; *Alna v. Plummer*, 4 Me. 258; *Frost v. Hill*, 3 Wend. (N. Y.) 386; *Eutz v. Mills*, 1 McNull (S. C.) 453; *Gett v. Bickell*, *ante*; *Hart v. Wood*, *ante*. As to the authority of a clerk of a telegraph

SEC. 428. Signature by Telegraph Clerk.—Where the instructions for a telegraphic message were signed by the defendant, but the telegram received by the plaintiff merely contained the names of the sender and receiver written by the company's clerk in the usual printed form, it was held that there was a sufficient signature by the defendant to render him liable to be charged on the contract.¹

SEC. 429. Broker is Agent for Both Parties.—A broker who is employed to sell goods for any person, and who agrees for the sale of them, and gives to the purchaser and to his employer bought and sale notes of the bargain, is an agent of both parties.² He has only a special authority, not a general one; and if he is employed to buy one kind of goods, and he buys another, the principal is not bound by his act.³ Where the plaintiff instructed the defendants to purchase for him fifty bales of cotton, and paid to the defendants £800, part of the purchase-money, and the defendants made a contract in their own names for the purchase of a much larger quantity, viz., 300 bales on account of the plaintiff and other principals, it was held in an action for money had and received that the plaintiff was entitled to recover back the money paid, as the defendants had not made a contract on which he could sue as principal.⁴

SEC. 430. Signed Entry in his Books Constitutes Contract.—A binding contract between the parties employing a broker is constituted by a signed entry in his books of a sale of the goods from the one to the other.

Company, in signing a despatch, see *Godwin v. Francis*, L. R. 5 C. P. 295.

¹ *Godwin v. Francis*, L. R. 5 C. P. 295; and see *McBlain v. Cross*, 25 L. T. (N. S.) 804.

² *Rucker v. Cammeyer*, 1 Esp. 104; *Simon v. Motivos*, 3 Burr. 1921; 1 W. Bl. 599.

³ *Pitts v. Beckett*, 13 M. & W. 747, *per* PARKE, B. Brokers and those buying and selling for others, necessarily act as agent for such parties, and are treated as having authority to bind such parties in transactions in which they act for them, upon the same principal that auctioneers are

treated as having such authority, and their signature to a memorandum of sale binds the parties if the memorandum is in other respects sufficient. *Lawrence v. Gallagher*, 10 J. & S. (N. Y.) 309; *Newberry v. Wall*, 84 N. Y. 576; *Butler v. Thompson*, 96 N. S. 412; *Coddington v. Goddard*, 16 Gray (Mass.) 442; *Baines v. Ewing*, L. R. 1 Exchq. 320; *Dickinson v. Silwall*, 4 Camp. 279; *Hinckley v. Arey*, 27 Md. 362; *Shaw v. Finney*, 13 Met. (Mass.) 453.

⁴ *Bostock v. Jardine*, 34 L. J. Ex. 142.

In *Hinde v. Whitehouse*,¹ the question was whether an entry made by an auctioneer on a catalogue of sale, not attached to the conditions of sale, was a sufficient memorandum. LORD ELLENBOROUGH said: "In respect to sales of goods it has been uniformly so holden ever since the case of *Simon v. Motivios*,² and it would be dangerous to break in upon a rule which affects all sales made by brokers acting between the parties buying and selling, and where the memorandum in the broker's book and the bought and sold notes transcribed therefrom, and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute to render the contract of sale binding on each."

In *Heyman v. Neale*,³ his Lordship said: "After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. . . . The entry made and signed by the broker, who is the agent of both parties, is alone the binding contract." And in *Thornton v. Charles*,⁴ PARKE, B., expressed an opinion to the same effect, saying with reference to the case of *Hawes v. Forster*:⁵ "Certainly it was the impression of part of the court, that the contract entered in the book was the original contract, and that the bought and sold notes did not constitute the contract." LORD ABINGER, C. B., however, held the contrary opinion, and in *Cumming v. Roebuck*,⁶ and *Thornton v. Meux*,⁷ Gibbs, C. J., and Abbott, C. J., also stated that the entry in the broker's book was not the original contract.

In *Sievwright v. Archibald*,⁸ however, the question seems

¹ 7 East, 569.

² 3 Burr. 1921; 1 W. Bl. 599.

³ 2 Camp. 337.

⁴ 9 M. & W. 802.

⁵ 1 Moo. & Rob. 368.

⁶ Holt, 172.

⁷ M. & M. 43.

⁸ 17 Q. B. 103; 20 L. J. Q. B. 529.

MR. BENJAMIN, in his work on Sales, after a careful review of the English cases, lays down the following rules:—

First. The broker's signed entry in his book constitutes the contract between the parties. *Heyman v. Neale*, 2 Camp. 337; *Sievwright v. Archibald*, 17 Q. B. 115; *Thompson v. Gardner*, 1 C. P. D. 177; *Thornton v. Charles*,

9 M. & W. 802. Holding the contrary, GIBBS, C. J., in *Cumming v. Roebuck*, Holt, 172; ABBOTT, C. J., in *Thornton v. Meux*, M. & M. 43; DENMAN, C. J., in *Townsend v. Drakeford*, 1 C. & K. 20; and LORD ABINGER in *Thornton v. Charles*, *ante*; but they are all overruled in *Sievwright v. Archibald*, *ante*.

Second. The bought and sold notes do not constitute the contract. PARKE, B., in *Thornton v. Charles*, *ante*; LORD ELLENBOROUGH in *Heyman v. Neale*, *ante*; *Sievwright v. Archibald*, *ante*. *Contra*. *Thornton v. Meux*, *ante*, and *dicta* in *Goom v. Affalo*, 6 B. & C. 117; and *Trueman v. Loder*, 11 Ad. & El.

to have been finally settled. There a broker authorized by the plaintiff, to sell 500 tons of Dunlop iron made a bargain

589, all of which are disapproved of in *Sievewright v. Archibald*, *ante*.

Third. But the bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute; even though there be no entry in the broker's book, or what is equivalent, only an unsigned entry. This was first settled by *Goom v. Affalo*, and reluctantly admitted to be no longer questionable in *Sievewright v. Archibald*.

Fourth. Either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book. This was the decision in *Hawes v. Forster*, 1 Mood. & Rob. 368, of the common pleas in *Parton v. Crofts*, 16 C. B. (N. S.) 11; 33 L. J. C. P. 189; *Newberry v. Wall*, 84 N. Y. 576; S. C. 65 ib. 484; *Butler v. Thompson*, 92 U. S. 412; and of the common pleas division in *Thompson v. Gardiner*, 1 C. P. D. 777.

Fifth. Where one note only is offered in evidence, the defendant has the right to offer the other note or the signed entry in the book to prove a variance. *Hawes v. Forster*, *ante*, is direct authority in relation to the entry in the book, and in all the cases on variance, particularly in *Parton v. Crofts*, *supra*, it is taken for granted that the defendant may produce his own bought or sold note to show that it does not correspond with the plaintiff's.

Sixth. As to *variance*. This may occur between the bought and sold notes where there is a signed entry, or where there is none. It may also occur when the bought and sold notes correspond, but the signed entry differs from them. If there be a signed entry, it follows from the authorities under the *first* of these propositions that this entry will in general control the case, because it constitutes the

contract of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain. If, however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury whether the acceptance by the parties of the bought and sold notes constitutes evidence of a new contract modifying that which was entered in the book. This is the point established by *Hawes v. Forster*, 1 Mood. & R. 368, according to the explanation of that case first given by PARKE, B., in *Thornton v. Charles*, 9 M. & W. 802, afterwards by PATTERSON, J., in *Sievewright v. Archibald*, 17 Q. B. 115; 20 L. J. Q. B. 529, and adopted by the other judges in this last named case.

Seventh. If the bargain is made by correspondence, and there is a variance between the agreement thus concluded and the bought and sold notes, the principles are the same as those just stated which govern variance between a signed entry and the bought and sold notes, as decided in *Heyworth v. Knight*, 17 C. B. (N. S.) 298; 33 L. J. C. P. 298.

Eighth. If the bought and sold notes vary, and there is no signed entry in the broker's book, nor other writing showing the terms of the bargain, there is no valid contract. 1 Chitty Contr. (11th Am. ed.) 551; *Suydam v. Clark*, 5 Sandf. 133; *Butters v. Glass*, 31 U. C. Q. B. 379. This is settled by *Thornton v. Kempster*, 5 Taunt. 786; *Curving v. Roebuck*, Holt, 172; *Thornton v. Meux*, 1 M. & M. 43; *Grant v. Fletcher*, 5 B. & C. 436; *Gregson v. Rucks*, 4 Q. B. 747; and *Sievewright v. Archibald*, 17 Q. B. 115; 20 L. J. Q. B. 529. The only opinion to the contrary is that of ERLE, J., in the last named case. In one case, however, at *nisi prius*, Rowe

with the defendant to sell it to him for a price exceeding £10. The broker sent a note to the plaintiff expressing that he had sold him 500 tons Dunlop iron, and a note to the defendant expressing that he had bought for him 500 tons Scotch iron. Dunlop's is Scotch iron, but not the only kind of Scotch iron. The broker made no signed entry in his book. After this there was a negotiation between the plaintiff and defendant as to the terms on which the defendant might be let off the contract, in which both treated the contract as binding; but there was nothing to show whether they considered the contract to be for Scotch iron generally, or only for Dunlop's, or that either was aware of the variance between the notes. The plaintiff brought an action on a contract to deliver Dunlop's iron. *Non assumpsit* was pleaded, and at the trial the variances between the notes appeared. The declaration was then amended so as to make the contract be to deliver Scotch iron; and the jury found that the defendant had ratified the contract contained in the bought note, and the plaintiff obtained a verdict. On a motion to enter a verdict for the defendant, it was held that the variance between the bought and sold notes was material; and that there was no sufficient memorandum of a contract to satisfy the statute.

SEC. 431. Bought and Sold Notes do not Constitute Contract, but are Proper Evidence of it.—It is now well settled that the bought and sold notes do not constitute the contract. In *Heyman v. Neale*,¹ LORD ELLENBOROUGH said: "The bought and sold note is not sent on approbation, nor does it constitute the contract. . . . What is called the bought and sold note is only a copy of (the entry in the broker's book) which would be valid and binding although

v. Osborne, 1 Stark. 140, LORD ELLENBOROUGH held the defendant bound by *his own signature* to a bought note delivered to the vendor, which did not correspond with the note signed by the broker and sent to the defendant.

Lastly. If a sale be made by a broker on credit, and the name of the purchaser has not been previously communicated to the vendor, evidence

of usage is admissible to show that the vendor is not finally bound to the bargain until he has had a reasonable time, after receiving the sold note, to inquire into the sufficiency of the purchaser, and to withdraw if he disapproves. *Hodgson v. Davies*, 2 Camp. 531; *Brandao v. Barnett*, 3 C. & B. 519.

¹ 2 Camp. 337.

no bought or sold note was ever sent to the vendor and purchaser.”¹ In *Goom v. Afflalo*,² on the other hand, ABBOTT, C. J., thought the contrary, and in *Thornton v. Meux*³ it was expressly decided at *nisi prius* that the bought and sold notes, and not the entry in the broker’s book, were the proper evidence of the contract.⁴ In *Sievwright v. Archibald*⁵ these cases were disapproved of.

Although the bought and sold notes do not constitute the contract, nevertheless, it appears that they are the proper evidence of the contract,⁶ but it must be shown that they correspond with each other,⁷ and the rule applies even though there is no entry in the broker’s book or though the entry is unsigned. In *Goom v. Afflalo*,⁸ ABBOTT, C. J., said: “The entry in the book has been called the original, and the notes copies; but there is not any actual decision that a valid contract may not be made by notes duly signed if the entry be unsigned. . . . We have no doubt that a broker ought to sign his book, and that every punctual broker will do so. But if we were to hold such a signature essential to the validity of a contract, we should go further than the courts have hitherto gone, and might possibly lay down a rule that would be followed by serious inconvenience, because we should make the validity of the contract to depend upon some private act of which neither of the parties to the contract would be informed, and thereby place it in the power of a negligent or fraudulent man to render the engagements of parties valid or invalid at his pleasure.”⁹

SEC. 432. Either Note may Prove Contract if no Variance. — Where it is sought to establish a contract by means of bought and sold notes, it is not necessary to produce both the bought note and the sold note. If it can be proved by

¹ And see *Thornton v. Charles*, 9 M. & W. 802.

² 6 B. & C. 117.

³ M. & M. 43.

⁴ See also *Trueman v. Loder*, 11 Ad. & El. 589.

⁵ 17 Q. B. 103; 20 L. J. Q. B. 529.

⁶ *Dickenson v. Lilwal*, 1 Stark, 128; *Cumming v. Roebuck*, Holt, 172; *Goom v. Afflalo*, 6 B. & C. 117; *Thornton v. Meux*, M. & M. 43; *Short v. Spackman*, 2 B. & Ad. 962.

⁷ *Cumming v. Roebuck*, Holt, 172; *Grant v. Fletcher*, 5 B. & C. 436; *Thornton v. Kempster*, 1 Marsh, 355; *Thornton v. Meux*, M. & M. 43; *Kempson v. Boyle*, 3 H. & C. 763.

⁸ 6 B. & C. 117.

⁹ And see *Sievwright v. Archibald*, 17 Q. B. 103; 20 L. J. Q. B. 529; *re Thorp, ex parte Thomas*, 5 New Rep. 230.

the plaintiff that there is no variance between the notes themselves, and between the notes and the entry in the broker's book, there is a sufficient contract. It is, of course, a good defence to prove that there is such a variance. In *Hawes v. Forster*,¹ LORD DENMAN, C. J., said: "I am of opinion that the plaintiffs have proved a contract by producing the bought note. . . . It is not shown that the sold note delivered to the defendants differed from the bought note delivered to the plaintiffs: had that been shown to be the case, it would have been very material; but, in the absence of all proof of that nature, I am clearly of opinion that I must look to the bought note, and to that alone, as the evidence of the terms of the contract." And in *Parton v. Crofts*,² ERLE, C. J., said: "In *Sievwright v. Archibald* the bought and sold notes differed, and so the evidence of the contract failed. Here the sold note only was produced, and there was nothing to impeach it. That distinguishes the two cases. To satisfy the seventeenth section of the statute, it is enough to produce a memorandum of the contract, signed by the party to be charged thereby, or by an agent thereunto duly authorized."

SEC. 433. Variance between Signed Entry and Notes.—Where there is a signed entry of the contract in the broker's book, and the bought and sold notes differ from each other, and one agrees with the signed entry, then the entry in the broker's book, together with the note agreeing with it, constitutes the contract. But where there is a signed entry, and the bought and sold notes correspond with each other but differ from the entry, then, according to *Hawes v. Forster*,³ if these documents have been delivered to the parties after the entry in the book has been signed, it becomes a question of fact for the jury to decide whether there has been a new contract made between the parties on the footing of those notes.⁴

Where a contract has been entered into by letters, defi-

¹ 1 Moo. & Rob. 368.

² 16 C. B. (N. S.) 22; 33 L. J. C. P. 189.

³ 1 Moo. & Rob. 368.

⁴ See also *Thornton v. Charles*, 9 M. & W. 802; *Sievwright v. Archi-*

bald, 17 Q. B. 115; 20 L. J. Q. B. 529; *Townsend v. Drakeford*, 1 Car. & K. 22; *Goom v. Affalo*, 9 D. & R. 148; 6 B. & C. 117; *Thornton v. Meux*, 1 M. & M. 43.

nitely fixing the terms, and subsequently bought and sold notes containing different terms pass between the parties, the letters, in the absence of any agreement to the contrary, will constitute the contract.¹

Where there is no signed entry in the broker's books, and no writing from which the terms of the contract can be gathered, and the bought and sold notes vary from each other, no contract arises.

Thus, where a broker, employed by the plaintiff to sell Petersburg clean hemp and by the defendant to buy hemp, sold to the defendant, and by mistake gave him a sale note of Riga Rhine hemp, a description of hemp of a different quality from the Petersburg hemp, and gave the plaintiff a note of the sale of Petersburg clean hemp, it was held that no contract for the sale of the hemp in question subsisted between the parties.² In *Grant v. Fletcher*,³ ABBOTT, C. J., said: "The broker is the agent of both parties, and as such may bind them by signing the same contract on behalf of the buyer and seller. But if he does not sign the same contract for both parties, neither will be bound. It has been decided accordingly that where the broker delivers a different note of the contract to each of the contracting parties there is no valid contract."⁴ In *Rowe v. Osborne*⁵ it was held that a vendee of goods was bound by the contract as stated in the note signed by him, and delivered by the broker who effected the sale to the vendor, although this note varied from the note delivered by the broker to the vendee.

SEC. 434. Immaterial Variance does not Avoid Contract.—An unimportant or immaterial variation between the bought and sold notes will not avoid a contract. Thus, where a broker delivered to the vendor bought and sold notes written on one sheet of paper, and the day for payment of the goods was inserted at the end of the bought note only, but in those

¹ *Heyworth v. Knight*, 17 C. B. (N. S.) 298; 10 Jur. (N. S.) 866; 33 L. J. C. P. 298, disapproving of the decision of the Privy Council in *Cowie v. Remfry*, 5 Moo. P. C. C. 232.

² *Thornton v. Kempster*, 5 Taunt. 786; and see *Cumming v. Roebuck*, Holt, 172.

³ 5 B. & C. 437.

⁴ And see *Thornton v. Meux*, M. & M. 43; *Heyman v. Neale*, 2 Camp. 337; *Gregson v. Ruck*, 4 Q. B. 747; and *Sieveright v. Archibald*, 17 Q. B. 103; 20 L. J. Q. B. 529.

⁵ 1 Stark, 140.

made out for the purchasers the day was inserted at the end of the bought as well as of the sold note, it was held that, as the bought and sold notes delivered to the vendor were both written on one sheet of paper, the whole must be considered as forming one contract; and consequently that there was no variance.¹ So where the broker made a mistake in the names of the contracting parties, it was held that the contract was not thereby avoided, it not being shown that any one was prejudiced thereby.²

SEC. 435. Sale on Credit by Broker. Vendor's Right to Retract.—If goods in the City of London are sold by a broker to be paid for by a bill of exchange, the vendor has a right, within a reasonable time, if he is not satisfied with the sufficiency of the purchaser, to annul the contract. But the vendor must intimate his dissent as soon as he has had an opportunity to inquire into the solvency of the purchaser; and five days has been considered too long a period for this purpose.³

SEC. 436. Broker Employed by Purchaser, only his Sold Note when Binding.—Where the plaintiff employed a broker to purchase some hemp for him, and the broker having negotiated with the defendant, signed and sent to him a sold note, and the defendant afterwards signed and sent to the broker a note differing in several material points from the note sent to him, it was held that it was a question for the jury whether both parties intended that the note signed by the defendant should be the contract, in which case there was a sufficient memorandum within the statute of frauds; or whether the defendant never intended to be bound as seller unless the buyer also signed a correlative note to bind him, and if so, there was no valid contract.⁴

SEC. 437. Revocation of Broker's Authority.—The authority of a broker may be revoked by his employer at any time before he has signed a contract for him. Thus, the authority

¹ *Maclean v. Dunn*, 1 Moo. & P. 224, citing *Brandao v. Barnett*, 3 C. B. 519; 12 C. & F. 787; and 1 Sm. L. C. 761.

² *Mitchell v. Lapage*, Holt, 253. 549, ed. 1867.

³ *Hodgson v. Davies*, 2 Camp. 530. ⁴ *Moore v. Campbell*, 10 Ex. 323; 23 L. J. Ex. 310.
As to whether this custom should be proved, see *Benj. on Sales*, 2d ed.

of a broker employed to effect a policy of insurance may be revoked after the underwriters have signed the slip, till such time as they have actually subscribed the policy; and if the broker, having procured a slip to be written on terms within the scope of his original authority, receives an intimation from his principals that they will not submit to those terms, and afterwards effects the policy, and pays the premium to the underwriters, he can maintain no action against his principals for commission or money paid.¹

¹ *Warwick v. Slade*, 3 Camp. 127; and see *Farmer v. Robinson*, 2 Camp. 339, n. A broker's note or memorandum of sale of goods, containing the names of both parties and the terms of sale, and delivered to both parties, makes a valid contract within the statute of frauds. *Newberry v. Wall*, 84 N. Y. 576. If a broker makes no entry in his books, the bought and sold notes, together, constitute a memorandum. *Suydam v. Clark*, 2 Sandf. (N. Y.) 133; *Peltier v. Collins*, 3 Wend. (N. Y.) 459; *Davis v. Shields*, 26 id. 341; *Gregson v. Ruck*, 4 Q. B. 735; *Loomis v. Spencer*, 1 D. & R. 32; *Grant v. Fletcher*, 5 B. & C. 436. But if he makes an entry in his books, the bought and sold notes must agree therewith. *Hawes v. Forster*, 3 Moo. & R. 368; *Short v. Spackman*, 2 B. & Ad. 962; *Loamer v. Dawson, Cheeves* (S. C.) 68. If either is produced alone, it will be presumed that they do correspond. *Parton v. Crofts*, 16 C. B. (N. S.) 11; *Hawes v. Forster, ante*. In *Wiener v. Whipple*, 53 Wis. 298, the agent signed his own name, and, it being shown that he acted as agent, and had authority to do so, the contract was binding on his principal. But in *Morgan v. Bergen*, 3 Neb. 209, it was held that a memorandum *must be signed by the agent in the principal's name*, and that if the name of the agent only is signed thereto, it must be treated as the agent's contract. See also *Briggs v. Partridge*, 64 N. Y. 357, where the same rule was adopted as to a contract under seal. See also *Moody v. Smith*, 70 N. Y. 598.

SEVENTH, EIGHTH, AND NINTH SECTIONS OF THE STATUTE OF FRAUDS.

SECTION 7. All declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

SEC. 8. Provided always, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law; then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding.

SEC. 9. All grants or assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.

CHAPTER XVI.

DECLARATIONS OF TRUST.

SECTION.

- 438. All Declarations or Creations of Trust shall be in Writing.
 - 439. Freeholds and Chattels Real within Statute. Charitable Uses.
 - 440. Chattels Personal not.
 - 441. Volunteer. Declaration must be Clear and Irrevocable.
 - 442. Trust of Money Secured on Mortgage.
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 - 444. What is Sufficient Declaration of Trust.
 - 445. Statute not Allowed to Cover Fraud.
 - 446. Lands in a Colony.
 - 447. Formalities Required.
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 - 449. Requisites to Proof of Trust.
 - 450. Signature.
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SECTION 438. All Declarations or Creations of Trust shall be in Writing. — The seventh section of the statute of frauds provides that “all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void, and of none effect.”¹ Before the statute of frauds a trust of lands might have been declared by parol.²

SEC. 439. Freeholds and Chattels Real within the Statute. Charitable Uses. — Trusts of freeholds, copyholds,³ and of

¹ *Adlington v. Cann*, 3 Atk. 149, 151; *Fordyce v. Willis*, 3 Bro. C. C. 587; *Thrupton v. Attorney General*, 1 Vern. 341; *Bellasis v. Compton*, 2 Vern. 294. In some of the States this (7th) section of the statute is omitted, as in Kentucky, Virginia, West Virginia, Wyoming, Tennessee, Texas, Rhode Island, Ohio, North Carolina, Delaware, and Connecticut.

² *Withers v. Withers*, Amb. 152;

Langfield v. Hodges, Lofft. 230; *Acherley v. Acherley*, 7 Bro. P. C. 273; but see *Devenish v. Baines*, Prec. Ch. 5.

³ *Skett v. Whitmore*, Freem. 280; *Riddle v. Emerson*, 1 Vern. 108; Eq. Cas. Abr. 381, pl. 3; *Bellasis v. Compton*, 2 Vern. 294; Eq. Cas. Abr. 381, pl. 5; *Hutchins v. Lee*, 1 Atk. 447; *Forster v. Hale*, 3 Ves. 696.

chattels real are within this section of the statute, and therefore a trust relating to such interests must be proved in the manner provided by the act.¹ Gifts to charitable uses are within the statute, and, therefore, a trust for a charity cannot be set up without a declaration in writing, even though there are such circumstances in favor of the charity that a testator could not mean anything else.²

SEC. 440. Chattels Personal not.—But chattels personal are not within the statute, and a declaration of trust relating to them may therefore be made by parol, either by the donor declaring himself, or some other person, a trustee.³

SEC. 441. Volunteer. Declaration must be Clear and Irrevocable.—There may be a valid declaration of trust in favor of a volunteer.⁴ The words of the declaration must be clear, unequivocal, and irrevocable,⁵ and if there is no doubt about it, the court will give effect to the trust as readily as if it were in writing.⁶ Remarks made in the course of conversation are not sufficient. "It may be doubtful," said SIR W. P. WOOD, V. C., "whether the court would hold that a voluntary trust could be created by merely oral expression; so much might depend on a correct report of the words. If, as part of a verbal communication by a proposed settlor, he had used words of this sort: 'I propose to do so and so,' or, 'it is my present intention to do it,' the effect might be to show that he had not at the time absolutely determined to create the trust; and in such a case, I can well imagine that the court would require extremely strong evidence before it would say that an irrevocable trust was created." Where a

¹ Lloyd v. Spillett, 3 P. Wms. 344, affd. 2 Atk. 148; Barn. 384; Adlington v. Cann, 3 Atk. 150; Boson v. Statham, 1 Eden, 513.

² Fane v. Fane, 1 Vern. 31; Fordyce v. Willis, 3 Bro. C. C. 587; Nab v. Nab, 10 Mod. 404; Lucas v. Lucas, 1 Atk. 270; West, 456; Bayley v. Boulcott, 4 Russ. 347; Thorpe v. Owen, 5 Beav. 224; Benbow v. Townsend, 1 M. & K. 510; George v. Bank of England, 7 Price, 646; McFadden v. Jenkyns, 1 Hare, 461; 1 Ph. 157; Hughes v. Stubbs, 1 Hare, 476; Hawkins v. Gardiner, 2 Sm. & G. 451;

Peckham v. Taylor, 31 Beav. 250; Grant v. Grant, 34 Beav. 623; Lister v. Hodson, L. R. 4 Eq. 30; Parker v. Stones, 38 L. J. Ch. 46; Roberts v. Roberts, 15 W. R. 117; 15 L. T. (N. S.) 260.

³ Jones v. Lock, 1 Ch. 28, overruling a dictum contra in Scales v. Maude, 6 D. M. G. 51.

⁴ Grant v. Grant, 34 Beav. 623.

⁵ Peckham v. Taylor, 31 Beav. 254.

⁶ Paterson v. Murphy, 11 Hare, 88; and see Dipples v. Corles, ib. 184.

father put a check into the hand of his son, an infant of nine months old, saying: "I give this to baby for himself," and then took back the check and put it away, and also expressed his intention of giving the amount of the check to the son, and the check was found among his effects after his death; it was held that there had been no valid declaration of trust.¹

SEC. 442. Trust of Money Secured on Mortgage.—A parol declaration of a trust of a sum of money secured upon a mortgage of real estate has been supported. Thus, where A took a mortgage in the name of B, declaring that the principal sum should be for the benefit of B, and received the interest during his life, it was held that the money after the death of A belonged to B by force of the parol declaration.²

SEC. 443. Parol Change of Trust.—If a trust is once declared of personalty by parol, the donor cannot afterwards change it by a parol declaration.³

SEC. 444. What is Sufficient Declaration of Trust.—The parol approval of a draft declaration of trust, subject to instructions as to alterations in some of the particulars, is not a sufficient declaration of a trust of personalty.⁴ Where the settlor of a fund directs an additional sum to be invested in the names of the trustees of the fund, and the dividends are treated as if they accrued from the original fund, there will be no resulting trust for the settlor, but the additional sum will be considered as impressed with the trusts of the settlement as an augmentation of the trust fund.⁵

SEC. 445. Statute not Allowed to Cover Fraud.—The statute of frauds cannot be used by a defendant to cover a fraudulent act. Therefore, where the plaintiff conveyed an estate to the defendant by a deed, in which the conveyance was expressed to be absolute in consideration of a sum of money

¹ *Jones v. Lock*, L. R. 1 Ch. 25; and see *Hughes v. Stubbs*, 1 Hare, 476; *Maguire v. Dodd*, 9 Ir. Ch. Rep. 452; *Moore v. Moore*, L. R. 18 Eq. 476.

² *Crabb v. Crabb*, 1 M. & K. 511; *Kilpin v. Kilpin*, ib. 533, per SIR J. LEACH.

³ *Re Sykes's Trusts*, 2 J. & H. 415.

⁴ *Benbow v. Townsend*, 1 M. & K. 506; and see *Bellasis v. Compton*, 2 Vern. 294.

⁵ *Re Curteis' Trusts*, L. R. 14 Eq. 217.

paid by the defendant, but no purchase-money actually passed, and the plaintiff alleged that he conveyed the estate to the defendant as a trustee for him; and the defendant in his answer admitted that he gave no consideration for the estate, but stated that the plaintiff made the conveyance, fearing that an adverse decision would be made against him in a suit then pending in chancery; and that it was understood that the defendant should account to the plaintiff for the rents until he could make arrangements for paying the purchase-money, and if no such arrangements could be made, that he should reconvey the estate; but nevertheless claimed to hold it discharged of any trust, and claimed the benefit of the statute; it was held that the statute could not be pleaded in answer to the plaintiff's claim, and that the defendant must reconvey the estate to the plaintiff.¹ But where A, the owner of estates in the Bedford Level, wishing to give his son a qualification as bailiff, for which, according to the Bedford Level Act, it is necessary to "have" 400 acres in the Level, wrote to the registrar of the Level, stating his wish, and asking him to find a qualification; and the registrar thereupon, without any further instructions, selected out of A's land the smallest lot that exceeded 400 acres, and sent to him a deed, by which he purported to convey it to the son in fee, in consideration of natural love and affection, and the deed was at once executed by A and registered; and the son died soon after without ever having heard of the transaction; it was held on a bill filed by A to establish his title to the land, against the infant heiress-at-law of the son, that, on the ground of trust, or of mistake, or on both grounds, he was entitled to the relief sought, as it clearly appeared that neither he nor the registrar intended or considered the transaction to have the effect of making the son the beneficial owner, nor intended any fraud or illegality.² In *May v. May*,³ a conveyance of property by a father to his son to give him a qualification to vote, was held not invalid, but a bounty. In *Groves v. Groves*,⁴ property was purchased by one person and conveyed to another, in order to give the latter a vote at parliamentary elections, and the court would not assist the

¹ *Haigh v. Kaye*, L. R. 7 Ch. 469; and see *Lincoln v. Wright*, 4 De G. & J. 16; *Davies v. Otty*, 35 Beav. 208.

² *Childers v. Childers*, 1 De G. & J. 482.

³ 33 Beav. 81. ⁴ 3 Y. & J. 163.

purchaser, and his bill seeking to make the grantee a trustee was dismissed.

In *Rex v. Portington*,¹ it was held that the statute of frauds did not bind the Crown, but took place only between party and party. In *Adlington v. Cann*,² however, LORD HARDWICKE said that he was doubtful as to this doctrine that the king was not bound by a statute unless he was expressly named, but referred to a case upon the sixteenth section of the statute in which it had been determined that he was not.

SEC. 446. Lands in a Colony. — The statute does not apply to lands in a colony acquired before the statute was passed. English subjects, wherever they go, carry their laws with them, and therefore a new colony is to be governed by the laws of England existing at the time when possession is taken, though afterwards acts of parliament made in England without naming the colony will not be binding there.³

SEC. 447. What Formalities Required. — It will be observed that the statute does not require that a trust shall be declared in writing, but that it shall be “manifested and proved” by writing, which must be signed.⁴ “It is not required by the statute,” said LORD ALVANLEY, “that a trust should be created by a writing; and the words of the statute are very particular in the clause respecting declarations of trust. It does not by any means require that all trusts shall be created only by writing; but that they shall be manifested and proved by writing; plainly meaning, that there should be evidence in writing, proving that there was such a trust. Therefore, unquestionably it is not necessarily to be created by writing, but it must be evidenced by writing, and then the statute is complied with; and, indeed, the great danger of parol declarations, against which the statute was intended to guard, is entirely taken away.”⁵

SEC. 448. Evidence of Trust. — A trust may be manifested and proved by a declaration made by the trustee even after

¹ 1 Salk. 162.

² 3 Atk. 154.

³ See 2 P. Wms. 75; *Gardiner v. Fell*, 1 Jac. & W. 22.

⁴ *Denton v. Davies*, 18 Ves. 503.

⁵ *Forster v. Hale*, 3 Ves. 707; and see S. C. 5 Ves. 315, *per* LORD LOUGH-

BOROUGH; *Davies v. Otty*, 35 Beav. 540; *Smith v. Matthews*, 3 De G. F. & J. 151, *per* TURNER, L. J.; *Donohoe v. Conrahy*, 2 J. & Lat. 696. As to whether these cases carry out the intention of the framers of the statute, see Lewin on Trusts, 6th ed. 49.

the death of the *cestui que trust*,¹ by letters written by the settlor,² by an affidavit,³ a recital in a bond,⁴ or deed,⁵ even though the deed may be inoperative,⁶ or by a mere memorandum promising to declare a trust.⁷ Where a lease was granted to W, who afterwards committed an act of bankruptcy, and then executed a declaration of trust in favor of R; it was held, it having been found on an issue directed by the court that W's name was used in trust for R, that the lease did not pass to W's assignees.⁸

SEC. 449. Requisites to Proof of Trust.—When it is sought to establish a declaration of trust from informal documents, there must be demonstration that they relate to the subject-matter,⁹ and the trust must be shown to be certain in its nature and in its object, otherwise it must fail.¹⁰ Parol evidence is admissible to show the position in which the writer of letters stood when he wrote them, the circumstances by which to his knowledge he was then surrounded, and the degree of weight and credit which, independently of any question of construction, may belong to the letters.¹¹

SEC. 450. Signature.—The declaration of trust must be signed "by the party who is by law enabled to declare such trust"; and it is now settled that the signature must be by the beneficial owner, and not by a trustee who has the legal estate;¹² and the rule applies to personal as well as to real estate.¹³

¹ *Ambrose v. Ambrose*, 1 P. Wms. 321; *Crop v. Norton*, 9 Mod. 233; 2 Atk. 74; *Barn*. 179.

² *O'Hara v. O'Neill*, 7 Bro. P. C. 227; *Forster v. Hale*, 3 Ves. 696; S. C. 5 Ves. 308; *Gardner v. Rowe*, 2 S. & S. 354; *Morton v. Tewart*, 2 Y. & C. 67; *Bentley v. Mackay*, 15 Beav. 12; *Childers v. Childers*, 1 De G. & J. 482.

³ *Barkworth v. Young*, 4 Drew, 1. Under the old practice an admission in an answer was sufficient: *Hampton v. Spencer*, 2 Vern. 288; *Nab v. Nab*, 10 Mod. 404; *Ryall v. Ryall*, 1 Atk. 59; *Cottingham v. Fletcher*, 2 Atk. 155; *Wilson v. Dent*, 3 Sim. 385.

⁴ *Moorecroft v. Dowding*, 2 P. Wms. 314.

⁵ *Deg v. Deg*, 2 P. Wms. 412.

⁶ *Re Bennett's Settlement Trust*, 16 W. R. 331; 17 L. T. (N. S.) 438.

⁷ *Bellamy v. Burrow*, Cas. temp. Talb. 98.

⁸ *Gardner v. Rowe*, 2 S. & S. 340, affd. 5 Russ. 258; see also *Earl of Plymouth v. Hickman*, 2 Vern. 167.

⁹ *Forster v. Hale*, 3 Ves. 708; *Smith v. Matthews*, 3 De G. F. & J. 151.

¹⁰ *Morton v. Tewart*, 2 Y. & C. C. 80, per KNIGHT BRUCE, V. C.; *Forster v. Hale*, 3 Ves. 707; *Smith v. Matthews*, 3 De G. F. & J. 151, 2.

¹¹ *Morton v. Tewart*, 2 Y. & C. C. C. 77.

¹² *Tierney v. Wood*, 19 Beav. 330; *Donohoe v. Conrahy*, 2 J. & Lat. 688.

¹³ *Ex parte Pye*, 18 Ves. 140, *Bridge v. Bridge*, 16 Beav. 315.

CHAPTER XVII.

RESULTING TRUSTS.

SECTION.

451. Trusts Arising, etc., by Act of Law not within Statute.
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480. Transfer of Trusts.

SECTION 451. **Trusts Arising, Resulting, Transferred, or Extinguished by Act of Law Excepted.**—The eighth section of the statute of frauds provides “that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such a case, such

trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding.”¹

SEC. 452. Trust of Part of Estate.—If a trust is declared of a part only of an estate, and the instrument creating the trust, whether a deed or will, does not mention the residue, the equitable interest therein will result to the settlor.²

Where the whole legal interest of a grantor is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted results to the grantor or to his heir of legal personal representatives. But where the whole legal interest is given for a particular purpose, with an intention to give to the grantee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the grantee, and there is no resulting trust. Thus, a devise to A and his heirs charged with the testator's debts is a beneficial devise, subject to a particular purpose, and there will be no resulting trust; but if the devise is upon trust to pay debts, that being a devise for a particular purpose only, a trust will result for the heir.³ Where estates are devised to executors upon trust, to sell and to invest part of the proceeds of the sale for a particular purpose, but no trust is declared of the sum so reserved, after the purpose is satisfied, there will be a resulting trust for the heir.⁴ The fact that a trust given for a particular purpose has lapsed will not prevent a trustee from taking beneficially under the rule in *King v. Denison*.⁵

SEC. 453. Devise of Residue.—Under a devise of all the residue of the testator's estate and effects whatsoever and wheresoever, of what nature or kind so ever, to trustees upon

¹ This section does not extend to wills; see Lewin on Trusts, 6th ed. 171.

² *Culpepper v. Aston*, 2 Ch. Cas. 115; *Cook v. Gwavas*, cited in *Roper v. Radcliffe*, 9 Mod. 187; *Lloyd v. Spillet*, 2 Atk. 150; *Cottingham v. Fletcher*, ib. 156; *Northern v. Carnegie*, 4 Drew, 587; *Mapp v. Elcock*, 3 H. L. C. 492.

³ *King v. Denison*, 1 V. & B. 272, *per* LORD ELDON; and see *Wood v. Cox*, 2 M. & C. 684; *Rogers v. Rogers*, 3 P. Wms. 193.

⁴ *Stonehouse v. Evelyn*, 3 P. Wms. 252; *Watson v. Hayes*, 5 M. & C. 125; *Page v. Leapingwell*, 18 Ves. 463; *Mariott v. Turner*, 20 Beav. 557.

⁵ *Supra*, *Tregonwell v. Sydenham*, 3 Dow. 210.

trusts applicable only to personal property, the real estate will pass with a resulting trust for the heir.¹ But if the trusts may be applicable to real estate, then the real estate will pass.²

SEC. 454. Trusts Vague, Lapsed, Unlawful.—If the trusts declared are so vague that they cannot be executed,³ or if they lapse,⁴ or are void because of unlawfulness,⁵ they will result. So also a trust will result when the instrument creating the trust shows that it was not intended that the grantee should take beneficially, as where the conveyance, devise, or bequest is to A “upon trust,” and no trust is declared.⁶

SEC. 455. Purchases made in the Names of Strangers.—Where property is bought by one person in the name of a stranger, to whom the conveyance is made, there will be a resulting trust for the person who paid the purchase-money. “The clear result of all the cases,” said EYRE, C. B., in *Dyer v. Dyer*,⁷ “without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers or others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or *successivé*, results to the man who advanced the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffer.”⁸ No resulting trust will be created by the mere expression of a

¹ *Dunnage v. White*, 1 Jac. & W. 583; *Lloyd v. Lloyd*, L. R. 7 Eq. 458; *Longley v. Longley*, L. R. 13 Eq. 133.

² *D’Almaine v. Moseley*, 1 Drew, 629; *Coard v. Holderness*, 20 Beav. 147.

³ *Stubbs v. Sargon*, 2 Keen, 255; 3 M. & C. 507; *Williams v. Kershaw*, 5 C. & F. 111.

⁴ *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Williams v. Coade*, 10 Ves. 500.

⁵ *Gibbs v. Rumsey*, 2 V. & B. 294; *Page v. Leapingwell*, 18 Ves. 463; *Tregonwell v. Sydenham*, 3 Dow. 194.

⁶ *Dawson v. Clarke*, 18 Ves. 254; *Penfold v. Bouch*, 4 Hare, 271; *Attorney General v. Dean and Canons of Windsor*, 24 Beav. 679; 8 H. L. C. 369; *Aston v. Wood*, L. R. 6 Eq. 419; *Barrs v. Fewkes*, 2 H. & M. 60.

⁷ 2 Cox, 93.

⁸ As to conveyance taken jointly, see *Ex parte Houghton*, 17 Ves. 253; *Rider v. Kidder*, 10 Ves. 367; and as to several successive, see *Howe v. Howe*, 1 Vern. 415; *Withers v. Withers*, Amb. 151; *Smith v. Baker*, 1 Atk. 385; *Prankard v. Prankard*, 1 S. & S. 1.

wish, on the part of the grantor, that the purchase-money may be applied in a certain way.¹ The rights of a purchaser may be barred by negligence or delay.²

SEC. 456. Rule Applies to First Purchase.—The rule that a trust results from the person who pays the purchase-money applies to the case of a joint purchase in the name of one. In *Crop v. Norton*,³ LORD HARDWICKE seemed to think that the application of the rule was confined to an advance by one individual. In *Wray v. Steele*,⁴ however, SIR P. PLUMER decided that a resulting trust arose upon a joint advance, the purchase being taken in the name of one. "LORD HARDWICKE," said his Honor, "could not have used the language attributed to him. What is there applicable to an advance by a single individual, that is not equally applicable to a joint advance under similar circumstances?"

SEC. 457. To Personal as well as Real Estate.—The foregoing doctrines apply as well to personal as to real estate,⁵ even though, when the property consists of shares in a company, the rules of the company provide that there shall be no benefit of survivorship.⁶

SEC. 458. Purchase in Fictitious Name.—Where money has been invested in the purchase of stock in a fictitious name, for the purpose of defrauding creditors, the court will order the fictitious name to be erased and the stock to be transferred to the person who paid the purchase-money.⁷ Where an intestate had executed transfers of railway shares and stock to a fictitious person, the court, on a bill filed by his administrator, declared that the intestate used the fictitious name as another designation of himself, and that the plaintiff, as administrator, was entitled to transfer the shares and stock in question, and to receive the dividends thereof.⁸

¹ *Delane v. Delane*, 7 Bro. P. C. 279.

² *Lewis v. Lane*, 2 M. & K. 449, overruling *Edwards v. Fidel*, 3 Madd. 237; and see *Jeans v. Cooke*, 24 Beav. 513.

³ 2 Atk. 74; 9 Mod. 233; Barn. 184.

⁴ 2 V. & B. 388.

⁵ *Ebrand v. Dancer*, 2 Ch. Ca. 26; *Lloyd v. Read*, 1 P. Wms. 607; *Mortimer v. Davies*, 10 Ves. 363; *Rider v. Kidder*, 10 Ves. 360; *Sidmouth v.*

Sidmouth, 2 Beav. 447; *Soar v. Foster*, 4 K. & J. 152; *Beecher v. Major*, 2 Dr. & Sm. 431; *Batstone v. Salter*, L. R. 19 Eq. 250; *affd.* L. R. 10 Ch. 431.

⁶ *Garrick v. Taylor*, 29 Beav. 79; *affd.* 4 De G. F. & J. 163.

⁷ *Green v. Bank of England*, 3 Y. & C. Exch. 722.

⁸ *Arthur v. Midland Railway Co.*, 3 K. & J. 204.

SEC. 459. Parol Evidence Admissible on part of Person Paying Purchase-Money. — Parol evidence is admissible on behalf of the person paying the purchase-money to show that it belonged to him. In *Sir John Peacher's case*,¹ **SIR THOMAS CLARKE, M. R.**, laid it down, that if A sold an estate to C, and the consideration was expressed to be paid by B, and the conveyance made to B, the court would allow parol evidence to prove the money paid by C.² But such proofs must be very clear.³

SEC. 460. On Behalf of Person to whom Conveyance Made. — Parol evidence is admissible on behalf of the person to whom the conveyance is made, to rebut the presumption of a resulting trust for the person paying the purchase-money. In *Beecher v. Major*,⁴ where A purchased and transferred £1,000 stock in the name of her niece, and wrote her a letter stating that she had done so, and that she intended it for the niece's benefit, and in the letter A inclosed a bank power, which she stated was to enable her to receive the dividends for her life, which power she requested the niece to execute and return to her and also to destroy the letter, both of which the niece accordingly did, it afterwards turned out that the bank power authorized A to sell out the stock as well as receive the dividends. It appeared that A had always been very kind to the niece, and by her will made before the transfer had given her an annuity of £30. It was held that parol evidence of the contents of the letter was admissible to rebut the general presumption that the stock still belonged to A.

SEC. 461. To Rebut Presumption as to Part of Property. — Parol evidence is admissible for the purpose of rebutting the presumption of a resulting trust as to a part, as well as to the whole, of the property.⁵

¹ *Rolls E. T. 1759, M. S. Sugd. V. 103; Gascoigne v. Thwing, 1 Ver. 366; Willis v. Willis, 2 Atk. 71.*

² See also *Ryall v. Ryall, 1 Atk.*

³ *59; Amb. 413; Willis v. Willis, 2 Atk. 71; Bartlett v. Pickersgill, 1 Eden, 516; Lane v. Dighton, Amb. 409; Groves v. Groves, 3 Y. & J. 163.*

⁴ *Newton v. Preston, Prec. Ch.*

⁴ *2 Dr. & Sm. 431; and see Groves v. Groves, 3 Y. & J. 163.*

⁵ *Bellasis v. Compton, 2 Vern. 294; Benbow v. Townsend, 1 M. & K. 506; Deacon v. Colquhoun, 2 Drew, 21; Garrick v. Taylor, 29 Beav. 79; affd. 4 De G. F. & J. 163.*

SEC. 462. **Not Admissible to Prove Agency.**—Parol evidence is not admissible to show that, where land has been paid for by one person, the purchase was made on behalf of another. This was decided in *Bartlett v. Pickersgill*,¹ where LORD KEEPER HENLEY said: “I think the allowing this evidence would be to overturn the statute. The statute says there shall be no trust of land unless by memorandum in writing, except such trusts as arise by operation of law. Where money is actually paid, there the trust arises from the payment of the money, and not from any agreement of the parties. But this is not like the case of money paid by one man and the conveyance taken in the name of another; in that case the bill charges that the estate was bought with the plaintiff’s money. If the defendant says he borrowed it of the plaintiff, then the proof will be whether the money was lent or not; if it was not lent, the plaintiff bought the land; but as here the trust depends on the agreement, if I establish the one by parol, I establish the other also. . . . If the plaintiff had paid any part of the purchase-money, it would have been a reason for me to admit the evidence; or if there had been any fraud used by the defendant to prevent an execution of the agreement; but as it is, I think that it is a case within the statute, and that the bill must be dismissed with costs.”²

SEC. 463. **Conveyance without Consideration.**—In some cases it has been held that where a conveyance is made to a stranger without any valuable consideration being expressed, that a resulting trust arises for the grantor.³ In *Young v. Peachy*, LORD HARDWICKE said:⁴ “If a trust by implication was to arise in the present case, it would be to contradict the statute of frauds; for it might be said in every case where a voluntary conveyance is made, that a trust shall arise by implication; but that is by no means the rule of the court;⁵ trusts by implication, or operation of law, arise in

¹ 1 Eden, 516; see also *Crop v. Prec. Ch. 80*; *Warman v. Seaman*, Norton, 9 Mod. 235; 2 Atk. 74; *Barn. Freem. 308*; *Sculthorp v. Burgess*, 179; *Chadwick v. Maden*, 9 Hare, Ves. Jr. 93; *Davies v. Otty* (No. 2), 35 Beav. 208.

² And see *Heard v. Pilley*, L. R. 4 Ch. 548.

⁴ 2 Atk. 256.

³ *Duke of Norfolk v. Browne*, C. 577.

⁵ See *Fordyce v. Willis*, 3 Bro. C.

such cases, where one person pays the purchase-money, and the conveyance is taken in the name of another, or in some other cases of that kind; but the rule is by no means so large as to extend to every voluntary conveyance.”¹ Where a son conveyed an estate to his father nominally as purchaser, but really as a trustee, and in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the use of the son; and the father died shortly afterwards and before any money was raised, having by a will subsequent to the conveyance made a general devise of all his real estates; it was held that the case was within the statute, and that parol evidence was not admissible to prove the trust; but that the son had a lien on the estate as vendor for the apparent consideration, no part of which was paid.²

SEC. 464. Purchases in the Name of a Wife or Child no Resulting Trust.—No resulting trust arises upon a purchase in the name of a wife alone,³ nor upon a joint purchase in the names of a husband and wife,⁴ nor upon a purchase in the name of a child.⁵ The presumption in these cases is that a gift to the wife or an advancement for the child was intended. If a mortgage is made in the joint names of a husband and wife, this will be considered as being in the nature of a joint purchase, and the wife will, if the husband dies, be entitled to the mortgage-money by survivorship.⁶

SEC. 465. Reputed Wife.—A purchase in the name of the purchaser and of a woman whom in form he has gone through the ceremony of marrying, but who could never become his lawful wife, does not come within the rule, and therefore such a purchase will not raise a presumption that it was intended as an advancement or provision for her.⁷

¹ And see 1 Sand. Uses, 5th ed. 365; Wms. R. P. 10th ed. 159; Lloyd v. Spillet, 2 Atk. 150.

² Leman v. Whitley, 4 Russ. 423. This case was doubted by Lord St. Leonards, Sug. V. & P. 14th ed. 702.

³ Kingdon v. Bridges, 2 Vern. 67; Back v. Andrew, 2 Vern. 120; Christ's Hospital v. Budgin, 2 Vern. 683; Rider v. Kidder, 10 Ves. 360; Gosling

v. Gosling, 3 Drew, 335; Lloyd v. Pughe, L. R. 8 Ch. 88.

⁴ Drew v. Martin, 2 H. & M. 130.

⁵ Dyer v. Dyer, 2 Cox, 92; Finch v. Finch, 15 Ves. 50; Murless v. Franklin, 1 Swanst. 13; Grey v. Grey, 2 Swanst. 597; Finch, 340.

⁶ Christ's Hospital v. Budgin, 2 Vern. 683.

⁷ Soar v. Foster, 4 K. & J. 152.

SEC. 466. **Person in Loco Parentis.**—The presumption of advancement may arise in the case of a purchase by a person who has placed himself *in loco parentis* to the person in whose name the purchase is made. Thus the presumption has been held to apply in the case of an illegitimate son,¹ of a grandchild,² of the nephew of a wife.³

But the presumption of advancement will not arise in the case of a purchase in the name of an illegitimate grandchild, although the grandfather has placed himself *in loco parentis* to the child.⁴

SEC. 467. **Purchase by Mother.**—In the case of *re De Visme*,⁵ it was said that a mother does not stand in such a relationship to a child as to raise a presumption of benefit for the child. In *Sayre v. Hughes*,⁶ a mother, after making her will in favor of her two daughters, transferred stock which had stood in her own name into the names of herself and one of the daughters, and died, and it was held that there was a presumption of intended benefit to the daughter which was unrebutted, and that the stock belonged absolutely to her. *Re De Visme* was cited as an authority for the proposition that there could be no presumption of advancement as between a mother and child, but STUART, V. C., pointed out that the word “father” does not occur in LORD CHIEF BARON EYRE’s judgment in *Dyer v. Dyer*,⁷ and said that it was not easy to understand why a mother should be presumed to be less disposed to benefit her child in a transaction of this kind than a father. Where stock was transferred by a mother into the names of herself, her daughter, and her daughter’s husband, and the dividends on the stock were received by the son-in-law and paid over to the transferor during her life, and the mother died leaving the son-in-law only surviving, it was held that there was no resulting trust, and that the son-in-law was entitled to the

¹ *Beckford v. Beckford*, Lofft. 490; 515; and see *Forrest v. Forrest*, 11 Kilpin v. Kilpin, 1 M. & K. 520; and Jur. (N. S.) 317; 13 W. R. 380; see, also *Soar v. Foster*, 4 K. & J. 152; however, *Powys v. Mansfield*, 3 My. & Tucker v. Burrow, 2 H. & M. 515. Cr. 359, as to double portions.

² *Ebrand v. Dancer*, 2 Ch. Ca. 26; ³ 2 De G. J. & S. 17.
Lloyd v. Read, 1 P. Wms. 607.

⁴ *Currant v. Jago*, 1 Coll. 261.

⁵ *Tucker v. Burrow*, 2 Hem. & M.

⁶ L. R. 5 Eq. 377; see also *Hepworth v. Hepworth*, L. R. 11 Eq. 10:
⁷ 2 Cox, 92.

stock, the court being of opinion that the evidence showed that the mother intended to create a beneficial interest in each of the three persons into whose names the stock was transferred.¹

SEC. 468. Fiduciary Relationship. — Where a fiduciary relationship, such as that of solicitor and client, subsists between a parent and child, and the parent's money is advanced by the child in her own name, the ordinary presumption in favor of the transaction being a gift is excluded, and the onus is thrown upon the child of proving that a gift was in fact intended.²

SEC. 469. When Avoided as against Creditors. — Purchases in the name of a wife or child by way of gift or advancement are, it appears, within the 13 Eliz. c. 5, and may be avoided as against creditors,³ but they are not within the 27 Eliz. c. 4, and are therefore good as against subsequent purchasers.⁴

SEC. 470. Rule Applies to Personal Estate. — The foregoing rules apply also to personal estate, and therefore where a husband transfers stock into the names of himself and his wife, no resulting trust will arise for the husband, but the wife will be entitled to the whole fund by survivorship;⁵ so also in the case of a transfer of stock into the names of a parent and child, the stock will belong to the child surviving.⁶

SEC. 471. Surrounding Circumstances to be Considered. — The mere circumstance that the name of a wife or child is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favor of the purchaser, if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a

¹ *Batstone v. Salter*, L. R. 19 Eq. 250, affd. L. R. 10 Ch. 431; and see *Fowkes v. Pascoe*, L. R. 10 Ch. 343.

² *Garrett v. Wilkinson*, 2 De G. & S. 244; see also *Hepworth v. Hepworth*, L. R. 11 Eq. 14.

³ *Glaister v. Hewer*, 8 Ves. 195; *Townsend v. Westacott*, 2 Beav. 340; 4 Beav. 58; *Christy v. Courtenay*, 13 Beav. 96; *Barrack v. McCulloch*, 3

K. & J. 110; *Drew v. Martin*, 2 H. & M. 130.

⁴ *Glaister v. Hewer*, 8 Ves. 195; *Drew v. Martin*, 2 H. & M. 130.

⁵ *Dummer v. Pitcher*, 2 M. & K. 262; *Low v. Carter*, 1 Beav. 426; *Vance v. Vance*, ib. 605; *Poole v. Odling*, 31 L. J. Ch. 439.

⁶ *Sayre v. Hughes*, L. R. 5 Eq. 376; see *re De Visme*, 2 De G. J. & S. 17.

wife or a child, if altogether unexplained, will be deemed a gift, yet the surrounding circumstances may be taken into consideration, so as to say that it is a trust and not a gift. Thus, in *Marshall v. Crutwell*,¹ the husband of the plaintiff, being in failing health, transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honor checks drawn either by himself or his wife, and he afterwards paid in considerable sums to their account. All checks were afterwards drawn by the plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. The husband never explained to the plaintiff what his intention was in transferring the account, but he was stated by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and his wife. After the death of her husband (which took place a few months after the transfer) the plaintiff claimed to be entitled to the balance. It was held that the transfer of the account was not intended to be a provision for the plaintiff, but merely a mode of conveniently managing her husband's affairs, and consequently that she was not entitled. JESSEL, M. R., said: "In all the cases in which a gift to the wife has been held to have been intended, the husband has retained the dominion over the fund in this sense, that the wife during the lifetime of the husband has had no power independently of him, and the husband has retained the power of revoking the gift. In transferring a sum of stock there is no obvious motive why a man should put a sum of stock into the name of himself and his wife. She cannot receive the dividends, he can and must, and it is difficult to see any motive of convenience or otherwise which should induce a man to buy a sum of stock or transfer a sum of stock (if there is any difference between the two) in or into the names of himself and his wife, except the motive of benefiting her in case she survives. But here we have the actual fact, that the man was in such a state of health that he could not draw checks, and the wife drew them. Looking at the fact that subsequent sums are paid in

¹ *Marshall v. Crutwell*, L. R. 20 Fowkes v. Pascoe, L. R. 10 Ch. 343. Eq. 329, per JESSEL, M. R.; and see ² L. R. 20 Eq. 329.

from time to time, and taking into view all the circumstances (as I understand I am bound to do), as a jurymen I think that the circumstances show that this was a mere arrangement for convenience, and that it was not intended to be a provision for the wife in the event which might happen, that at the husband's death there might be a fund standing to the credit of the banking account."

SEC. 472. Purchase-Money Unpaid. — Where a purchase either of real or personal property is made in the name of a wife or child, and the purchaser dies before the whole of the purchase-money is paid, the purchase will enure for the benefit of the wife or child, and the unpaid purchase-money is payable out of the purchaser's personal estate.¹

SEC. 473. Joint Tenancy, when Created. — A purchase in the joint names of father and son creates a joint tenancy.² In one case where the father had no other estate to which a judgment creditor could resort, the creditor was relieved in equity against the survivorship at law.³

SEC. 474. Purchase in the Name of a Child and a Stranger. — If a purchase is made by a parent in the name of a child and of a stranger, whether of real or personal estate, it will be considered as an advancement; the stranger will be treated as a trustee for the child, and there will not be any resulting trust to the father.⁴

SEC. 475. Evidence to Rebut Presumption of Advancement. — In certain cases where a purchase is made in the name of a child, the presumption of advancement may be rebutted. Thus, where a father tenant, by copy of court roll for his life, took according to the custom of the manor a grant from the lord of the reversion to his sons for the terms of their

¹ *Redington v. Redington*, 3 Ridg. P. C. 106; *Vance v. Vance*, 1 Beav. 605; *Drew v. Martin*, 2 H. & M. 130; *Skidmore v. Bradford*, L. R. 8 Eq. 134; *Nicholson v. Mulligan*, 3 J. R. Eq. 308; see 30 & 31 Vict. c. 69.

² *Scroope v. Scroope*, Freem. Ch. 171; 1 Ch. Cas. 27; *Back v. Andrews*, 2 Vern. 120; *Grey v. Grey*, 2 Swans. 599; *Dummer v. Pitcher*, 2 M. & K. 272.

³ *Stileman v. Ashdown*, 2 Atk. 477; see *Pole v. Pole*, 1 Ves. 76. This case, however, is doubted by Mr. Lewin in his work on Trusts, 6th ed. 153.

⁴ *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Mumma v. Mumma*, 2 Vern. 19; *Finch v. Finch*, 15 Ves. 43; *Crabb v. Crabb*, 1 M. & K. 511; *Collinson v. Collinson*, 3 D. M. G. 403.

lives, in trust for himself "as the purchaser," it was held that the sons were trustees of the reversion for him.¹ The antecedent and contemporaneous acts and declarations of the parent are admissible in evidence to rebut the presumption of advancement, but his subsequent acts and declarations are inadmissible for that purpose.² In *Devoy v. Devoy*,³ the presumption that the transfer (by a father) of stock into the joint names of himself, his wife, and child, was intended to be an advancement, was allowed to be rebutted by the evidence upon oath of the transferor that no trust was intended, but that the transfer was made under a misapprehension of its legal effect.⁴ Although subsequent acts and declarations of the parent are not evidence to support the trust, subsequent acts and declarations of the child may be so.⁵

SEC. 476. Possession by Father. — The presumption of advancement will not be rebutted by the fact of the father having continued in possession of the estate during his life,⁶ nor by the fact that the father has expended money in repairs on the estate.⁷

Where a father purchases stock or shares in the name of a child, and receives the dividends during his life under a power from the son, this alone will not rebut the presumption of advancement.⁸ In *Smith v. Warde*,⁹ a father directed stock to be purchased in the names of himself and his wife in trust for his infant son. The purchase was made in the joint names without any trust being declared, and the father received the dividends down to his decease. It was held

¹ *Keats v. Hewer*, 10 Jur. (N. S.) 1040; 13 W. R. 34.

² *Reddington v. Reddington*, 3 Ridg. 177; *Lloyd v. Read*, 1 P. Wms. 607; *Murless v. Franklin*, 1 Swanst. 13; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Collinson v. Collinson*, 3 D. M. G. 409; *Dumper v. Dumper*, 3 Giff. 583; *Williams v. Williams*, 32 Beav. 370; *Tucker v. Burrow*, 2 H. & M. 515.

³ 3 Sm. & G. 403.

⁴ See *Stone v. Stone*, 3 Jur. (N. S.) 708.

⁵ *Sidmouth v. Sidmouth*, 2 Beav. 455, *per* LORD LANGDALE.

⁶ *Grey v. Grey*, 2 Swanst. 600; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Taylor v. Taylor*, 1 Atk. 386; *Christy v. Courtenay*, 13 Beav. 96.

⁷ *Shales v. Shales*, Freem. 252; see further *Elliot v. Elliot*, 2 Ch. Cas. 231; *Scawin v. Scawin*, 1 Y. & C. C. 65.

⁸ *Sidmouth v. Sidmouth*, 2 Beav. 447; *Scawin v. Scawin*, 1 Y. & C. C. 65.

⁹ 15 Sim. 56.

that neither his son nor his wife (who survived him) were entitled to the stock, but that it formed part of his assets.¹

SEC. 477. Devise, Bequest, or Lease. — If, after a purchase of property by a parent or by a husband in the name of a child or wife, the purchaser devises or bequeaths it,² or leases it,³ the *prima facie* presumption of advancement will not be rebutted. Where a testator by his will settled £1,000 reduced annuities on each of his granddaughters, the children of his only son, and two years afterwards he transferred a sum of £3,200 reduced annuities, which was all the property he possessed, into the name of his son, and died at the age of ninety-four, having resided the last ten years of his life with his son, who was a man of considerable property, it was held that the transfer to the son operated as an absolute gift to him free from any trusts.⁴

When stock invested in the joint names of a husband and wife is sold out, the proceeds, though retained by the wife, are nevertheless the property of the husband. Thus, where a sum of money was invested in the funds in the joint names of a husband and wife, and she, by power of attorney from him, sold out a portion, and with his knowledge kept it locked up in her own special custody until his death, it was held that the portion which remained in the funds in the joint names of the husband and wife survived to the wife, but that the other portion which was sold out by her and kept in her custody, formed, on the husband's death, a part of his general personal estate.⁵

SEC. 478. Child Fully Advanced. — If a purchase is made in the name of a child who is already fully advanced, by the parent, there will be a resulting trust for the father;⁶ but if the child be not at all or only in part advanced, the presumption of advancement will not be turned into a trust.⁷

¹ See also *Hayes v. Kindersley*, 2 Sm. & G. 195; *Bone v. Pollard*, 24 Beav. 283, which turned upon the special circumstances of the cases.

² *Crabb v. Crabb*, 1 M. & K. 511; *Dummer v. Pitcher*, 2 M. & K. 262; *Jeans v. Cooke*, 24 Beav. 513.

³ *Murless v. Franklin*, 1 Sw. 13.

⁴ *Hepworth v. Hepworth*, L. R. 11 Eq. 10.

⁵ *Re Gadbury*, 11 W. R. 895.

⁶ *Lloyd v. Read*, 1 P. Wms. 608; *Pole v. Pole*, 1 Ves. Sr. 76.

⁷ *Grey v. Grey*, 2 Swanst. 600; *Elliot v. Elliot*, 2 Ch. Cas. 231.

SEC. 479. **Purchase in Pursuance of Covenant.**—Where lands are purchased in a certain place in the name of a child by a father, but it appears that the father is bound to settle lands so purchased in a particular manner, there will not be any advancement, but the child will be a trustee merely.¹

SEC. 480. **Transfer of Trusts.**—By the ninth section of the statute of frauds “all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.”

This section refers to assignments by the *cestui que* trust.² Before the statute the transfer of an equitable interest might have been made by parol. A writing is all that is now necessary, but it is the practice to employ the same species of instrument and the same form of words in the transfer of equitable as of legal estates.³

¹ *Blake v. Blake*, 7 Bro. P. C. 241.

² *Jerdein v. Bright*, 2 J. & H. 325.

³ *Lewin on Trusts*, 6th ed. 573.

CHAPTER XVIII.

SPECIFIC PERFORMANCE.

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SECTION 481. Specific Performance on the Ground of Part Performance.—Notwithstanding the provisions of the fourth section of the statute of frauds, that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized; the court will in some cases decree specific performance of a parol contract, where there have been acts of part performance on the part of the plaintiff. The leading case on this point is *Lester v. Foxcraft*,¹ where

¹ 1 Coll. P. C. 108; S. C. nom.; *Foxcraft v. Lyster*, 2 Vern. 456. In *Barnes v. Boston & Maine R.R. Co.*, 130 Mass. 388, an oral agreement made by a railroad company to release to a person one of two parcels of land, included in its location and owned by him at the time the location was filed, in consideration that he should waive damages for the taking

of the land so released, was held to be an agreement relating to an interest in land and the building of fences by the company, afterwards dividing the land released from that used for the railroad, and the digging of a new channel for a brook along the dividing line between the land, nor the refraining by the owner from collecting compensation for the taking of

the acts of part performance consisted in the plaintiff's pulling down an old house and building new houses according to the terms of the agreement.

SEC. 482. **Principles on which Court Acts.** — The principles upon which the court acts were thus laid down by LORD REDESDALE, in *Bond v. Hopkins*:¹ "The statute of frauds says that no action or suit shall be maintained on an agreement relating to lands which is not in writing, signed by the party to be charged with it, and yet the court is in the daily habit of relieving, where the party seeking relief has been put into a situation, which makes it against conscience in the other party to insist on the want of writing so signed as a bar to his relief. The first case (apparently) of this kind was *Foxcraft v. Lyster*.² That case was decided on a principle acted upon in courts of law, though not applicable by the modes of proceeding in a court of law to the particular case. It was against conscience to suffer the party who had entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out. At law fraud destroys rights. If I mix my corn with another's, he takes all; but if I induce another to mix his corn with mine, I cannot then insist on having the whole. The law in that case does not give me his corn. The case of *Foxcraft v. Lyster*, therefore, I conceive was decided on clear principle, though whether the cases founded on that case have been all so well considered I will not take upon me to say. But it appears from these cases that courts of equity have decided

the land covered by the agreement, and the continued occupation by him of the land, was held not to constitute such part performance as to warrant a decree for specific performance. In all cases an oral contract for the sale of land, to be specifically executed, must be plain, just, reasonable, *bona fide*, mutual, and certain in all its parts; and if it be wanting in any one of these essentials, it cannot be enforced. Nor will a court of equity enforce contracts depending upon parol evidence and part performance, unless the existence of the

contract, the terms, and the acts of part performance, are sustained by clear and satisfactory proof. *Hopkins v. Roberts*, 54 Md. 312. The court will decree specific performance of a contract to give a mortgage upon lands, where the contract, although by parol, has been executed on complainant's part. *Dean v. Anderson*, 34 N. J. Eq. 496.

¹ 1 Sch. & Lef. 433.

² Cited 2 Vern. 456; and reported in Colles's Parl. Cas. 108; Agnew on Statute of Frauds, 461.

on equitable grounds, in contradiction to the positive enactment of the statute of frauds, though their proceedings are in words included in it.”¹ In the case of the Duke of Leeds *v.* the Earl of Amherst,² SHADWELL, V. C., said: “I take it that the general wisdom of mankind has acquiesced in this, that the author of a mischief is not the party who is to complain of the result of it, but he who has done it must submit to have the effects of it recoil upon himself. This, I say, is a proposition which is supported by the Holy Scriptures, by the authority of profane writers, by the Roman civil law, by subsequent writers upon civil law, by the common law of this country, and by the decisions in our own courts of equity.”

And in *McCormick v. Grogan*,³ LORD WESTBURY defined the principles upon which the court acts in decreeing specific performance as follows: “The Court of Equity has from a very early period decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that act, and imposes on him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the statute of frauds.” The general rule has long been settled that a part performance by the purchaser, of an oral contract for the sale and purchase of land, may take the contract out of the operation of the statute of frauds, and authorize a court of general equity powers, in the exercise of a sound discretion, to decree specific performance of the contract on the part of the vendor.⁴ This is said to be upon

¹ See also *Clinan v. Cooke*, 1 Sch. & Lef. 41; *Dillwyn v. Llewellyn*, 10 W. R. (L. C.) 742.

² 20 Beav. 239. Specific performance of a parol contract will not be granted unless it is substantially the contract set forth in the bill and is clearly proved. *Brown v. Brown*, 47 Mich. 378. But in *West Va. Oil Co. v. Vinal*, 14 W. Va. 637, where the contract set up in the bill was denied in the answer to be as there set forth,

and the proof established a contract materially variant from that set forth in either the bill or answer, it was held that the court might, with the plaintiff's consent, decree performance of the contract as proved, or rescind it, and put the parties *in statu quo*.

³ L. R. 4 H. L. 97.

⁴ 2 Story's Eq. Jur., § 259 *et seq.*; 1 Sugd. Vend. (8th Am. ed.), ch. 18, § 7; 4 Kent's Com. 451.

the ground that one party shall not interpose the statute of frauds to defraud the other party, it appearing that it would be a fraud upon the latter, who has acted in good faith, relying that the former would do the same, if the contract is not completed.¹

SEC. 483. Position of Parties must be Altered.—It is in general of the essence of an act of part performance that the court shall by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract.²

SEC. 484. Acquiescence.—Where the parties have for a great length of time acted under the impression that a bind-

¹ *Wilton v. Harwood*, 23 Me. 131; *Potter v. Jacobs*, 111 Mass. 32; *Pulsifer v. Waterman*, 73 Me.

² *Dale v. Hamilton*, 5 Hare, 381, *per WIGRAM*, V. C.; see also *Att. Gen. v. Day*, 1 Ves. Sr. 218; *Taylor v. Beach*, *ib.* 297. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent, there exist all the materials required to make a legally binding contract, in a case within the provisions of the statute of frauds, so that specific performance of the same may be decreed. Delivery of possession by a vendor or lessor, accepted and acted on by vendee or lessee, is such an act of part performance by the former as to take the contract out of the statute of frauds, and justify a decree of specific performance against the latter. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266. A parol contract may be specifically enforced although the purchaser is unable to show that he has made improvements for which he cannot be compensated in damages. As where in pursuance of a contract made in December, 1874, A erected a house on the lot before B, in October, 1875, took possession. *Jamison v. Dimock*,

95 Penn. St. 52. In *O'Neil v. Martin*, 25 Kan. 494, O was in possession of 160 acres of school land, with the expectation of purchasing the same. He made, in 1871, an oral contract with M to sell the latter 9 acres of the tract for a valuable consideration agreed upon. Possession was taken by M, who made payment, and placed lasting and valuable improvements upon the land, O agreeing to execute a warranty deed as soon as he should obtain title. In 1872, O purchased the whole quarter-section from the State, paying one-tenth of the purchase-money in cash, and receiving a certificate. In 1879, O died; his administrator completed the payment and took a patent from the State for the benefit of O's heirs. Held that M could compel from O's heirs a specific performance of the agreement made with O. Where the promisor in an oral agreement to convey land died three days after its execution, leaving minor children, and the promisee subsequently entered on the land, and made valuable improvements, held, that the performance of such agreement could not be enforced against the children, even though they did not notify the promisee not to put on the improvements. *Ryan v. Wilson*, 56 Tex. 36.

ing contract existed, the court will not allow the defence of the statute of frauds to be set up, although the acts of part performance relied on are such as probably would not have been considered sufficient in themselves to take the case out of the statute.¹

SEC. 485. Acts of Part Performance must be Unequivocal, not Introductory or Ancillary.—An act merely introductory or ancillary to the agreement, though attended with expense, does not amount to part performance,² and an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the statute.³ Thus, the giving instruction to a solicitor to prepare a lease,⁴ or a conveyance,⁵ even though the defendant has altered the draft in his own hand, and sent it back to be engrossed,⁶ admeasurements by a surveyor,⁷ going to view the estate,⁸ the delivery of an abstract of title,⁹ the appointment of a person to appraise stock,¹⁰ or of an arbitrator to value the land,¹¹ registering the conveyance,¹² are not acts of part performance to take a case out of the statute. Nor will the preparation and signature by the defendant of a deed, which has never been parted with by his solicitor amount to an act of part performance.¹³ In the case of a purchase of different lots by different parol contracts, part performance as to one of the lots will not take the agreements as to the other lots out of the statute.¹⁴

SEC. 486. Part Payment of Purchase-Money not take Case out of Statute.—*The payment of part or even the whole of*

¹ Blachford v. Kirkpatrick, 6 Beav. 232.

² Whitbread v. Brockhurst, 1 Bro. C. C. 412.

³ Dale v. Hamilton, 5 Hare, 381, per WIGRAM, V. C.; and see Gunter v. Halsey, Amb. 586; Lacon v. Mertins, 3 Atk. 4; *ex parte* Hooper, 19 Ves. 479.

⁴ Cole v. White, cited 1 Bro. C. C. 409.

⁵ Clerk v. Wright, 1 Atk. 12; Whitchurch v. Bevis, 2 Bro. C. C. 559; Redding v. Wilkes, 3 Bro. C. C. 400.

⁶ Hawkins v. Holmes, 1 P. Wms. 770; Stokes v. Moore, 1 Cox, 219.

⁷ Pembroke v. Thorpe, 3 Swanst. 441, n.

⁸ Clerk v. Wright, 1 Atk. 12.

⁹ Whitbread v. Brockhurst, 1 Bro. C. C. 412; Thomas v. Blackman, 1 Coll. 301.

¹⁰ Whitchurch v. Bevis, 2 Bro. C. C. 559.

¹¹ Cooth v. Jackson, 6 Ves. 17, 41.

¹² Hawkins v. Holmes, 1 P. Wms. 770.

¹³ Cooke v. Tombs, 2 Anst. 420; Whaley v. Bagenal, 1 Bro. P. C. 345; Phillips v. Edwards, 33 Beav. 440.

¹⁴ Buckmaster v. Harrop, 13 Ves. 474.

*the purchase-money is not such an act of part performance as alone to take a case out of the statute.*¹ Thus in *Clinan v. Cooke*,² the act of part performance on which the plaintiff relied was the payment to and acceptance by the defendant of the sum of fifty guineas, but it was held that this was not

¹ *Wood v. Jones*, 35 Tex. 64; *Temple v. Johnson*, 71 Ill. 13; *Glass v. Hulbert*, 102 Mass. 28; *Lanz v. McLaughlin*, 14 Minn. 72; *Crouk v. Trumble*, 66 Ill. 428; *Ham v. Goodrich*, 33 N. Y. 32; *Kidder v. Barr*, 35 id. 235; *Thompson v. Todd*, Pet. (U. S. C. C.) 380; *Underhill v. Allen*, 18 Ark. 466; *Eaton v. Whittaker*, 18 Conn. 222; *Purcell v. Miner*, 4 Wall. (U. S.) 413; *Allen's Estate*, 1 W. & S. (Penn.) 383; *Parke v. Leewright*, 20 Mo. 85; *Cole v. Potts*, 10 N. J. Eq. 67; *Hyde v. Cooper*, 13 S. C. 250; *Givens v. Calder*, 2 Dessau (S. C.) Eq. 174; *Smith v. Smith*, 1 Rich. (S. C.) Eq. 130; *Anderson v. Chick*, 1 Bail. (S. C.) Eq. 118; *Church & c. v. Farron*, 7 Rich. (S. C.) Eq. 378; *Litcher v. Crosby*, 2 A. K. Mar. (Ky.) 106; *McKee v. Phillips*, 9 Watts (Penn.) 85; *Rankin v. Simpson*, 19 Penn. St. 471; *Parker v. Wells*, 6 Whart. (Penn.) 153; *Wilber v. Paine*, 1 Hamm. (Ohio) 252; *Sites v. Keller*, 6 id. 528; *Hart v. McClellan*, 41 Ala. 251. Mere payment, even if it be payment in full of the consideration, is not such a part performance of a parol contract for the conveyance of land as will justify a decree of specific performance in a case where the payment alleged consisted partly of services rendered and partly of moneys advanced. A specific performance will be decreed only where the purchaser has done some other act, such as taking possession of the land under the agreement, or has been induced to act in such manner that if the contract be abandoned he cannot be restored to his former position, and the refusal to perform will operate as a fraud. Where the complaint avers that plaintiff advanced moneys and performed services under an oral agreement with defendants for the conveyance to him of an interest in certain lands, and

demands judgment against them for a specific performance, and the facts alleged do not show him entitled to the remedy demanded, he cannot have in such action a judgment at law for the amount of such moneys and the value of such services. *Horn v. Ludington*, 32 Wis. 73; *Semmes v. Worthington*, 38 Md. 298; *Lane v. Schackford*, 5 N. H. 130; *Temple v. Johnson*, 71 Ill. 13. It makes no difference that the vendee has been compelled to make sacrifices to obtain the money to pay for the land, and that he made them under an assurance from the vendor that he would convey the land. Thus A, the owner of certain real estate, in order to procure means to purchase certain other real estate of B, would be compelled to dispose of his own real estate, which could only be done at a certain sacrifice, of which he informed B. B verbally agreed with A that if the latter would so dispose of his property, and apply the proceeds of such sale to purchasing B's real estate, he, B, on a certain day, for a fixed price, would sell and convey his real estate to A. The latter, thereupon, disposed of his real estate, making such sacrifice, tendered to B the proceeds of such sale, demanded of him that he so convey his said real estate to A, and, upon B's refusal to sell and convey, brought an action for damages for a breach of such agreement. It was held: 1. That B's agreement to convey was within the statute of frauds, and that such action could not be maintained. 2. That A's disposal of his property, at such sacrifice, was not such a part performance as would take B's agreement out of the operation of such statute. *Parker v. Heaton*, 55 Ind. 1.

² 1 Sch. & Lef. 22; and see *Watt v. Evans*, 4 Y. & C. 579.

sufficient to take the case out of the statute. "It has always," said LORD REDESDALE,¹ "been considered that the payment of money is not to be deemed part performance to take a case out of the statute. *Seagood v. Meale*² is the leading case on that subject; there a guinea was paid by way of earnest, and it was agreed clearly that that was of no consequence in case of an agreement touching lands. Now if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally, for it is paid in both cases as part payment, and no distinction can be drawn, but the great reason, as I think, why part payment does not take such agreement out of the statute is that the statute has said, that in another case, viz., with respect to goods, it shall operate as part performance. And the courts have therefore considered this as excluding agreements for lands, because it is to be inferred that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands." So in *O'Herlihy v. Hedges*,³ the payment of £100 fine upon the renewal of a lease was held not to be sufficient ground upon which to decree specific performance. In *Hughes v. Morris*,⁴ the rule was even further extended, KNIGHT BRUCE, L. J., saying that "a parol contract for the sale of land, though *all* the money be paid without part performance (*for the payment of the money is no part performance*), cannot be carried into effect if the person sued chooses to avail himself of the defect." So the procuring a release from a stranger by the payment of a valuable consideration is not an act of part performance.⁵ But services rendered and money expended in taking care of a person under an agreement that such person will convey his lands to the person rendering such services, etc., is held to be such a part performance as will justify a decree for a specific performance, because, although given in payment for the land, they are of such a character that their value cannot be estimated in money.⁶

¹ P. 40.

² Prec. Chanc. 560.

³ 1 Sch. & Lef. 123.

⁴ 2 D. M. G. 356.

⁵ *O'Reilly v. Thompson*, 2 Cox, Y.) Ch. 279; *Webster v. Gray*, 37

271; see observations on this case in *Parker v. Smith*, 1 Coll. 624, per KNIGHT BRUCE, V. C.

⁶ *Rhodes v. Rhodes*, 2 Sandf. (N.

SEC. 487. Effect of Part Payment on Executory Contract.—

*Where the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does in equity finally transfer to the purchaser the ownership of a corresponding portion of that estate.*¹

SEC. 488. Admission to Possession is Part Performance.—

*Admission into possession of land in pursuance of a parol agreement is held by the English courts and most of our own to be a sufficient act of part performance to take a case out of the statute.*² “Admission into possession,” said SIR

Mich. 37; *Watson v. Maban*, 20 Ind. 228; *Gupton v. Gupton*, 47 Mo. 37; *Davison v. Davison*, 13 N. Y. Eq. 246.

¹ *Rose v. Watson*, 10 H. L. C. 678, *per* LORD WESTBURY.

² *Borrett v. Gomserra*, Bunb. 94; *Earl of Aylesford's Case*, 2 Str. 783; *Pyke v. Williams*, 2 Vern. 455; *Lacon v. Mertins*, 3 Atk. 1; *Wills v. Stradling*, 3 Ves. 381; *Bowers v. Cator*, 4 Ves. 91; *Gregory v. Mighell*, 18 Ves. 328; *Kine v. Balfe*, 2 Ball & B. 343; *Ungley v. Ungley*, 4 Ch. Div. 73; *Hunt v. Wimbledon &c.*, 4 C. P. Div. 48; *Coles v. Pilkington*, L. R. 19 Eq. 174; *Pain v. Coombs*, 1 De G. & J. 34; *Coles v. Pilkington*, L. R. 19 Eq. 174; *Clinan v. Cooke*, 1 Sch. & Lef. 22, 41, *per* LORD REDESDALE; *Morphett v. Jones*, 1 Sw. 181; *Bowers v. Cator*, 4 Ves. 91; *Gregory v. Mighell*, 18 Ves. 328; *Shilliber v. Jarvis*, 8 De G. M. & G. 79; *Butcher v. Stapely*, 1 Vern. 363; *Seagood v. Meale*, Prec. Ch. 560; *Boardman v. Mostyn*, 6 Ves. 467; *Tilton v. Tilton*, 9 N. H. 386; *Pindall v. Trevor*, 30 Ark. 249; *Eaton v. Whitaker*, 18 Conn. 222; *Murray v. Jayne*, 8 Barb. (N. Y.) 612; *Malins v. Brown*, 4 N. Y. 403; *Pugh v. Good*, 3 W. & S.

(Penn.) 56, 61; *Allen's Estate*, 1 W. & S. (Penn.) 383, 386; *Jones v. Peterman*, 3 S. & R. (Penn.) 543; *Reed v. Reed*, 12 Penn. St. 17; *Johnston v. Johnston*, 6 Watts. (Penn.) 370; *Rhodes v. Frick*, 6 Watts. (Penn.) 315; *Stewart v. Stewart*, 3 Watts. (Penn.) 253; *Miller v. Hower*, 2 Rawle (Penn.) 53; *Bassler v. Niesly*, 2 S. & R. (Penn.) 352; *Johnston v. Glancy*, 4 Blackf. (Ind.) 94; *Anderson v. Simpson*, 21 Iowa, 399; *White v. Watkins*, 23 Mo. 423; *Catlett v. Bacon*, 33 Miss. 269; *Danforth v. Loney*, 28 Ala. 274; *Reynolds v. Johnston*, 13 Tex. 214; *Harris v. Crenshaw*, 3 Rand. (Va.) 14; *Wells v. Stratton*, 1 Tenn. Ch. 328; *Arrington v. Porter*, 47 Ala. 714; *Pindall v. Trevor*, 30 Ark. 249; *Reed v. Reed*, 12 Penn. St. 117; *Sands v. Thompson*, 43 Ind. 18; *Wharton v. Staughtenbaugh*, 35 N. J. Eq. 266; *Graham v. Thers*, 47 Ga. 479. But letting a person into possession under a parol gift of land is not enough of itself. The donee must also have made expenditures upon the faith of the gift. *Stewart v. Stewart*, 3 Watts. (Penn.) 253; *Shelham v. Ashbaugh*, 83 Penn. St. 24; *Lower v.*

THOMAS PLUMER, M. R., "having unequivocal reference to contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the court regarding what has been done as consequence of contract or tenure."¹ Where, upon a verbal agreement for a mortgage, it was agreed that the mortgagor (the plaintiff) should remain in possession of the property, and an absolute conveyance was made, it was held that the plaintiff's continuance in possession after the conveyance, being referable only to the verbal agreement, amounted to part performance of that agreement, and excluded the operation of the statute.² But in several of the States, merely letting the purchaser into possession under a parol agreement is not treated as sufficient to warrant a specific performance,³ but something more is required, as possession and part payment,⁴ or the making of valuable and permanent improvements, either with or without part payment of the purchase-money,⁵ and the instances will be

Weaver, 84 id. 262; *Bright v. Bright*, 41 Ill. 97; *Guyn v. McAuley*, 32 Ark. 97. But see, questioning the rule that possession by the purchaser is sufficient to warrant a decree for specific performance, *Galbreath v. Galbreath*, 5 Watts. (Penn.) 146; *Wood v. Farmare*, 10 Watts. (Penn.) 194; *Dougan v. Blocher*, 25 Penn. St. 28; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Owings v. Baldwin*, 8 Gill. 1 (Md.) 337; *Morris v. Harris*, 9 Gill. (Md.) 19; *Glass v. Hulbert*, 102 Mass. 25, 32; *Tatum v. Brooker*, 51 Mo. 148.

¹ *Morphett v. Jones*, 1 Swanst. 81; and see *Dale v. Hamilton*, 5 Hare, 381; *Pain v. Coombs*, 3 Sm. & Giff. 449; 1 De G. & J. 34.

² *Lincoln v. Wright*, 4 De G. & J. 16.

³ *Glass v. Hulbert*, 102 Mass. 32; *Dougan v. Bloucher*, 25 Penn. St. 28; *Johnson v. Dimock*, 95 id. 52; *Moore v. Small*, 19 id. 461.

⁴ *Green v. Finin*, 35 Conn. 178.

In this case there was possession, part payment, and improvement. In *Ingles v. Patterson*, 36 Wis. 373, there were the same elements. *Hoffman v. Fett*, 39 Cal. 109; *Adams v. Fullam*, 43 Vt. 592; *Wiswell v. Lefft*, 5 Kan. 263; *Moss v. Culvert*, 64 Penn. St. 89; *Poland v. O'Conner*, 1 Neb. 50; *Cagger v. Lansing*, 43 N. Y. 530; *Sackett v. Spencer*, 65 Penn. St. 89. In Mississippi, no action can be maintained to charge another with a contract for the sale of lands, unless the promise or agreement upon which the action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged, or by his agent. There is no exception contained in the statute of frauds, and the courts will not create any. *Hairston v. Jaudon*, 42 Miss. 380.

⁵ *Potter v. Jacobs*, 111 Mass. 32; *Freeman v. Freeman*, 43 N. Y. 34. In *Richmon v. Foote*, 3 Lans. (N. Y.) 244, the court held that "part pay-

found to be very rare indeed, where the courts latterly, will decree a specific performance, because of the naked circumstance that the vendee has been let into possession under a parol contract, as the tendency of the courts is in the direction of requiring something more than that to take the contract out of the operation of the statute,¹ and the former excuse for this doctrine, that otherwise the vendee would be liable as a trespasser, is regarded as insufficient because he can shield himself from such liability, under the license to enter which, as we have seen, is a complete protection until revoked.²

SEC. 489. Express Assent not Necessary.—It is not necessary that there should have been express assent by the vendor to the taking possession, if he acquiesces in it, and there have been acts of part performance.³ Thus, where part of the agreement for a lease was that the plaintiff should execute certain repairs before the lease was granted, and he was put into possession by the defendant's solicitors and executed some repairs, it was held that although he might have been let into possession without authority from the defendant, there was a concluded agreement for a lease on the part of the defendant, and a sufficient part performance to take the case out of the statute.⁴

SEC. 490. Either Party may Enforce Agreement.—An agreement may be enforced, on the ground of part performance

ment of the purchase-money, *with possession and other acts of the vendee*, was sufficient. *Lowry v. Buffington*, 6 W. Va. 249. In *Tracy v. Tracy*, 14 id. 243, possession for twenty years, and making valuable improvements, was held sufficient. See also *Hibbert v. Aylott*, 52 Tex. 530. Possession and payment of the purchase-money was held sufficient in *Hanlon v. Wilson*, 10 Neb. 138. In *Ann Berta Lodge v. Lenerton*, 42 Tex. 18, tender of purchase-money improvements by the vendee, and possession, it not appearing that the value of the improvements was beyond the value of the rents for the time of occupancy, was held not to be sufficient to warrant a

specific performance. *Northrop v. Boone*, 66 Ill. 368; *Tatum v. Brooke*, 51 Mo. 148; *Johnson v. Bowden*, 37 Tex. 621; *Gregg v. Hamilton*, 12 Kair. 333; *McCarger v. Road*, 47 Cal. 138; *Welsh v. Bayard*, 21 N. J. Eq. 186; *Neale v. Neale*, 9 Wall. (U. S.) 1; *Peckham v. Barber*, 8 R. I. 17; *Fall v. Hazleregg*, 45 Ind. 576.

¹ *Woodward, J.*, in *Dougan v. Blocher*, 24 Penn. St. 28.

² *Glass v. Hulbert*, 102 Mass. 32.

³ *Gregory v. Mighell*, 18 Ves. 328; *Pain v. Coombs*, 3 Sm. & Giff. 449; 1 De G. & J. 34.

⁴ *Shillibeer v. Jarvis*, 8 D. M. G. 79; and see *Powell v. Lovegrove*, ib. 357.

by admission into possession, by the vendor as well as the vendee.¹

SEC. 491. **Expenditure of Money.** — *The laying out of money on land and making improvements on the faith of the contract, and with the knowledge of the owner, amounts to part performance.*² Thus, where a tenant entered into possession of a farm, and expended moneys under an agreement that the landlord would grant a lease for twenty-one years, and make such improvements and repairs as he and the landlord should jointly agree, it was held on demurrer to a bill for specific performance, that the stipulation as to repairs was not of the essence of the agreement, and that the impossibility of the strict performance of that stipulation in consequence of the death of the landlord was no reason for allowing a demurrer to a bill for specific performance where the plaintiff had so long a possession, and had expended money on the faith of the agreement.³ Although the earlier decisions do not harmonize with each other, yet it is now held in this country that all parol contracts for the sale of lands are not invalidated by the statute of frauds. *Where possession has been taken in pursuance of the contract, and there has been such part performance that the purchaser cannot reasonably be compensated in damages,* the case is taken out of the statute in equity, so that the contract will be specifically enforced. Possession and payment of purchase-money only are not sufficient, for the vendee may be compensated in damages; but *when to possession are added permanent improvements of considerable value which cannot be reasonably compensated in damages,* the rule is held otherwise. This constitutes such a part performance as to take the case out of the statute.⁴ When the plaintiff relies on an equitable title, tender of the money due must generally precede the action. Yet the rule has its exceptions. It does not apply when the vendor, before payment, has put the vendee into possession under

¹ Kine v. Balfe, 2 Ball & B. 343.

Whceler v. D'Esterre, 2 Dow. 359;

² Floyd v. Buckland, 2 Freem. 268; Crook v. Corporation of Seaford, L. Lester v. Foxcraft, 1 Colles P. C. 108; R. 6 Ch. 551.

S. C. nom. Foxcraft v. Lyster, 2 Vern. ³ Norris v. Jackson, 3 Giff. 396.

456; Mortimer v. Orchard, 2 Ves. J. ⁴ McGibbeny v. Burmaster, 53 243; Wills v. Stradling, 3 Ves. 381; Penn. St. 332.

Toole v. Medlicott, 1 Ball & B. 401;

the contract, and induced him to make valuable improvements, and afterward, by collusion or other unfair practice, regains the possession.¹

SEC. 492. Expenditure under Terms of Lease not Part Performance.—Expenditure by a tenant under the terms of his lease is not an act of part performance. Thus where the plaintiff was in possession, and was under an engagement which bound him to make a fence and wall of a particular description, for which he was to have an allowance, and which ought to have been made during the term of the lease which he had, and they were not completed during the term, but the allowance was made notwithstanding, it was held that this alone would not entitle the plaintiff to a decree.²

SEC. 493. Acquiescence in Expenditure.—Where a colliery proprietor constructed a railway from his colliery across the lands of several other persons, by agreement, and his solicitors wrote a letter to the defendant, across whose lands he desired to carry the railway, referring to the powers of a local act of Parliament, supposed to enable him to take lands within a certain area for roadways, and offering on the part of the plaintiff to pay him for the land at a fair valuation, and the defendant did not reply to the letter, and the railway was made across his land without further communication with him, and after three or four years, the parties being unable to agree upon the price to be paid for the land, the defendant brought ejectment; the action was restrained upon the plaintiff giving judgment in the ejectment and paying a sum not less than the utmost valuation of the land into court.³

Again, where a canal was made in 1794 through land of which A was the owner, and B lessee, “with the full consent and approbation of, and in accordance with the wishes of A,” and compensation was paid to the lessee but not to A; his representatives were in 1844, when the tenancy expired, re-

¹ *Harris v. Bell*, 10 S. & R. (Penn.) 39; *Dixon v. Oliver*, 5 Watts. (Penn.) 509; *Gregg v. Patterson*, 9 W. & S. (Penn.) 197; *Wykoff v. Wykoff*, 3 id. 481; *D'Arras v. Keyser*, 26 Penn. St. 249; *Eberly v. Lehman*, 96 Penn. St. 000.

² *Lindsay v. Lynch*, 2 Sch. & Lef. 1; and see *Frame v. Dawson*, 14 Ves. 386.

³ *Powell v. Thomas*, 6 Hare, 300; and see *Clavering's Case*, cited 5 Ves. 690; *Duke of Devon v. Eglin*, 14 Beav. 530.

strained from asserting their legal rights, the court considering that they were entitled to compensation to be determined by the agricultural value of the land taken as calculated in 1844, and not in 1794.¹

But where a person knowing the rights of the owners of land is induced to build on the land without entering into a binding contract, he will not be entitled to relief. Thus, where the agent of a railway company made a verbal agreement with the contractor for the line, that if he would build on land of the company certain cottages more substantially than would be required for his own purposes, and would leave them for the use of the company, then the company would pay him £5,000, and the cottages were built and left on the land, it was held that the contractor could not claim compensation for having been induced to build on the land.²

SEC. 494. Parol Contract by Tenant for Life under a Power, Remainder Man not Bound.— And it appears that the parol contract under a power of sale of a tenant for life, followed by expenditure on the part of the purchaser, will not bind the remainder man who has not acquiesced in the expenditure.³ “It is,” said SIR W. GRANT, M. R., “considered as a fraud in a party permitting an expenditure on the faith of his parol agreement to attempt to take advantage of its not being in writing. But of what fraud is a remainder man guilty who has entered into no agreement, written or parol, and has done no act on the faith of which the other party could have relied? The only way in which he could be affected with fraud would be by showing that an expenditure had been permitted by him, with a knowledge that the party had only a parol agreement from the tenant for life. Without that knowledge there is nothing but the mere circumstance of expenditure. For the *prima facie* presumption is that he who is making it has a valid lease under the power, or at least a binding agreement for a lease. That the remainder man in this case, or those acting on his behalf, had any such knowledge is neither alleged nor proved. The reason, there-

¹ Duke of Beaufort v. Patrick, 17 Beav. 60.

² Crampton v. Varna Railway Co., L. R. 7 Ch. 562.

³ Trotman v. Flesher, 3 Giff. 1; Morgan v. Milman, 3 D. M. G. 33; Lowry v. Lord Dufferin, 1 Ir. Eq. Rep. 281.

fore, fails, on which the case of a parol agreement in part performed is taken out of the statute of frauds.”¹

SEC. 495. Whether Change of Residence Sufficient Part Performance. — In *Millard v. Harvey*² the plaintiff removed his place of business to a house belonging to the defendant, his father-in-law, upon the faith, as he alleged, of a parol promise by the defendant that he should occupy the house rent free during his life. During the period of his occupation he expended money in repairs. Upon a bill to restrain an action of ejectment, it was held that the change of the plaintiff's place of business did not constitute a sufficient consideration to support the parol agreement, and that he was not entitled to any lien in respect of the money spent in repairs. In *Coles v. Pilkington*³ it was decided that the statute could not be pleaded to a verbal agreement to allow the occupation of a leasehold house for life on payment merely of ground-rent, rates, and taxes, where there had been a part performance by possession under the agreement, and the agreement had affected the mode of living of the occupying party. It does not appear, however, from the report that *Millard v. Harvey* was cited in this case.

SEC. 496. Acts of Part Performance must be Referable to an Agreement. — *In order that a case may be taken out of the statute by acts of part performance, the acts must unequivocally refer to a contract the non-execution of which would be a fraud.*⁴ “In order,” said SIR T. PLUMER, “to amount to part performance, an act must be unequivocally referable to the agreement, and the ground on which courts of equity have

¹ *Blore v. Sutton*, 3 Mer. 246.

² 10 Jur. (N. S.) 1167.

³ L. R. 19 Eq. 174.

⁴ *Richmond v. Foote*, 3 Lans. (N. Y.) 244; *Wood v. Thomby*, 58 Ill. 464; *Robertson v. Robertson*, 9 Watts (Penn.) 32; *Stoddard v. Tuck*, 4 Md. Ch. 475; *Moore v. Higbee*, 45 Ind. 487; *Hood v. Bowman*, Freem. Ch. (Ill.) 290; *Welsh v. Bayard*, 21 N. J. Eq. 186; *Smith v. Smith*, 1 Rich. (S. C.) 130; *Edwards v. Fry*, 9 Kan. 417; *Moore v. Scriven*, 33 Mich. 500; *Jacobs v. R. R. Co.*, 8 Cush. (Mass.) 223; *Atkin v. Young*, 12 Penn. St.

15; *Wilmer v. Farres*, 40 Iowa, 309; *German v. Machin*, 6 Paige, Ch. (N. Y.) 289; *Ham v. Goodrich*, 33 N. H. 32; *Hollis v. Edwards*, 1 Vern. 159; *Cox v. Cox*, 27 Penn. St. 375; *Poorman v. Kilgore*, 27 id. 365; *Hollis v. Edwards*, 1 Vern. 159; *Hawkins v. Holmes*, 1 P. Wms. 770; *Walker v. Walker*, 2 Atk. 100; *Att. Gen. v. Day*, 1 Ves. 221; *Whitbread v. Brockhurst*, 1 Bro. C. C. 417; *Wills v. Stradling*, 3 Ves. 378; *Buckmaster v. Harrop*, 7 Ves. 346; *Frame v. Dawson*, 14 Ves. 386.

allowed such acts to exclude the application of the statute is fraud; a party who has permitted another to perform acts on the faith of an agreement shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referable to the contract."¹ And in *Clinan v. Cooke*² LORD REDESDALE laid down the principles upon which the court acts, as follows: "I take it that nothing is considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. This is put strongly in the case of *Foxcraft v. Lyster*;³ there the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong-doer, and to account for the rents and profits, and why? because he entered into pursuance of an agreement. Then for the purpose of defending himself against a charge which might otherwise be made against him such evidence was admissible, and if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which courts of equity have proceeded in permitting part performance of an agreement to be a ground for avoiding the statute, and I take it, therefore, that nothing is to be considered as part performance which is not of that nature. *Payment of money is not part performance*, for it may be repaid, and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought, for in the case of *Foxcraft v. Lyster*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent." In *Ramsden v. Dyson*⁴

¹ *Morphett v. Jones*, 1 Swanst. 181; *Richmond v. Foote*, 3 Lans. (N. Y.) 244. and see *Farrall v. Davenport*, 3 Giff. 363; *Price v. Salusbury*, 32 Beav. 459; *affd. ib.* 461. If there is but one contract to which it can relate, it will be presumed that it refers to that.

² 1 Sch. & Lef. 41.

³ 2 Vern. 456; *Colles*, P. C. 108;

⁴ L. R. 1 H. L. 170.

LORD WENSLEYDALE stated the principle as follows: "If a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation."¹ And where the possession is fairly referable to an express agreement to give a fair consideration, the exact amount of which has not been settled, the court will, in favor of possession, expenditure, and enjoyment, referable to an agreement or to an offer honestly accepted, endeavor by every means within the legitimate bounds of its jurisdiction to ascertain the amount of rent and consideration. But this can only be where there is sufficient evidence of essential terms in the agreement to enable the court to reach the amount.² But if a tenant builds on his landlord's land, he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.³

SEC. 497. **Trustee with Power of Leasing.**—In *Phillips v. Edwards*,⁴ it was said that the doctrine of part performance of a parol agreement is not to be extended by the court, and is inapplicable to a case where a trustee has a power to lease at the request in writing of a married woman, which has not been made. In this case, however, the acts on which the plaintiffs based their case were held not to be acts of part performance, and the point was not expressly decided.

SEC. 498. **Wrongful Possession.**—*Specific performance will not be decreed where the possession of the land has been obtained wrongfully.*⁵ Nor where the plaintiff, after filing his bill, but before the hearing, has obtained by an Act of Par-

¹ See also *Baukart v. Tennant*, L. R. 10 Eq. 146.

² *Meynell v. Surtees*, 3 Sm. & Giff. 115, *per* STUART, V. C.; and see *Gregory v. Mighell*, 18 Ves. 333.

³ *Ramsden v. Dyson*, L. R. 1 H. L. 129.

⁴ 33 Beav. 440.

⁵ *Cole v. White*, cited 1 Bro. C. C. 409.

liament the means of securing and keeping his possession without the aid of the court. "The jurisdiction in cases of specific performance is discretionary, and it is sought in this case only as ancillary to quieting the possession. If that purpose has been accomplished, and if by acts of a plaintiff subsequent to the institution of such a suit, he has obtained the means of quieting his possession without further assistance from this court, this must materially affect the right to a decree for specific performance where it depends on the principle of protecting the possession."¹

SEC. 499. Contract with Wife Adopted by Husband.—Where a wife, unknown to her husband, took £150 out of her private savings to the defendant, and asked him to sell a field for the purpose of pasturing her husband's horse, and the defendant said he would not sell it, but received and retained the money, and shortly afterwards let the plaintiff into possession, telling him he might have it to put his horse in, and the plaintiff remained in possession, and the defendant retained the money for ten years, during which time the plaintiff paid no rent, and the defendant no interest, and at the end of that time the defendant attempted to eject the plaintiff, it was held that there had been a contract with the wife, adopted by the husband, and such part performance as to justify a decree for specific performance.²

SEC. 500. Continuance in Possession not in General Part Performance.—*Between landlord and tenant, when the tenant is in possession at the date of the agreement, continuance in possession is not an act of part performance.*³ In *Wills v. Stradling*,⁴ LORD

¹ *Meynell v. Surtees*, 3 Sm. & G 101, 116, per STUART, V. C.; and see *Somersets. Coal Co. v. Harcourt*, 2 De G. & J. 596.

² *Millard v. Harvey*, 34 Beav. 237.

³ *Mophett v. Jones*, 1 Swanst. 181. The possession must be attended by some act on the part of the tenant which is of a decisive character and connected with the contract. *Danforth v. Laney*, 28 Ala. 474; *West v. Flanagan*, 4 Md. 36; *Rosenthal v. Freeburger*, 26 Md. 76; *Anderson v. Simpson*, 21 Iowa, 399; *Mahana*

v. Blunt, 20 id. 142; *Workman v. Guthrie*, 29 Penn. St. 595; *Armstrong v. Katterhorn*, 11 Ohio, 265; *Greenlee v. Greenlee*, 22 Penn. St. 225; *Johnston v. Glaney*, 4 Blackf. (Ind.) 94; *Anthony v. Leftwych*, 3 Rand. (Va.) 238; *Cole v. Potts*, 10 N. J. Eq. 67; *Wills v. Stradling*, 3 Ves. 381; *Kine v. Balfe*, 2 B. & B. 343; *Savage v. Carroll*, 1 id. 265; *Wilde v. Fox*, 1 Rand. (Va.) 265; *Williams v. Evans*, L. R. 19 Eq. 547; *Mahon v. Baker*, 26 Penn. St. 519; *Howe v. Hall*, 4 Ir. Eq. 242; *Mundy v. Jolliffe*, 5 My. &

LOUGHBOROUGH said: "As to . . . the possession in the case of a tenant, who of course continues in possession, unless he has notice to quit, the mere fact of his continuance in possession (which is all the plea can admit, *quo animo* he continued in possession is not a subject of admission) would not weigh. The delivery of possession by a person having possession to the person claiming under the agreement is a strong and marked circumstance, but the mere holding over by the tenant, which he will do of course, if he has no notice to quit, would not of itself take the case out of the statute, or even call for an answer."¹ But if the tenant in possession upon the faith of an agreement upon the landlord's part to convey to him, when the lease has expired, goes on and makes permanent improvements, this is such part performance as entitles him to a decree for a specific performance of the contract.² So where a married woman, being entitled under

C. 167; *Spear v. Orendorf*, 26 Md. 37; *Shepherd v. Walker*, L. R. 20 Eq. 659; *Williams v. Landman*, 8 W. & S. (Penn.) 55; *Brown v. Jones*, 46 Barb. (N. Y.) 400; *Morrison v. Pery*, 21 Ark. 110; *Watson v. Mahan*, 20 Ind. 223; *Howe v. Rogers*, 32 Tex. 218; *Edwards v. Fry*, 9 Kan. 417; *Blunt v. Tomlin*, 27 Ill. 93; *Holmes v. Holmes*, 44 id. 168; *Lincoln v. Wright*, 4 De G. & J. 16.

¹ See also *Smith v. Turner*, Prec. Ch. 561; *Savage v. Carroll*, 1 Ball & B. 282; *Brennan v. Bolton*, 2 Dru. & War. 349.

² *Hibbert v. Aylott*, 52 Tex. 530. See also *Brennan v. Bolton*, 2 Dru. & W. 349; *Frame v. Dawson*, 14 Ves. 385; *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Mahon v. Baker*, 26 Penn. St. 519. In *Sutherland v. Briggs*, 1 Hare, 26, the plaintiff was the lessee of a house and other premises for thirty-one years, at rent of £60, and was bound to make certain improvements. He also held an adjoining meadow belonging to another owner, from year to year, for £9 rent. The landlord of the house, etc., bought the meadow, and verbally agreed to grant a lease of the same to the plaintiff. In pursuance of the stipulations of this

parol bargain, the improvements were made more extensive than was before contemplated; part of the house was made to project over the meadow, and part of the meadow was attached to the original premises of which plaintiff held the lease. One-half of the expense of these alterations was paid by the plaintiff, which far exceeded the amount he had covenanted to expend for improvements by his lease, and he also signed a written promise to pay £80 a year rent for the whole property. In a suit for a specific performance of the contract to lease the meadow, SIR JAMES WIGRAM, V. C., held that the extension of the house into the meadow by the plaintiff, in connection with the landlord, was evidence of a sufficient consideration for an agreement to lease the meadow; that the building the house upon the meadow was evidence of a right which extended to the whole of that field, and which could not be restricted so as to reach only that part of the meadow upon which the building actually stood; and that the extension of the house into the meadow and the increase and consolidation of the rents into one annual sum was evidence that the

her marriage settlement to an interest in the settled lands for her separate use for life, with a power of leasing for any term not exceeding twenty-one years in possession, leased part of the lands for fourteen years to D, and about a year and a half before the expiration of that lease, signed and delivered to D a written undertaking by which she engaged, upon the expiration of the existing lease, to grant to D a new lease upon the same terms and for the same period as before, and after the expiration of the lease D continued in possession without taking a new lease, but doing acts on the premises which were solely referable to the written undertaking; it was held that the transaction between the parties amounted to an agreement which was in part performed by the continuance in possession of the tenant after the expiration of the lease.¹ In *Shepherd v. Walker*,² at the expiration, in July, 1857, of a lease under which, by assignment, he was in possession of property, B signed an agreement to accept from A a new lease for thirty-one years at the same

meadow was to be had for the same time as the premises of which the plaintiff had the lease. In other words, the verbal agreement concerning the meadow had been part performed by the plaintiff, and should be specifically enforced. On the general subject of the part performance, the Vice Chancellor said: "The first point suggested, rather than pressed, was that the plaintiff, being in possession of the meadow as tenant from year to year, the expenditure upon the property did not unequivocally show that it had proceeded upon some antecedent contract with the landlord. Undoubtedly it is, in general, necessary that an act of part performance which is to take a case out of the statute of frauds, should unequivocally demonstrate the existence of some contract to which it must be referred. *Morphett v. Jones*, 1 Sw. 172. But if the act of extending the house, in which the tenant had an interest for a term of years, into the meadow, with the landlord's consent, be not evidence of a contract between them, I know not what act on the part of a tenant in possession of prop-

erty could possibly be so considered. Circumstances much less stringent have been deemed sufficient; and if the case of *Mundy v. Jolliffe*, *ante*, may be considered as correctly illustrating the rule of this court, as to the acts of part performance which will take a case out of the statute, the alterations of the garden fence and making the plantation in the meadow would be sufficient. In that case, the expenditure by the tenant was in draining the land, and the court decreed Mr. Jolliffe to grant him a lease upon the promise of which it was said the expense of draining had been incurred."

¹ *Dowell v. Dew*, 1 Y. & C. C. C. 345; and see *Pain v. Coombs*, 1 De G. & J. 34, 46; *Nunn v. Fabian*, L. R. 1 Ch. 35. It is, of course, open for the vendor to show that the acts of part performance are properly referable to the pre-existing tenancy. *Dart. V. & P.* 5th ed. 1025.

² L. R. 20 Eq. 659; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Spear v. Orendorf*, 26 Md. 37; *Wilde v. Fox*, 1 Rand. (Va.) 165; *Williams v. Landman*, 8 W. & S. (Penn.) 55.

rent as was reserved by the old lease, and payment of £600 on the day fixed for completion (1st August, 1857), with interest if the lease should not be completed on the day fixed. A draft lease was sent to B for his approval, but was not returned, and no steps were taken by A to press for completion. B remained in possession and paid rent, but no payment of the £600 or interest was ever made or demanded. In 1871 A died. On a bill by her legal personal representatives it was held that, as B's possession and payment of rent must be referred to the new agreement, and not to a holding over after the expiration of the former lease, the lapse of time did not operate as a bar to specific performance, which was accordingly decreed, with interest on the £600 from the 1st of August, 1857.

SEC. 501. **Payment of Increased Rent.**—*Payment of increased rent, with reference to the contract*, is an act of part performance. In *Wills v. Stradling*,¹ LORD LOUGHBOROUGH said: "Payment of additional rent, *per se*, is an equivocal circumstance, it is true. It may be that he shall hold over, from year to year, the lease being expired. There may be other inducements. But how stands the averment upon this plea? It is that the landlord accepted the additional rent upon the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon this plea, is not equivocal at all. It is incumbent upon the defendant to say whether it was merely accepted upon a holding from year to year, or any other ground. How would it stand at law? Suppose this averment was proved by parol evidence, it would be a good lease for three years, and would defend the tenant against an ejectment brought within the three first years. *Charlewood v. Duke of Bedford*,² which finally turned upon the want of authority in the steward, is an authority upon which, under the circumstances alleged in this bill, the benefit of the plea ought to be saved to the hearing."³ Where a landlord, who had verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease, and before his death

¹ 3 Ves. 382.

² 1 Atk. 497.

³ And see *Lord Desart v. Goddard*,
1 Wallis Rep. by Lyne, 347.

the tenant had paid one quarter's rent at the increased rate, it was held that this constituted a sufficient part performance of the agreement to take the case out of the statute.¹ And where the tenant had contracted to sublet, and the sublessee had expended money in alterations and repairs, with the knowledge and approval of the landlord, it was held that the outlay by the sublessee was as much a part performance of the agreement as if made by the tenant.²

SEC. 502. Laying out of Money Part of Consideration.—
*If it was part of the contract that money should be laid out, and it is one of the considerations for granting the lease (the laying out of which must then be with the privity of the landlord), it is very strong to take it out of the statute.*³

¹ *Nunn v. Fabian*, L. R. 1 Ch. 35; and see *Clarke v. Reilly*, 2 I. R. C. L. 422; *Howe v. Hall*, 4 I. R. Eq. 242; *Archbold v. Lord Howth*, 1 I. R. C. L. 608.

² *Williams v. Evans*, L. R. 19 Eq. 547.

³ *Wills v. Stradling*, 3 Ves. 382, *per* LORD LOUGHBOROUGH. The making of valuable improvements upon land is regarded as affording the strongest ground for a specific performance, and it would require peculiar circumstances to dissuade a court of equity from decreeing a specific performance under that state of facts. *Savage v. Foster*, 5 Vin. Abr. 524, pl. 43, when an intended lessee entered and built; *Sutherland v. Briggs*, 1 Ha. 26; *Stockley v. Stockley*, 1 V. & B. 23; *Toole v. Medlicott*, 1 Ball & B. 393; *Mundy v. Jolliffe*, 5 My. & Co. 167; *Surcome v. Penniger*, 3 De G. M. & G. 571; *Floyd v. Buckland*, 2 Freem. 208; 2 Eq. Cas. Abr. 44; *Mortimer v. Orchard*, 2 Ves. 243; *Wheeler v. D'Esterre*, 2 Dow. 359; *Norris v. Jackson*, 10 W. R. 228; *Crook v. Corporation of Seaford*, L. R. 6 Ch. 551; *Williams v. Evans*, L. R. 19 Eq. 547; *Coles v. Pilkington*, L. R. 19 Eq. 174; *Wilson v. West Harthlepool Ry. Co.*, 2 De G. J. & S. 475; *Wilton v. Harwood*, 23 Me. 133, 134; *Newton v. Swazey*, 8 N. H. 9, 14; *Miller v. Tobie*, 41 N. H. 84; *Wet-*

more v. White, 2 Caine Cas. (N. Y.) 87, 109; *Parkhurst v. Van Cortlandt*, 14 Johns. (N. Y.) 15; *Adams v. Rockwell*, 16 Wend. (N. Y.) 285; *Harder v. Harder*, 2 Sandf. Ch. (N. Y.) 17; *Casler v. Thompson*, 4 N. J. Eq. 59; *Martin v. McCord*, 5 Watts, 493; *Syler v. Eckhart*, 1 Bin. (Penn.) 378; *Simmons v. Hill*, 4 H. & McH. (Md.) 252; *Harrison v. Harrison*, 1 Md. Ch. 331; *Shepherd v. Bevin*, 9 Gill. (Md.) 32; *Rowton v. Rowton*, 1 H. & M. (Va.) 92; *Wilkinson v. Wilkinson*, 1 Dessau. Ch. (S. C.) 201; *Mims v. Lockett*, 33 Ga. 9; *Byrd v. Odem*, 9 Ala. 756, 764; *Cummings v. Gill*, 6 Ala. 562; *Brock v. Cook*, 3 Port. (Ala.) 464; *Finucane v. Kearney*, 1 Freem. Ch. (Ill.) 65; *Farley v. Stokes*, 1 Sel. Eq. Cas. (Penn.) 422; *Blakeney v. Ferguson*, 3 Eng. (Ark.) 272; *Ottenhouse v. Burleson*, 11 Tex. 87; *Dugan v. Colville*, 8 Tex. 126; *Johnson v. McGruder*, 15 Mo. 365; *Despain v. Carter*, 21 Mo. 331; *Cummins v. Nutt*, *Wright* (Ohio) 713; *Moreland v. Le Masters*, 4 Blackf. (Ind.) 383, 385; *Underhill v. Williams*, 7 id. 125; *School District No. 3 v. McLoon*, 4 Wis. 79; *Morin v. Martz*, 13 Minn. 191; *Johnson v. Glancy*, 4 Blackf. (Ind.) 94; *Tibbs v. Barker*, 1 Blackf. 58; *Thornton v. Henry*, 2 Scam. 218; *Bomier v. Caldwell*, *Harr. Ch.* (Del.) 67. In *Crook v. Corporation of Seaford*, L. R. 6 Ch. 551; 10 Eq. 678, a muni-

Where the plaintiff, in pursuance of a parol agreement for a lease, drained the lands on a farm of which he was tenant from year to year, laid a piece of arable land into pasture, and repaired the farm buildings, it was held that he was entitled to a decree for specific performance.¹ "Courts of equity," said LORD COTTENHAM, "exercise their jurisdiction in decreeing specific performance of verbal agreements where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the statute of frauds, after the other party to the contract has, upon the faith of such engagement, expended his money, or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and with that object it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect, if it can, what the terms of it really were."²

In *Sutherland v. Briggs*,³ the plaintiff was the lessee of a house and other premises for a term of thirty-one years at a rent of £60, and was under a covenant to make certain improvements on the property. He was also tenant, from year to year, of an adjoining meadow belonging to a different

corporation passed a resolution in 1860, to lease to the plaintiff the flat part of the sea-beach opposite to his land for 300 years, at a nominal rent. He took possession of the beach between lines drawn in prolongation of the sides of his lot, and built a wall and terrace along such part. In 1864, the corporation gave him notice to quit, and in 1869 brought ejectment. He then sued for a specific performance. Held, a good part performance, and the corporation bound, although their agreement was not under seal, and therefore not binding at law, and they were ordered to execute a lease. In *Williams v. Evans*, L. R. 19 Eq. 547, A, a tenant in possession, made a verbal contract for a lease of thirty years with defendant. A had contracted to sublet to B, and B had

expended money in repairs and alterations, with the knowledge and approval of the lessor. Held, as much a part performance as if made by A, who was entitled to a specific performance. In *Coles v. Pilkington*, L. R. 19 Eq. 174, a verbal agreement was made to allow plaintiff to occupy a leasehold house for her life, on payment merely of the ground rent, rates, and taxes. She took possession, and on account of the agreement, changed her whole mode of life; this was held a sufficient part performance.

¹ *Mundy v. Jolliffe*, 5 My. & Cr. 167, reversing S. C. 9 Sim. 413.

² See also *Dale v. Hamilton*, 5 Hare, 381; *Gregory v. Wilson*, 9 Hare, 690; *Ramsden v. Dyson*, L. R. 1 H. L. 170.

³ 1 Hare, 26.

proprietor, at a rent of £9. The lessor of the house became the purchaser of the meadow, and by arrangement between him and the plaintiff, the improvements were extended, and part of the house was made to project over the field, and part of the field was attached to the demised premises, the plaintiff paying about half the expense of the alterations, which far exceeded the sum he had originally covenanted to lay out, and also signing a memorandum, which the lessor drew up, whereby he agreed to pay an entire rent of £80 a year for the consolidated property. It was held that the extension of the house into the meadow by the plaintiff, with the concurrence of his landlord, was evidence of, and was sufficient consideration for, a contract to demise the meadow. That the act of building part of the house upon the meadow, if it was evidence of any right, was evidence of a right which affected the entire tenement, and that it could not be restricted so as to affect only the part of the meadow actually built upon. That the extension of the house, part of the demised premises, into the meadow, and the increase and consolidation of the rents, was evidence that the meadow was to be held for the same term as the demised premises, and that the doctrine with regard to the mutuality of contracts had no application to such a case. "The first point," said WIGRAM, V. C., "suggested rather than pressed, was that the plaintiff, being in possession of Lock's Meadow, as tenant from year to year, the expenditure upon the property did not unequivocally show that it had proceeded upon some antecedent contract with the landlord. Undoubtedly it is, in general, necessary that an act of part performance, which is to take a case out of the statute of frauds, should unequivocally demonstrate the existence of some contract to which it must be referred.¹ But if the act of extending the house in which the tenant had an interest for a term of years, into the meadow, with the landlord's consent, be not evidence of a contract between them, I know not what act on the part of a tenant in possession of property could possibly be so considered. Circumstances much less stringent have been deemed sufficient.² And if the case of *Munday v. Jolliffe*,³ in which LORD COTTENHAM differed from the Vice Chancellor

¹ *Morphett v. Jones*, 1 Swans. 172. ² *Sugden, V. & P.* ³ 5 My. & Cr. 167.

of England, may be considered as correctly illustrating the rule of this court as to the acts of part performance which will take a case out of the statute, the alterations of the garden fence, and making the plantation in the meadow, would be sufficient. In that case the expenditure by the tenant was in draining the land, and the court decreed Mr. Jolliffe to grant him a lease, upon the promise of which it was said the expense of draining had been incurred. It was next said that the justice of the case would be satisfied by giving to the plaintiff so much of the meadow as the house stands upon, which the defendant offered to do. To the suggestion that justice would be satisfied by doing this, I cannot accede; for some additional portion of the meadow would be essential to the enjoyment of the house. The rules of this court will not, however, permit me so to consider the case. If the acts done by the plaintiff are to be considered as acts of part performance, taking the case out of the operation of the statute, the rules of the court entitle him to prove the entire agreement which the acts relied upon were intended partly to perform. The act of building part of the house upon the meadow was an act affecting the whole tenement—namely, Lock's Meadow—and not that part of it only upon which the house stands. The case of *Munday v. Jolliffe* will apply also to this part of the present case.”¹

In *Frame v. Dawson*² it was said that the money expended might be returned, or that it might be got back from the landlord by an action at law. But there the act done was not distinctly referable to any agreement. It might and would have been done without any agreement,—it was a matter of duty independently of any agreement.³

In *Parker v. Smith*,⁴ the landlord of a coal set, having four tenants, partners, holding under a lease, of which there were several years to come, and which reserved a rent that circumstances showed to be beyond the value, entered into an agreement with the four lessees that two of the partners should retire, so that the benefit of the lease and business of the colliery should remain to the other two, that they should

¹ See also *Howe v. Hall*, 4 I. R. Eq. 242. KNIGHT BRUCE, V. C.; and see *Williams v. Evans*, L. R. 19 Eq. 557.

² 14 Ves. 386.

⁴ 1 Coll. 623.

³ *Parker v. Smith*, 1 Coll. 624, *per*

release the outgoing partners from all liability, and that the old lease should be surrendered, and a new lease granted at a reduced rent. It was held that specific performance of this agreement could be enforced. "It is part of the entire agreement," said KNIGHT BRUCE, V. C., "that the dissolution and release shall take place. They do take place. It is impossible to treat these acts otherwise than as acts of part performance, taking the case out of the statute of frauds."

SEC. 503. Agreement must be Complete.—*Part performance, in order to take a case out of the statute of frauds, always supposes a completed agreement.* There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement.¹

SEC. 504. Terms of Contract must be Certain.—*The terms of contract must be certain;*² if there is uncertainty, it can-

¹ Johnson v. Johnson, 16 Minn. 512; Stanton v. Miller, 58 N. Y. 192; Graham v. Call, 5 Munf. (Va.) 396; Northfleet v. Southall, 3 Murph. (N. C.) 189; Baker v. Glass, 6 Munf. (Va.) 212; Dike v. Green, 4 R. I. 285; Frith v. Midland Railway, L. R. 20 Eq. 100; Wilks v. Davis, 3 Mer. 507; Darnley v. London &c. Railway Co., L. R. 2 H. L. 43; Collins v. Collins, 26 Beav. 306; Richardson v. Smith, L. R. 5 Ch. 648; Vickers v. Vickers, L. R. 4 Eq. 529; Darby v. Whittaker, 4 Drew, 134; Morgan v. Milman, 3 De G. M. & G. 24; Milnes v. Gerry, 14 Ves. 400; Clark v. Clark, 49 Cal. 586; McGlynn v. Maynz, 104 Mass. 263; Grace v. Dennison, 114 id. 16; Riley v. Farnsworth, 116 id. 223; Nichols v. Williams, 22 N. J. Eq. 63; Potts v. Whitehead, 20 id. 55; Tiernan v. Gibney, 24 Wis. 190; Brown v. Bellows, 4 Pick. (Mass.) 179; Peters v. Newkirk, 6 Cow. 103, and McMahon v. N. Y. & Erie R. R. Co., 20 N. Y. 463; Elmendorf v. Harris, 5 Wend. (N. Y.) 521. The New York rule is not adopted in Illinois. McAuley v.

Carter, 22 Ill. 53; Korf v. Lull, 70 id. 420. See also Leeds v. Burrows, 12 East, 1; Lee v. Hemmingway, 3 Nev. & M. 860; Collins v. Collins, 26 Beav. 306; Garred v. Macey, 10 Mo. 161; Currey v. Lackey, 35 id. 389; Garr v. Gomez, 9 Wend. (N. Y.) 649; Mason v. Bridge, 14 Me. 468; Oakes v. Moore, 24 id. 214; Rochester v. Whitehouse, 15 N. H. 468; Norton v. Gale, 95 Ill.; Lady Thynne v. Earl of Glengall, 2 H. L. C. 158; Parker v. Smith, 1 Coll. 623; *in re* Thomas Ryan, 3 I. R. Eq. 238.

² As a condition precedent to the exercise of such jurisdiction, the contract must be complete and certain, and the terms of it so precise as that neither party could reasonably misunderstand it. If it is vague, indefinite, or uncertain, or the evidence to establish it is insufficient, this remedy will be withheld. Lockerson v. Stilwell, 13 N. J. Eq. 357; Bowman v. Stilwell, 78 Ill. 48; Colson v. Thompson, 2 Wheat. (U. S.) 336; Minturn v. Bayliss, 33 Cal. 129; Odell v. Morin, 5 Oreg. 96; Thynne v. Glengall, 2 H. L. Cas. 131;

not be carried into execution, even though reduced into writing, as the court cannot compel specific performance,

Martin v. Holley, 61 Mo. 196; *Miller v. Cottin*, 5 Ga. 341; *Burke v. Creditors*, 9 La. An. 57; *Fitzpatrick v. Beatty*, 6 Ill. 454; and, unless partly performed, the subject-matter must be susceptible of identification from the description in the contract, "the 120 acres in Shannon County, Missouri," without any other words of identification, was held insufficient, as the land could not be identified without a resort to parol evidence. *Miller v. Campbell*, 52 Ind. 125. But if it had been "the 120 acres of land owned by me in A —, Shannon County, Missouri," it would doubtless have been regarded as sufficient. *Lynes v. Hayden*, 118 Mass. 482; *Lewis v. Reichy*, 27 N. J. Eq. 240; *Colerick v. Hooper*, 3 Md. 316. So when it was sought to have a contract specifically enforced, where the defendant agreed, in consideration that certain land was conveyed to him, to "erect a certain building," it was held too uncertain. *Martin v. Holley*, *ante*. The bill must set out a contract which is clear and definite in all essential details. *Wright v. Wright*, 31 Mich. 380; *Stanton v. Miller*, 58 N. Y. 192; *Reese v. Reese*, 41 Md. 554. Where the contract is incomplete in any essential respect, and furnishes no means of identifying the property with certainty, this remedy will be denied. *Patrick v. Horton*, 3 W. Va. 23; *Hammer v. McEldowney*, 46 Penn. St. 334; *Southern Ins. Co. v. Cole*, 4 Fla. 359; *Ohio v. Baum*, 6 Ohio, 383; *Jordan v. Deaton*, 23 Ark. 704; *Prater v. Miller*, 5 Jones (N. C.) Eq. 153. "The houses in Smithfield St.," without other designation, held too uncertain. *Hammer v. McEldowney*, *ante*. When the writing appears only to be the basis of an agreement and not the agreement itself, there is no binding agreement. *Frost v. Moulton*, 21 Beav. 496; or when it provides that any of the terms shall be afterwards settled. *Wood v. Midgeley*, 5 De G.

M. & G. 41; *Honeyman v. Maryatt*, 21 Beav. 14; or that further negotiations are contemplated. *Stratford v. Bosworth*, 2 V. & B. 341; *Tawney v. Crowther*, 3 Br. & C. C. 318; and if it is doubtful whether a positive agreement exists, the court will not interfere; all the terms must be settled. *Huddleston v. Briscoe*, 11 Ves. 592; *Jackson v. Oglander*, 2 H. & M. 405. But if all the terms are settled and agreed upon, the fact that a more formal instrument is contemplated is not sufficient to defeat this relief. *Skinner v. McDowall*, 2 De G. & S. 265. If there is a doubt as to whether the parties understood the contract alike, fairly arising from the language of the contract, it will not be enforced. *Cowles v. Bawne*, 10 Paige (N. Y.) Ch. 526; *Buckmaster v. Thompson*, 36 N. Y. 558. The term or duration of a lease is an essential part of it, and specific performance will not be decreed when the contract does not specify the term. *Myers v. Forbes*, 24 Md. 599. In an agreement to renew a lease at as much rent as any one else would pay, it was left optional with the lessee to accept it or not, and it was held lacking both in certainty and mutuality. *Galston v. Sigmund*, 27 Md. 334; *Heywood v. Cope*, 25 Beav. 140; *Taylor v. Parlington*, 7 De G. M. & G. 328; *Parker v. Taswell*, 2 De G. & J. 559. Where the rent is to be afterwards fixed, and this has not been done, the contract is too incomplete and uncertain. *Graham v. Call*, 5 Munf. (Va.) 396. When a contract of this character, or any other, is uncertain and vague, the court will leave the parties to their legal remedies. *Maddox v. McQueen*, 3 A. K. Mar. (Ky.) 400; *McKibbin v. Brown*, 14 N. J. Eq. 13; *Dobson v. Litton*, 5 Cold. (Tenn.) 616; *Sales v. Hickman*, 20 Penn. St. 180. Thus, a clause in a lease which reads "and the party of the first part agrees, in case the said parties of the second

when according to the agreement there is no contract; and the rule holds good although there have been acts of part performance. In an early case it was laid down, that whenever the court had decreed specified execution of a parol agreement, the same had been supported and made out by letters in writing, and the particular terms, stipulated therein, as a foundation for the decree; otherwise the court would never carry such an agreement into execution.¹

part shall then be tenants of said premises, to first offer the property so demised for sale to and purchase by them for the sum of \$2,000," was held too uncertain for enforcement, because there was no time fixed within which it was to be performed, nor any agreement that the lessor should convey to them at any time for that sum while they were tenants. *Buckmaster v. Thompson*, 36 N. Y. 558. So a stipulation to renew a lease at its expiration, "the rent to be proportioned to the valuation of said premises at said time," and providing no method for determining the valuation, was held too uncertain to be specifically enforced. *Pray v. Clark*, 113 Mass. 283. *Dobson v. Litton*, *ante*, 113; *Hammer v. McEldowney*, 46 Penn. St. 334. By this it is not meant that parol evidence to identify the property is never admissible, but that the writing must furnish such a basis therefor that by the aid of parol evidence absolute certainty can be arrived at. Thus, an agreement "for the sale of houses on Smithfield Street" was held too uncertain, because the contract furnished no guide by which to arrive at a certainty as to what houses were intended. *Hammer v. McEldowney*, *ante*. But if it had been "for the sale of my houses," etc., or "houses owned by me," etc., absolute certainty could have been arrived at, because the houses owned by him could have been identified. *Colerick v. Hooper*, 3 Ind. 316; *Lewis v. Reichy*, 27 N. J. Eq. 240; *Lynes v. Hayden*, 118 Mass. 482; *Puttman v. Haltey*, 24 Iowa, 425. The term and duration of the lease, *Myers v. Forbes*,

ante, as well as the amount of rent, must be definitely stated. *Gelston v. Sigmund*, 27 Md. 345. *Lester v. Foxcraft*, 1 Coll. C. C. 108. In an Illinois case an agreement to convey a right of way 80 feet wide was held to have become sufficiently certain to be enforced, after the guarantee, with the acquiescence of the grantor, had entered upon the land and laid out the way. *Purinton v. Northern Ill. R. R. Co.*, 46 Ill. 297.

¹ *Wiswall v. Loft*, 5 Kan. 263; *Johnson v. Johnson*, 16 Minn. 512; *Buckmaster v. Thompson*, 36 N. Y. 558; *McGuire v. Stevens*, 42 Miss. 724; *McClintosh v. Laing*, 22 Mich. 212; *Munsell v. Loree*, 21 id. 491; *Hardesty v. Richardson*, 44 Md. 617; *Agard v. Valencia*, 39 Cal. 292; *Dobson v. Litton*, 5 Cold. (Tenn.) 616; *Huff v. Shepherd*, 58 Mo. 242; *Gelston v. Sigmund*, 27 Md. 334; *Whelan v. Sullivan*, 102 Mass. 204; *Ferris v. Irving*, 28 Cal. 645; *Matteson v. Scofield*, 27 Wis. 671; *Pilling v. Armistage*, 12 Ves. 78; *Mortimer v. Orchard*, 2 Ves. 243; *Savage v. Carroll*, 1 Ball & B. 265, 551; 2 Ball & B. 451; *Reese v. Reese*, 41 Md. 554; *Townsend v. Hawkins*, 45 Mo. 286; *Twiss v. George*, 33 Mich. 253; *Ackerman v. Ackerman*, 24 N. J. Eq. 315; *Semmes v. Worthington*, 38 Md. 298; *Long v. Duncan*, 10 Kans. 294; *Hardesty v. Richardson*, 44 Md. 617; *Lester v. Kinne*, 37 Conn. 9; *Huff v. Shepard*, 58 Mo. 242; *Allen v. Webb*, 64 Ill. 342; *Wright v. Wright*, 31 Mich. 380; *Blanchard v. Detroit &c. R. R.*, 31 Mich. 44; *Newton v. Swazey*, 8 N. H. 9, 13; *Tilton v. Tilton*, 9 N. H. 386, 391; *Parkhurst v. Van Cortlandt*, 1

The court will endeavor to put a reasonable interpretation upon ambiguous expressions,¹ though no decree can be made if the material terms of the contract are left doubtful.² Thus specific performance has been refused, when it could not be shown whether timber was included in the purchase,³ when the term for which a lease was to be granted was not mentioned in the agreement,⁴ and when the period at which the payment of increased rent was to commence could not be ascertained.⁵

So also the words "land required" have been considered too indefinite.⁶ Where the contract was for the sale of an

Johns. Ch. 273, 284; 14 Johns. 15; 584; *Reese v. Reese*, 41 Md. 554; *Phillips v. Thompson*, 1 Johns. Ch. Symondson *v.* Tweed, Prec. Ch. 374; (N. Y.) 131; *German v. Machin*, 6 Gilb. Eq. Rep. 35; see *Allen v. Paige Ch.* (N. Y.) 288, 292; *Lobdell v. Lobdell*, 36 N. Y. 327; *Wallace v. Brown*, 10 N. J. Eq. 308, 311; *Eyre v. Eyre*, 4 N. J. Eq. 102; *Petrick v. Ashcroft*, 4 ib. 339; *Force v. Dutcher*, 4 N. J. Eq. 401; *Brewer v. Wilson*, 17 N. J. Eq. 180; *Brown v. Finney*, 53 Penn. St. 373; *Sage v. McGuire*, 4 W. & S. (Penn.) 228, 229; *Charnley v. Hansbury*, 13 Penn. St. 16, 21; *Moore v. Small*, 19 Penn. St. 461, 470; *Rankin v. Simpson*, 19 Penn. St. 471; *McCue v. Johnston*, 25 Penn. St. 306; *Cox v. Cox*, 26 Penn. St. 375; *Frye v. Shepler*, 7 Barr. 91; *Greenlee v. Greenlee*, 22 Penn. St. 224; *Burns v. Sutherland*, 7 Penn. St. 103; *Hugus v. Walker*, 2 Jones (N. C.) 173; *Shepherd v. Bevin*, 9 Gill. 32; *Owings v. Baldwin*, 1 Md. Ch. 120; *Shepherd v. Shepherd*, 1 Md. Ch. 244; *Beard v. Linthicum*, 1 Md. Ch. 345; *Chesapeake & Ohio Canal Co. v. Young*, 3 Md. 480; *Wingate v. Dail*, 2 H. & J. (Md.) 76; *Minturn v. Baylis*, 33 Cal. 129; *Shropshire v. Brown*, 45 Ga. 175; *Rowton v. Rowton*, 1 H. & M. (Va.) 91; *McNeil v. Jones*, 21 Ark. 277; *Printup v. Mitchell*, 17 Ga. 558; *Kay v. Curd*, 6 B. Mon. (Ky.) 100; *Stoddard v. Tuck*, 5 Md. 18; *Hatcher v. Hatcher*, 1 McMull (S. C.) Eq. 311; *Goodwin v. Lyon*, 4 Port. (Ala.) 297; *Bell v. Bruen*, 1 How. (U. S.) 169; *Pearce v. Watts*, L. R. 20 Eq. 492; *Allen v. Webb*, 64 Ill. 342; *Tallman v. Franklin*, 16 N. Y.

¹ *Saunderson v. Cockermouth Railway Co.*, 11 Beav. 497; *Richardson v. Eyton*, 2 D. M. G. 79;

² *Dart. V. & P.* 5th ed. 1033; *McMurray v. Spicer*, L. R. 5 Eq. 527; *Kennedy v. Lee*, 3 Mer. 441; *White v. Henman*, 51 Ill. 243; *Ross v. Baker*, 72 Penn. St. 186; *Hurley v. Brocon*, 98 Mass. 545; *Fowler v. Radican*, 52 Ill. 405; *Waring v. Ayres*, 40 N. Y. 357; *Holmes v. Evans*, 48 Miss. 247; *Lynes v. Hayden*, 119 Mass. 482; *Purinton v. Northern Ill. R. R. Co.*, 46 Ill. 297; *Miller v. Campbell*, 52 Ind. 125; *Bell v. Warren*, 39 Tex. 106; *King v. Rickman*, 20 N. J. Eq. 316; *Carr v. Passaic Land & Co.*, 22 id. 85; *Chidister v. Springfield & Co. R. R. Co.*, 59 Ill. 87.

³ *Reynolds v. Waring*, You. 346.

⁴ *Clinan v. Cooke*, 1 Sch. & Lef. 22.

⁵ *Lord Ormond v. Anderson*, 2 Ball & B. 363; and see *Blore v. Sutton*, 3 Mer. 237.

⁶ *Lord Stuart v. L. & N. W. R. Co.*, 1 D. M. G. 721; and see *Tatham v. Platt*, 9 Hare, 660.

estate, the vendor reserving "the necessary land for making a railway" through the estate, it was held that the reservation was void for uncertainty and that the contract could not be enforced.¹ And an agreement to take a lease of a house if put into thorough repair, and "the drawing-rooms handsomely decorated according to the present style," was held to be too uncertain for the court to enforce.² In the absence of special circumstances, the court will not enforce specific performance of a contract for the purchase of land, which is silent as to the means of access to it, when it is reasonably uncertain whether any means of entering on the land at all times can be conferred on the purchaser.³ So also specific performance has been refused when the agreement for a mining lease turned on the construction of an "etc."⁴ But in *Cooper v. Hood*⁵ the terms "good will, etc.," in a contract for the sale of a foundry, were held not to be so uncertain as alone to prevent a decree for specific performance of it; for the words *et cetera* point to things necessarily connected with and belonging to the good will and to be defined in the conveyance.

Where the terms for letting farms provided that all materials required for buildings proposed to be built or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant leading tiles; that gates, buildings, "etc.," should be left in repair by the tenant; that the landlord reserved to himself all customary rights, such as liberty to search for and work mines or minerals, "etc.," it was held that these stipulations did not render the agreement uncertain so as to be incapable of being enforced specifically.⁶ Again, an agreement for a lease for three lives or thirty-one years may be specifically enforced although the lives are not named in the agreement, and it is not provided by whom they are to be nominated;⁷ and where the contractor was to take a lease of "those two seams of coal known as 'the two-feet coal' and 'the three-feet coal,'

¹ *Pearce v. Watts*, L. R. 20 Eq. 492.

² *Taylor v. Portington*, 7 D. M. G. 328; see, however, *Samuda v. Lawford*, 8 Jur. (N. S.) 739.

³ *Denne v. Light*, 8 D. M. G. 774.

⁴ *Price v. Griffith*, 1 D. M. G. 80.

⁵ 26 Beav. 293.

⁶ *Parker v. Taswell*, 2 De G. & J. 559.

⁷ *Fitzgerald v. Vickers*, 2 Dr. & Wal. 298; *Kensington v. Phillips*, 5 Dow. 61; overruling, it appears, *Wheeler v. D'Esterre*, 2 Dow. 360.

lying under lands hereafter to be defined in the Bank End Estate," and the lessor agreed to let "the before-mentioned seams of coal," the contract was held to be sufficiently definite to be enforced.¹

SEC. 505. Contradictory Evidence, When Specific Performance Decreed.—*Although the evidence is contradictory, specific performance may be decreed, if the court is able satisfactorily to ascertain what the terms are.* A reference to ascertain the terms will, however, only be directed when the evidence is contradictory; not when insufficient evidence has been produced by the person seeking to enforce the contract.²

In *Mortimer v. Orchard*³ the only witness for the plaintiff proved an agreement different from that stated in the bill; and two of the defendants by answer stated an agreement different from both. LORD LOUGHBOROUGH said, that in strictness the bill ought to be dismissed, but specific performance was decreed according to the agreements stated in the answers. Again, "in a case that came from Malton, in Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, LORD THURLOW thought proper to send it to the master, upon the ground of the possession being delivered, to inquire what the agreement was. The difficulty there was in ascertaining that. The master decided as well as he could; and then the cause came before LORD ROSSLYN upon further directions; who certainly seemed to think LORD THURLOW had gone a great way, and either drove them to a compromise, or refused to go on with the decree upon the principle upon which it was made."⁴

In *Mundy v. Jolliffe*,⁵ LORD COTTENHAM said: "Courts of Equity exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been

¹ *Hayward v. Cope*, 25 Beav. 140; and see *Monro v. Taylor*, 8 Hare, 51; aff'd. 3 Mac. & G. 713.

² *Savage v. Carroll*, 1 Ball & B. 283, 551; 2 Ball & B. 451; *Hurper v. Laney*, 39 Ala. 398; *Long v. Duncan*, 10 Kan. 294; *Parkhurst v. Vancortlandt*, 11 John. (N. Y.) 15; *Rhodes v. Rhodes*, 2 Sandf. (N. Y.) Ch. 279.

³ 2 Ves. Jr. 243.

⁴ *Per* LORD ELDON in *Boardman v. Mostyn*, 6 Ves. 470, where his Lordship said: "Perhaps if it was *res integra* the soundest rule would be that if the party leaves it so uncertain, the agreement is not taken out of the statute sufficiently to admit of its being enforced."

⁵ 5 My. & Cr. 177.

part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the statute of frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances the court will struggle to prevent such injustice from being effected; and with that object, it has at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect if it can what the terms of it really were.”¹

In *Laird v. The Birkenhead Railway Company*,² the plaintiff, in 1855, submitted to the directors of a railway company a project for a private branch line, to be constructed at the plaintiff's cost and for his accommodation; to which the directors expressed their consent and agreement generally, but the terms and details were left for future arrangements. In the year 1856, the plaintiff, at considerable cost, constructed the branch, and the company prohibited the user until a definite understanding should be come to. *WOOD, V. C.*, thought that at that time the company were bound to assent to reasonable terms, and that the court, if possible, would have decreed specific performance. His Honor said: “Where one set of persons have said to another, ‘You desire to construct expensive works for purposes which will require our consent; we allow you to incur this outlay;’ I have grave doubts, looking to the authorities, whether these persons, after having allowed the money to be laid out on reasonable terms, can be permitted to say, ‘The terms must be such as we dictate; we are masters of the situation, and all your expenditure must go for nothing unless we can agree about the terms.’” And in *Wilson v. West Hartlepool Railway Company*,³ *TURNER, L. J.*, said: “Where permission has been given upon the faith of an agreement, it is, I think, the duty of the court, as far as it is possible to do so, to ascertain the terms of the agreement and to give effect to it.”⁴

¹ And see *Gregory v. Wilson*, 9 Hare, 690; *Pain v. Coombs*, 1 De G. & J. 34; *Nunn v. Fabian*, L. R. 1 Ch. 35.

² Johns. 500.

³ 2 De G. J. & S. 494.

⁴ See also *Norris v. Jackson*, 1 J. & H. 319.

SEC. 506. Surrounding Circumstances Considered.—The court, having regard to the terms of the agreement, will consider the surrounding circumstances, and the conduct of the parties in dealing with the property comprised in it, in the interval between the making of the agreement and the commencement of the suit for its enforcement.¹

SEC. 507. Immaterial Terms need not be Proved.—*Immaterial terms need not be proved.* Thus, it has been held that the fact that an allegation in the bill that the plaintiff, the tenant, was to pay taxes and do necessary repairs, was not proved, was no substantial variance, being an admission against himself, and immaterial from the tenant's legal liability.² Nor is it necessary to prove matters which are immaterial so far as relates to anything remaining to be done.³

SEC. 508. Family Arrangements by Parol.—In the case of family arrangements involving the giving up, partition, or exchange of land, the court will, where there has been long possession under the arrangement, decree specific performance, although the arrangement was made by parol.⁴ Thus, in the recent case of *Williams v. Williams*,⁵ A died in 1831 possessed of real estates of socage, gavelkind, and borough English tenure, and also of leaseholds, stock-in-trade, and other personal property, leaving a wife and two sons. He made a will by which, after certain provisions for his wife, he gave all his property to his two sons equally, but the will was not admitted to probate, being incomplete. At an interview between the brothers, shortly after the will had been refused probate, the elder brother declared that the invalidity of the will should make no difference, and that the property should be "not mine or thine, but ours." No agreement in writing was made, but for twenty years after the death of A the two sons carried on the partnership together, and dealt with the whole property, real and personal, as if it belonged to them equally, and the widow never insisted on her rights in her husband's property. In 1851 the partnership was dis-

¹ *Oxford v. Provand*, L. R. 2 P. C. 135; *Baumann v. James*, L. R. 3 Ch. 508.

² *Gregory v. Mighell*, 18 Ves. 328.

³ *Mundy v. Jolliffe*, 5 My. & Cr. 176.

⁴ *Stockley v. Stockley*, 1 V. & B. 23; *Neale v. Neale*, 1 Keene, 672; *Persse v. Persse*, 7 C. & F. 279; *Cood v. Cood*, 33 Beav. 314.

⁵ L. R. 2 Ch. 294.

solved. The younger brother having died, his representative filed a bill for the equal division of the property. It was held, affirming the decree of *KINDERSLEY, V. C.*,¹ that there was sufficient evidence of a family arrangement which the court would uphold, although there was no formal contract between the parties.

SEC. 509. Corporation. — A corporation may be bound by an agreement not under seal where there have been acts of part performance. In *Crook v. Corporation of Seaford*² a municipal corporation by a resolution agreed to let waste land to the plaintiff for 300 years at a nominal rent, the plaintiff to do certain acts, and to expend money on the land, which was to be stumped out by a committee and by the plaintiff. The corporation did not stump out the land, and the plaintiff stumped it out himself, and did the acts required by the corporation, and expended money. He also paid the rent agreed upon. It was held, upon a bill filed to restrain an action of ejectment brought by the corporation, that, though the agreement was not under seal, the corporation was bound by acquiescence, and must perform the agreement to grant a lease. *LORD HATHERLEY, L. C.*, said:³ "Upon this bill being filed the corporation raised several objections, one of which was that the agreement was not under seal. But a corporation, although it may not have eyes to see what is going on, has agents who can see, and if the corporation allow a wall to be built and money to be expended on the faith of a resolution regularly entered in their books, they must be answerable. As to the power of this corporation to grant such a lease, they are not within the Municipal Corporations Act, and they get a wall and terrace built upon land which was of no use to them, and they thereby encourage people to build houses. It cannot be said to be an improvident lease."

SEC. 510. Fraud takes Case out of Statute. — Where the defendant has by his fraud prevented compliance with the requisitions of the statute, he will not be entitled to plead it as a defence to an action for specific performance.⁴ In *Mes-*

¹ 2 Dr. & Sm. 378; 6 N. R. 60.

³ L. R. 6 Ch. 554.

² L. R. 10 Eq. 678; aff'd. ib. 6 Ch. 551.

⁴ *Maxwell v. Montacute*, Prec. Ch. 526; 1 P. Wms. 618; 1 Str. 235;

taer *v.* Gillespie¹ LORD ELDON said: "Upon the statute of frauds, though declaring that interests shall not be bound except by writing, cases in this court are perfectly familiar, deciding that a fraudulent use shall not be made of that statute, where this court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud, even though the statute has declared that in case those circumstances do not exist the instrument shall be absolutely void. One instance is the case of instructions upon a treaty of marriage, the conveyance being absolute, but subject to an agreement for a defeasance, which, though not appearing by the contents of the conveyance, can be proved *aliunde*, and there are many other instances." Where the plaintiff and defendant had entered into a written agreement for sale by the defendant to the plaintiff of an estate at twenty-five years' purchase, on an annual value to be estimated by referees on or before a certain day, and it appeared that the defendant had prevented the valuation from being made, it was held that although the time of valuation was of the essence of the contract, the defendant could not set up a defence which grew out of his own misconduct, and that the agreement was to be acted upon as if no time had been limited or the time had not passed.²

In *Lincoln v. Wright*³ the facts were as follows: A mortgagee, with a power of sale of real estate, informed L, the mortgagor, that he should sell it for £220, unless more were offered. It was thereupon verbally agreed between L and W, that W should buy it on L's behalf for £230, and have a lien on it for that sum; that L should pay interest, and continue to occupy the part he then occupied, and that W should receive the rents of the rest to reduce the principal. An offer by W to purchase for £230 was then sent by L's agent to the mortgagee, who accepted it, and under his power of sale conveyed to W's infant daughter by W's direc-

Thynn v. Thynn, 1 Vern. 296; *Oldham v. Litchford*, 2 Vern. 506; *Sellack v. Harris*, 5 Vin. 521, pl. 31; *Walker v. Walker*, 2 Atk. 41; *Joynes v. Statham*, 3 Atk. 388; *Reech v. Kennegal*, 1 Ves. 123; 1 Wils. 227; *Amb. 67*; *Hare v. Shearwood*, 1 Ves. 243; *Pym v. Blackburn*, 3 Ves. 38; *Whitchurch v. Bevis*, 2 Bro. C. C. 565.

¹ 11 Ves. 627.

² *Morse v. Merest*, 6 Madd. 26.

³ 4 De G. & J. 16.

tion. L continued in occupation of the part he was to occupy, and paid interest, W receiving the rents of the rest. This continued for about ten months, when W died. After his death the daughter by her guardian brought ejectment, claiming to be absolute owner. It was held that, without reference to part performance, the statute was no defence, because W's insisting on the conveyance as absolute, when it had been agreed that it should be a mortgage, was a fraud, and the statute is not allowed to cover fraud.¹

It is not fraud on the part of a purchaser, who has approved of a draft agreement and promised to sign a fair copy of it, to refuse afterwards to sign the copy.² In *Jervis v. Berridge*³ the plaintiffs agreed to purchase an estate from the Law Life Assurance Society, and to pay a deposit on the signing of the contract. Before it had been signed the plaintiffs verbally agreed with Berridge to make it over to him on certain terms. In order to enable Berridge to deal with the Society, the plaintiffs signed, and gave to him a memorandum making over the contract to him in consideration of his paying to the Society the deposit, and engaging to pay a certain sum to the plaintiffs; the other terms of the bargain between the plaintiffs and Berridge, which were in favor of the plaintiffs being, at Berridge's request, omitted from the memorandum. On the same day the contract between the plaintiffs and the Society was signed, and the part signed by the Society was given to Berridge, who paid the deposit. Berridge afterwards repudiated all the stipulations in favor of the plaintiffs which had not been inserted in the memorandum. The plaintiffs then filed their bill against Berridge and the Society, asking to have the memorandum between Berridge and the plaintiffs cancelled, and for a conveyance from the Society on payment of what was due to them. To this bill Berridge demurred, and it was argued for him that the written agreement was used only for the purpose for which it was given, and that although he was afterwards advised that he was not bound to carry into effect the parol terms, that was not fraud, and *Wood v. Midgley* was cited. It was, however, held by the Court of Appeal (affirming the

¹ And see *Haigh v. Kaye*, L. R. 7 Ch. 469; *Booth v. Turle*, L. R. 16 Eq. 182.

² *Wood v. Midgley*, 5 D. M. G. 41.
³ L. R. 8 Ch. 351.

decision of *MALINS, V. C.*) that the demurrer was not sustainable on the merits, for that the memorandum was only ancillary to the verbal agreement between the plaintiffs and Berridge, and any use of it by him for a purpose inconsistent with that agreement was fraudulent. *LORD SELBORNE, L. C.*, in delivering the judgment of the court, p. 359, said: "The written document signed by the plaintiffs was a mere piece of machinery obtained by the demurring defendant from the plaintiffs, as subsidiary to and for the purposes of the verbal and only real agreement under circumstances which would make the use of it, for any purpose inconsistent with that agreement, dishonest and fraudulent."

SEC. 511. Partnership. — Where a partnership, or an agreement in the nature of a partnership, exists between two persons, and land is acquired by the partnership as a substratum for such partnership, the land is in the nature of the stock-in-trade of the partnership, and the partnership being proved as an independent fact, the court, without regarding the statute of frauds, will inquire of what the partnership stock consisted, whether it be of land, or of property of any other nature.¹

SEC. 512. Statute cannot be Pleaded after Admission of Agreement by Defendant. — A defendant cannot, after admitting an agreement and submitting to perform it, on the pleadings being amended as to other circumstances, take advantage of the statute,² and he cannot join a plea of the statute to another defence set up by his statement of defence.³

¹ *Dale v. Hamilton*, 5 Hare, 382, *per WIGRAM, V. C.*; 2 Ph. 266; *Darby v. Darby*, 3 Drew, 495.

² *Spurrier v. Fitzgerald*, 6 Ves. 548; *Beatson v. Nicholson*, 6 Jur. 620.

³ *Cooth v. Jackson*, 6 Ves. 12; *Newton v. Swanzy*, 8 N. H. 9; *Tilton v. Tilton*, 9 id. 386; *Burt v. Wilson*, 28 Cal. 132; *McGowan v. West*, 7 Mo. 569; *Vanpell v. Woodward*, 2 Sandf. Ch. (N. Y.) 143; *Harris v. Knickerbocker*, 5 Wend. (N. Y.) 638; *Jervis v. Smith, Hoff. Ch. (N. Y.)* 476; *Arz v. Grove*, 21 Md. 456; *Dyer v. Martin*, 4 Ill. 483; *Hall v. Hall*, 1 Gill. (Md.) 383; *Cozine v. Graham*, 2 Paige Ch.

(N. Y.) 178; *Minns v. Morse*, 15 Ohio, 568; *Hollingshead v. McKenzie*, 8 Ga. 457; *Dean v. Dean*, 9 N. J. Eq. 425; *Houser v. Lamort*, 55 Penn. St. 311; *Switzer v. Skiles*, 8 Ill. 529; *Tarlton v. Victes*, 5 id. 470; *Chetwood v. Brittain*, 2 N. J. Eq. 430; *Sneed v. Bradley*, 4 Sneed (Tenn.) 301; *Patterson v. Ware*, 10 Ala. 445; *Albert v. Ware*, 6 Md. 66; *Argenbright v. Campbell*, 3 H. & M. (Va.) 144; *Kirksey v. Kirksey*, 30 Ga. 156; *Baker v. Hollobough*, 15 Ark. 322; *Garner v. Shebblesfield*, 5 Tex. 552; *Esmay v. Grotser*, 18 Ill. 483; *Gunta v. Hulsy, Amb.* 586.

It does not appear to be settled whether, when the defendant is not required to put in a statement of defence, he may plead the statute orally at the hearing. In *Lincoln v. Wright*¹ the statute seems to have been pleaded orally at the hearing; and in *Snead v. Green*,² LORD ROMILLY allowed the statute of limitations to be so pleaded. But in *Holding v. Barton*,³ STUART, V. C., refused to allow a plea of the statute of limitations at the hearing, on the ground that if the statute had been pleaded properly, the plaintiff might have stated matter to countervail the plea.

SEC. 513. *Demurrer.*—*A defence that there is no written agreement within the statute may be taken by general demurrer where the facts of the case appear on the pleadings.*⁴ The function of a demurrer is to insist, summarily and simply, that on the assumption of the truth of the facts alleged by the pleadings the plaintiff is not, according to law, entitled to the relief required, and there is no difference whether the law to which the appeal is made is that which is founded on general principles of law and equity, or that which rests on the authority of a particular statute, or whether the statute on which it rests is one which destroys the right, or only precludes the remedy.⁵

Where the bill alleged in effect that the defendant held certain real estate as a trustee for the plaintiff, but contained no allegation that the trust was evidenced by writing, a demurrer was disallowed with costs.⁶

If a defendant demurs, on the ground of the statute, to a statement of claim, and the demurrer is overruled, and afterwards the statement is amended, it is not necessary, in order that the objection on the ground of the statute may be taken at the trial, that the defendant should plead the defence on the statute to the amended statement.⁷

¹ 4 De G. & J. 16.

² 10 W. R. 36; 8 Jur. (N. S.) 4.

³ 1 Sm. & G. App. xxv.

⁴ *Wood v. Midgley*, 2 Sm. & G. 115; 5 D. M. G. 41; *Middlebrook v. Bromley*, 2 N. R. 224; *Rummens v. Robins*, 11 Jur. (N. S.) 631.

⁵ *Barkworth v. Young*, 4 Drew, 9,

per KINDERSLEY, V. C.; and see *Pain v. Croombs*, 3 Sm. & G. 449; 1 De G. & J. 34.

⁶ *Davies v. Otty*, 12 W. R. 682; *affd. ib.* 896.

⁷ *Johnasson v. Bonhote*, L. R. 2 Ch. D. 298.

SEC. 514. Agreement Admitted by Defendant. — *Where the defendant admits a verbal contract by his statement of defence, the case will be taken out of the statute, although there have not been any acts of part performance, as in an action by purchaser of lands against the vendor to carry into execution the agreement, though not in writing, nor so stated by the pleadings, the vendor, by putting in a defence admitting the agreement as stated in the pleadings, takes the case out of the mischief sought to be provided against by the statute, there being no danger of perjury, and the court will decree specific performance; and also, if the vendor should die, upon a bill of revivor against his heir, the principle going throughout, and equally binding on the representative.*¹

A defendant admitting by his defence that at the date of the contract the plaintiff was entitled, cannot at the hearing object that no abstract was delivered and no title shown.²

SEC. 515. Executory Contract. — It seems to be doubtful whether, consistently with the statute of frauds, the court can entertain an action for rectifying an executory contract for the sale of lands, and carrying it, when rectified, into execution, even where the mistake is admitted by the defendant. In *Attorney General v. Sitwell*,³ ALDERSON, B., said: "I cannot help feeling that, in the case of an executory agreement, first to reform and then to decree an execution of it would be virtually to repeal the statute of frauds. The only ground on which I think the case could have been put would have been that the answer contained an admission of the agreement as stated in the bill, and the parties mutually agreeing that there was a mistake, the case might have fallen within the principle of those cases at law where there is a declaration on an agreement not within the statute, and no issue taken upon the agreement by the plea; because, in such case, it would seem as if the agreement of the parties being admitted by the record, the case would no longer be within the statute. . . . But in my present view of the question, it

¹ *Gunter v. Halsey*, Amb. 586; *Atk. 3*; *Huddleston v. Briscoe*, 11 Child v. Godolphin, 1 Dick, 39; *Cottingham v. Fletcher*, 2 Atk. 155; *Att. Gen. v. Day*, 1 Ves. S. 221; *Potter v. Potter*, ib. 441; *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Lacon v. Mertins*, 3

Ves. 583; *Parker v. Smith*, 1 Coll. 615; see *ante*, p. 600, n.

² *Phipps v. Child*, 3 Drew, 709.

³ 1 Y. & C. 559, 583.

seems to me that the court ought not in any case, where the mistake is denied or not admitted by the answer, to admit parol evidence, and upon that evidence to reform an executory agreement." Where a defendant admits the agreement if he means to rely on the fact of its not being in writing and signed, and so being invalid by reason of the statute, he must say so, otherwise he is taken to mean that the admitted agreement was a written agreement, good under the statute, or else that, on some other ground, it is binding on him.¹

SEC. 516. Statute Insisted Upon.—Although the verbal agreement is admitted by the statement of defence, the statute may be used as a defence to the suit.² *It is immaterial what admissions are made by a defendant insisting upon the benefit of the statute, for he throws it on the plaintiff to show a complete written agreement, and it can no more be thrown upon the defendant to supply defects in the agreement than to supply the want of an agreement.*³

SEC. 517. Defendant Denying Agreement but not Claiming Benefit of Statute.—It seems now to be settled that when a defendant alleges that no formal note of the agreement was made, and denies that any binding agreement ever existed, but does not expressly claim the benefit of the statute, he will not be entitled to claim the benefit of the statute at the hearing.⁴ In *Ridgway v. Wharton*,⁵ LORD CRANWORTH, C., said that where the defendant denies or does not admit an agreement, he need not plead the statute, and that the burden of proof was altogether on the plaintiff, who must then produce a valid agreement capable of being enforced; but in *Heys v. Astley*,⁶ the Lords Justices declined to follow *Ridgway v. Wharton*.⁷

¹ *Ridgway v. Wharton*, 3 D. M. G. 375; *Jackson v. Oglander*, 2 H. & M. 689; 6 H. L. C. 238, per LORD CRANWORTH, C.; and see *Heys v. Astley*, 4

De G. J. & S. 34; 3 N. R. 19; 12 W. R.

² *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Moore v. Edwards*, 4 Ves. 23; *Cooth v. Jackson*, 6 Ves. 12.

³ *Blagden v. Bradbear*, 12 Ves. 471; and see *Rowe v. Teed*, 15 Ves.

⁴ *Skinner v. McDouall*, 2 De G. & Sm. 265; *Baskett v. Cafe*, 4 De G. & S. 388.

⁵ 3 D. M. G. 689.

⁶ 4 De G. J. & S. 37; 3 N. R. 19; 12 W. R. (L. J.) 64.

⁷ And see *Homfray v. Fothergill*, L. R. 1 Eq. 572.

SEC. 518. Different Agreement Admitted.—If the defendant admits a different agreement to that stated in the pleadings, the plaintiff may amend his statement by abandoning the first stated agreement, and may have a decree for that admitted by the defendant.¹ If the plaintiff relies on the agreement admitted by the defendant, he will not be allowed to bring parol evidence to vary the term.²

SEC. 519. Rule of Law as to Admissibility of Parol Evidence on Behalf of a Defendant before Statute.—Before the statute of frauds, a defendant might produce parol evidence as a defence to a suit for specific performance, and the statute has not altered the law in this respect.³ “It should be recollected,” says LORD REDESDALE, “what are the words of the statute: ‘No person shall be charged upon any contract or sale of lands, etc., unless the agreement or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.’ No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement; but the statute does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, ‘That is not the agreement meant to have been signed.’ Such a case is left as it was by the statute: it does not say that a written agreement shall bind, but that an unwritten agreement shall not bind.”⁴

SEC. 520. When Parol Evidence Admissible on Behalf of Defendant Resisting Specific Performance.—Parol evidence is admissible on behalf of a defendant resisting an action seeking the specific performance of a written agreement to show that, upon the grounds of fraud, mistake, or surprise, the written agreement does not express the real terms.⁵

¹ *Lindsay v. Lynch*, 2 Sch. & Lef. 350, n.; and the judgment of EYRE, 9.

² *Pym v. Blackburn*, 3 Ves. 34.

³ *Clarke v. Grant*, 14 Ves. 524.

⁴ *Clinan v. Cooke*, 1 Sch. & Lef.

⁵ *Rich v. Jackson*, 4 Bro. C. C. 39; see also *Rann v. Hughes*, 7 T. R. 514; 6 Ves. 334, n.; *Joynes v. Stat-*

C. B., in *Davis v. Symonds*, 1 Cox, 402; see also *Wallis v. Littell*, 11 C. B. (N. S.) 369.

SEC. 521. Grounds upon which Parol Evidence Admitted on Behalf of Defendant.—Such evidence is admitted, not to explain or alter the agreement, but consistently with its terms to show the circumstances of fraud, mistake, or surprise. “There is,” said SIR T. PLUMER, “however, considerable difficulty in the application of evidence under this head, calling for great caution, especially upon sales by auction, lest, under this idea of introducing evidence of mistake, the rule should be relaxed by letting it in to explain, alter, contradict, and in effect get rid of a written agreement. In sales by auction the real object of introducing declarations by the auctioneers or other persons is, to explain, alter, or contradict the written contract; in effect, to substitute another contract; and, independently of authority, I should be much disposed to reject such declarations, as open to all the mischief against which the statute was directed, and also violating the rule of law which prevailed previously, whether offered by a plaintiff seeking a performance, or by a defendant to get rid of the contract; a distinction which it is difficult to adopt, where the evidence is introduced to show that the writing purporting to be the contract is not the contract, that there is no contract between them if that which is proved by parol does not make a part of it.”¹

SEC. 522. Cases where Parol Evidence Admitted.—In *Joynes v. Statham*,² the bill was brought to carry an agreement into execution for a lease of a house, and on the face of the agreement the plaintiff was to pay a rent of nine pounds a year. The defendant insisted by his answer that it ought to have been inserted in the agreement that the tenant should pay the rent clear of taxes, but the plaintiff, having written the agreement himself, had omitted to make it clear of taxes; and that the defendant, unless this had been the agreement, would not have sunk the rent from £14 to £9; and offered to read evidence to show that this was part of the agreement. For the defendant, it was insisted that the defendant ought not to be admitted to parol proof

ham, 3 Atk. 388; the Marquis Townshend *v.* Stangroom, 6 Ves. 328; Price *v.* Dyer, 17 Ves. 356; Clowes *v.* Higginson, 1 V. & B. 524; Earl of Darnley *v.* London, Chatham, &

Dover R. C., L. R. 2 H. L. 43; Snelling *v.* Thomas, L. R. 17 Eq. 303.

¹ Clowes *v.* Higginson, 1 V. & B. 327.

² 3 Atk. 388.

to add to the written agreement, which is expressly guarded against by the statute of frauds. LORD HARDWICKE said: "I permitted this point to be debated at large, because it is decisive in the cause, for I am very clear this evidence ought to be read. This has been taken up by way of objection to the plaintiff's bill. The constant doctrine of this court is, that it is in their discretion whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law. Now has not the defendant a right to insist, either on account of an omission, mistake, or fraud, that the plaintiff shall not have a specific performance? It is a very common defence in this court, and there is no doubt but it ought to be received, and quite equal whether it is insisted on as a mistake or a fraud."¹

The distinction between the case of a plaintiff seeking to add to or vary a written agreement by parol evidence and that of a defendant producing parol evidence for the same purpose is well illustrated by the case of *The Marquis Townshend v. Stangroom*,² where cross bills were filed; one by the lessor, seeking specific performance of a written agreement for a lease, and attempting to prove a variation in the quantity of land to be let, by parol evidence; the other by the lessee, for a specific performance of the written agreement. Both bills were dismissed, that by the lessor on the ground that parol evidence on behalf of a plaintiff was not admissible to vary the written agreement; that by the lessee on the ground that the evidence, inadmissible on behalf of the lessor in the character of plaintiff, was admissible on his behalf when resisting specific performance.³

¹ And see *Ramsbottom v. Gosden*, 1 V. & B. 165.

² 6 Ves. 328.

³ See also *Wood v. Scarth*, 2 K. & J. 33. Where several writings are relied upon to establish a contract for the sale of land, the relation between the writings must appear on their face. The subject-matter of the contract must appear from the memorandum, and the land must be so described that it may be identified. Its location and identification may be by parol. Thus, in *Sanborn v. Nockin*, 20 Minn. 178, the plaintiff by letter offered to

buy five acres owned by defendant in a certain section. This offer was accepted in writing and a valid contract established. The writing contained a description, but a question might be raised as to its sufficiency. In such case, however, it would be competent to identify by extrinsic evidence the five acres owned by defendant in the section, if he owned but one five-acre tract, and to show the identity of different forms of description of the same land. *Hurley v. Brown*, 98 Mass. 548. The connection and relation of several writings

Again, in *Clark v. Grant*,¹ SIR W. GRANT, M. R., said: "It has been ruled that it is not open to the plaintiff to supply or correct a term of a written agreement by parol; but it has never been determined that a defendant cannot set up a parol engagement in opposition to a party who, having entered into it, seeks to have a written engagement specifically performed independently of it. The statute of frauds has not altered the situation of a defendant against whom a specific performance is prayed. A defendant in such a case may give the same evidence now which he might have given before." In *Winch v. Winchester*² an estate was described in the particulars as "containing by estimation forty-one acres, be the same more or less." After the sale the land was measured and it was found that it amounted only to between thirty-five and thirty-six acres. Upon a bill for specific performance, the defendant, submitting to perform the agreement with an abatement, was allowed to produce parol evidence to prove that at the sale the auctioneer had declared that the property contained forty-one acres, and that if the purchaser did not like to take it so, it should be measured; and if it proved more, the excess must be paid for; if less, that an abatement should be made. In *Manser v. Back*³ premises were advertised to be sold according to certain printed particulars and conditions of sale. Before the sale took place, several of the printed copies were altered by the vendor's solicitor, who introduced, in writing, a reservation of a right of way to other premises belonging to the vendor. Several of the altered copies of the particulars were laid on the table in the auction-room, without any remark with regard to the alteration, and an altered copy was delivered to the auctioneer, who read the same aloud before the biddings commenced; but the party who became the pur-

assumed to constitute one contract must appear on their face either from the nature of their contents or subject-matter, or by reference, and cannot be shown by parol. *Ridgway v. Ingram*, 50 Ind. 145. Parol evidence, showing the fact of the delivery and receipt of the several writings, including time, place, situation of property and parties, and other circumstances, may

be received to aid in the interpretation of the contract, but the essential terms of the writing required by the statute of frauds cannot be supplied by oral testimony of what the parties intended or understood. *Tice v. Freeman*, Minn. Sup. Ct.

¹ 14 Ves. 524.

² 1 V. & B. 375.

³ 6 Hare, 443.

chaser did not hear or notice the alteration. The contract was inadvertently signed by the auctioneer and by the purchaser, on a copy of the particulars of sale not containing the reservation. After the purchase-money was paid and possession given, the purchaser filed his bill for a specific performance of the contract by a conveyance from the vendor, without a reservation of the right of way, but the bill was dismissed, *WIGRAM, V. C.*, saying: "If the vendors had been plaintiffs asking a decree for specific performance, with an addition to the paper signed by Manser such as they say ought to have been introduced, it is clear that no such decree could have been made. The evidence to prove the additional term would have been inadmissible. . . . The principle, however, is general. Where the fraud, mistake, or surprise cannot be established without evidence, equity will allow a defendant to a bill for specific performance to support a defence founded upon any of those grounds by evidence *dehors* the agreement."¹

SEC. 523. Grounds upon which Parol Evidence not Admitted on Behalf of Plaintiff. — The grounds upon which the court acts in refusing to allow a plaintiff to produce parol evidence to contradict a written agreement were thus stated by *SIR W. GRANT*: "By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry that the rule of law was adopted. Though the written instrument does not contain the terms it must in contemplation of law be taken to contain the agreement, as furnishing better evidence than any parol can supply."² *LORD HARDWICKE* appears to have thought that by possibility a case might be

¹ And see *Price v. Ley*, 4 Giff. 235, *affd.* 32 L. J. Ch. 530; *Myers v. Watson*, 1 Sim. (N. R.) 523; *Rose v. Watson*, 10 H. L. C. 672.

² *Woollam v. Hearn*, 6 Ves. 211, 218; and see *Parteriche v. Powlet*, 2 Atk. 383; *Tinney v. Tinney*, 3 Atk. 8; *Lake v. Phillips*, 1 Ch. Rep. 110;

Lord Irnham v. Child, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Bro. C. C. 219; *Hare v. Sherwood*, 3 Bro. C. C. 168; *Jordan v. Sawkins*, *ib.* 388; *Binsted v. Coleman*, Bunb. 65; *Hogg v. Snaith*, 1 Taunt. 347; *Martin v. Pycroft*, 2 D. M. G. 795.

made in which even a plaintiff might be permitted to show an omission in a written agreement either by mistake or fraud.¹ In *Joynes v. Statham*² his lordship is reported to have said: "Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but that he might have been allowed the benefit of disclosing this to the court."

This case was cited in *Clinan v. Cooke*,³ for the purpose of showing that LORD HARDWICKE thought that there might be an addition to the agreement by parol. LORD REDESDALE, however, said: "I have found a reference to a note of the same case by Mr. Brown, who was King's counsel in LORD HARDWICKE's time, and in great business, and the manner in which he has put this case is thus: 'But query if, on a bill for performance of an agreement, and an attempt to add to the agreement by parol, whether plaintiff can do it in that case?' Therefore Mr. Brown certainly did not understand LORD HARDWICKE as saying that it could be done, and looking attentively at the words used by Atkyns, I do not think they import anything positive."⁴

SEC. 524. Whether Parol Evidence Admissible on Behalf of Plaintiff when Objection Taken before Agreement Signed.—In *Pember v. Mathers*⁵ parol evidence was admitted on behalf of the plaintiff, the written agreement having been entered into upon the faith of a parol undertaking by the defendant; and LORD THURLOW laid it down that where the objection is taken before the agreement is executed, and the other side promises to rectify it, it is to be considered as a fraud if such promise is not kept.⁶

SEC. 525. Parol Variation of Written Contract may be Enforced where Part Performance.—Where there have been acts of part performance in pursuance of a parol contract varying a written contract, and the defendant has acquiesced, specific performance of the contract as varied by parol may be enforced. In the Anonymous case,⁷ W leased a house to

¹ *Walker v. Walker*, 2 Atk. 98.

² 3 Atk. 389.

³ 1 Sch. & Lef. 38.

⁴ And see *Marquis of Townshend v. Stangroom*, 6 Ves. 338.

⁵ 1 Bro. C. C. 54.

⁶ See, however, *Clarke v. Grant*, 14 Ves. 525.

⁷ 5 Vin. Abr. pl. 38.

N for eleven years, and was to allow £20 to be laid out in repairs. The agreement was reduced into writing, signed and sealed by both parties. N repaired the house, and finding it to take a much greater sum than £20, told W of it, that he would nevertheless go on, and lay out more money if he would enlarge the term to twenty-one years, or add fourteen, or as many as N should think fit. W replied that they would not fall out about that, and afterwards declared that he would enlarge the term, without mentioning any term in certain. The question was whether this new agreement, made by parol, which varied from the written agreement, should be carried into execution notwithstanding the statute of frauds? The Master of the Rolls said, that before the statute written agreements could not be controlled by a parol agreement contrary to it or altering it, but this is a new agreement, and the laying out the money is a performance on one part, and ought to be carried into execution, and built his decree upon these cases: first, where a parol agreement was for a building lease, and before it was reduced into writing the lessee began to build, and after differing on the terms of the lease the lessee brought a bill, and the lessor insisted on the statute of frauds, the Lord Keeper dismissed the bill, but the plaintiff was relieved in Dom. Proc.; and the second was a case in LORD JEFFRIES' time.¹

SEC. 526. Parol Evidence not Admissible on Behalf of Plaintiff unless Part Performance.— Unless there have been acts of part performance, parol evidence will not be admitted on behalf of a plaintiff to vary a written agreement, although the plaintiff alleges that the variation was fraudulent. Thus parol evidence to prove that a particular estate was left out of a lease under a parol agreement by the joint direction of both parties was refused.² So parol evidence is not admissible to prove declarations by an auctioneer at a sale made for the purpose of explaining the particulars or conditions of sale. In *Jenkinson v. Pepys*,³ upon the sale of an estate by auction, the particular was equivocal as to the woods, but it was

¹ M. S. Rep. Mich. 4 Geo. Canc.;
and see *Legal v. Miller*, 2 Ves. S.
299; *Pitcairn v. Ogbourn*, ib. 375;
Marquis of Townshend v. Stangroom,
6 Ves. 628.

² *Lawson v. Laude*, 1 Dick. 346;
Fell v. Chamberlain, 2 Dick. 484.

³ Cited 6 Ves. 330; 1 V. & B. 528;
15 Ves. 521.

clear that the purchaser was to pay for timber and timber-like trees, and there was a large underwood upon the estate. At the sale the auctioneer declared that he was only to sell the land, and everything growing upon the land must be paid for. The defendant, the purchaser, insisted that he was only to pay for timber and timber-like trees, not for plantation and underwood. The declaration at the sale was distinctly proved, but it was determined that the parol evidence was not admissible.¹

SEC. 527. Term Omitted by Mistake may be Proved by Parol by Defendant.—A defendant who has previously had negotiations with other persons in which the terms on which he would sell have been discussed may prove by parol that a term mentioned in the previous negotiations was omitted by mistake from the agreement of which specific performance is sought,² or that he has by mistake agreed to sell at a less price than the property is worth.³

Where the plaintiff agreed to take a lease of a public house from the defendant, a brewer, but the written contract said nothing as to the restrictive covenant of a brewer's lease, and the plaintiff instituted a suit to obtain an unrestricted lease, the bill was dismissed upon the restricted parol agreement being proved.⁴

SEC. 528. Inadvertent Omission.—Although specific performance of an agreement may not be enforced against a defendant who reasonably misapprehends its terms, a mere case of inadvertent omission to propose an intended term is different; and therefore where an occupant of land under an expiring tenancy had always paid the tithe rent charge, and afterwards entered into a written agreement with the landlord for a lease at the old rent, but without any stipulation being introduced as to the tithe rent charge, it was held that the landlord could not insist on such a stipulation being inserted as a condition of specific performance, being enforced against him. "In all the cases," said LORD CHELMSFORD, L. C., "which have been cited on this point, there was clear evidence of mistake. Here there is no evidence that the

¹ See also *Higginson v. Clowes*, 15 Ves. 516, affd. 1 V. & B. 424; *Humphries v. Horne*, 3 Hare, 277.

² *Wood v. Scarth*, 2 K. & J. 33.

³ *Webster v. Cecil*, 30 Beav. 62.

⁴ *Barnard v. Cave*, 26 Beav. 253.

parties intended anything, except to leave the payment of the rent charge to be made according to the Act of Parliament.”¹

SEC. 529. Mistake must be Clearly Proved.—Where an agreement has been reduced into writing and signed by the parties, the proof must be very clear which will induce the court to refuse to enforce the written agreement upon the ground that a term of the real agreement has been omitted by mistake.²

If when the terms of a parol agreement are reduced into writing it is agreed that a certain term shall be inserted, and the agreement is executed without such term being inserted, and no fraud is alleged, the omission cannot be set up as a defence to an action for specific performance.³

SEC. 530. Parol Evidence Admissible to Prove Promised Alterations.—If a person is induced to sign an agreement upon representation that certain alterations shall be made in the terms, and the person making the promise refuses afterwards to fulfil it, parol evidence is admissible to show what the promised alterations were, and specific performance will be refused.⁴

SEC. 531. Terms Omitted, Plaintiff Offering to Perform.—Specific performance, where there has been no fraud or mistake, may be decreed where a term has been omitted from the written agreement, upon the plaintiff submitting to perform the omitted term. Thus, where the defendants agreed in writing to grant the plaintiff a lease at a specified rent and for a specified term, subject to the same covenants, clauses, and agreements as were contained in an expiring lease, under which he then held the property, and the plaintiff filed a claim for specific performance, stating the agreement, and that it was further agreed that he should pay a premium of £200, which he offered to do, it was held that this additional

¹ *Parker v. Taswell*, 2 De G. & J. C. C. 350; *Jackson v. Cator*, 5 Ves. 559, 575. 688; *Rich v. Jackson*, 4 Bro. C. C. 518.

² *Clay v. Rufford*, 14 Jur. 803, 805, *per* WIGRAM, V. C.; and see *Alvanley v. Kinnaid*, 1 Mac. & G. 1; *Earl of Darnley v. London, Chatham, & Dover R. C.*, L. R. 2 H. L. 43. ⁴ *Micklethwait v. Nightingale*, 12 Jur. 638; *Clarke v. Grant*, 14 Ves. 519; *Vouillon v. States*, 2 Jur. (N. S.) 845.

³ *Shelburne v. Inchiquin*, 1 Bro.

term did not render the statute of frauds a valid defence to the claim. "Our opinion is," said KNIGHT BRUCE, L. J., "that where persons sign a written agreement upon a subject obnoxious or not obnoxious to the statute that has been so particularly referred to, and there has been no circumvention, no fraud, nor (in the sense in which the term 'mistake' must be considered as used for this purpose) mistake, the written agreement binds at law and in equity, according to its terms, although verbally a provision was agreed to, which has not been inserted in the document; subject to this, that either of the parties sued in equity upon it may perhaps be entitled in general to ask the court to be neutral, unless the plaintiff will consent to the performance of the omitted term."¹

Where the written agreement only provided that the purchaser should bear the expense of the conveyance, parol evidence was admitted to show, that by the mistake of the solicitor a provision that the purchaser should also bear the expense of making out the title was omitted, and it was held that the plaintiff must submit to have the agreement performed in the way contended for by the defendant, or have his bill dismissed.² So, where in a suit for specific performance of a written agreement, a parol variation not set up by the answer came out on the cross-examination of the defendant's agent, who was one of the plaintiff's witnesses, it was considered that there was a proper subject for inquiry before the court finally disposed of the case; but the plaintiff consenting to adopt it as part of the contract, specific performance with the parol variation was decreed.³

SEC. 532. Subsequent Variation, Plaintiff Offering to Perform.—Specific performance with a parol variation cannot be obtained by a plaintiff.⁴ But where a written agreement has been subsequently varied by parol, or by an informal document, and the plaintiff offers the defendant the benefit of

¹ *Martin v. Pycroft*, 2 D. M. G. 785, 795; and see *Leslie v. Thompson*, 9 Hare, 268; *Barnard v. Cave*, 26 Beav. 253; *Vouillon v. States*, 2 Jur. (N. S.) 847.

² *Ramsbottom v. Gosden*, 1 V. & B. 165; and see *Lord Gordon v. Marquis of Hertford*, 2 Madd. 121.

³ *London & Birmingham Railway Co. v. Winter*, 1 Cr. & Ph. 57; and see *Flood v. Finlay*, 2 Ball & B. 9; *Garrard v. Grinling*, 2 Swanst. 244.

⁴ *Robson v. Collins*, 7 Ves. 130; *Nurse v. Lord Seymour*, 13 Beav. 254.

the variations, the court will decree a specific performance of the agreement with the variations if the defendant elects to take advantage of them, and if he does not so elect, it will decree a specific performance of the original agreement.¹

But after an agreement has been correctly reduced into writing, parol evidence is not admissible to add a term omitted from the written agreement.²

SEC. 533. When Parol Evidence not Admissible to Add Term.—In *Croome v. Lediard*,³ by a written agreement between the plaintiff and the defendant, the plaintiff agreed to sell and the defendant agreed to purchase, upon the terms stated, a certain property called the Leigh Estate, and by the same agreement the defendant agreed to sell and the plaintiff agreed to purchase another estate, called the Haresfield Estate, and it was not expressed that the two contracts were to be dependent on each other. The defendant was eventually unable to make a good title to the Haresfield Estate; it was held that the plaintiff was entitled to a specific performance of the contract as to the Leigh Estate. “The intention of the parties,” said SIR J. LEACH, M. R., “must be collected from the expressions in the written instrument, and no evidence *aliunde* can be received to give a construction to the agreement contrary to the plain import of those expressions.” On appeal the decree was affirmed, LORD BROUGHAM saying: “It had been argued that, although evidence of matter *dehors* was not admissible for the purpose of raising an equity, and that, therefore, it was competent to the defendant in a suit for specific performance to avail himself of such evidence, though it was not competent to the plaintiff to do so. The distinction was sound within certain limits, and within those limits the rule might be safely adopted. Parol evidence of matter collateral to the agreement might be received, but no evidence of matter *dehors* was admissible to alter the terms and substance of the contract.” His lordship then commented on *Clarke v. Grant*,⁴ and continued: “In the present case, the purpose for which the parol evidence was tendered

¹ *Robinson v. Page*, 3 Russ. 114; *Snelling v. Thomas*, L. R. 17 Eq. and see *Price v. Dyer*, 17 Ves. 356; 303.

Van v. Corfe, 3 My. & K. 277.

³ 2 My. & K. 251; see also *Lloyd*

² *Omerod v. Hardman*, 5 Ves. 722; *v. Lloyd*, 2 M. & C. 192.

Jenkins v. Hiles, 6 Ves. 654, 655; ⁴ 14 Ves. 519.

on the part of the defendant was, not to enforce a collateral stipulation, but to show that the transaction was conducted on the basis of an exchange, a circumstance which, if true, was totally at variance with the language and plain import of the instrument. Nothing could be more dangerous than to admit such evidence; for if the agreement between the parties was in fact conducted upon the basis of an exchange, why was the instrument so drawn as to suppress the real nature of the transaction?" Upon this case LORD ST. LEONARDS remarks: "The decision was probably well founded. The evidence, it is submitted, was inadmissible, not because it was not to enforce a collateral stipulation, but because it did not prove that by fraud, mistake, or surprise, the agreement did not state the alleged real contract, viz., for an exchange between the parties. The defendant was an attorney, and fraud was not alleged, nor indeed was mistake or surprise; for he had himself prepared the agreement, and he preferred making it a mutual contract for sale and purchase instead of an exchange, and of course he could not be permitted to alter its character by parol evidence of the mode in which the negotiation was conducted, and of the views of the parties, in order to avoid the consequences which attached to the nature of the contract which the parties, with their eyes open, having regard to other objects, had thought it proper to adopt."¹

So in *Lord Irnham v. Child*,² parol evidence to prove that it was part of an agreement that a grant of an annuity should be redeemable, a proviso for redemption not having been inserted with the knowledge of both parties, was refused, it not being charged that the omission was fraudulent.³

SEC. 534. Terms of Agreement Ambiguous.—Where the terms of the written agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the court has upon that ground only refused to enforce the agreement.⁴ Thus the court will not decree

¹ Sugd. V. & P. 13th ed. 134.

² 1 Bro. C. C. 92; 2 Dick. 554.

³ And see *Marquis Townshend v. Stangroom*, 6 Ves. 332.

⁴ *Manser v. Back*, 6 Hare, 447;

Calverley v. Williams, 1 Ves. Jr. 210;

Jenkinson v. Pepys, 15 Ves. 521; 1 V & B. 528; 6 Ves. 330; *Clowes v.*

specific performance of an incomplete gift,¹ nor where, by adopting the construction of an ambiguous contract, the effect of the decree would be to compel the vendor to convey property not intended or believed by him to be included in the contract,² or to compel the defendant to accept less than he actually contracted for.³ So specific performances will not be decreed where the description on the plan of property is misleading, and there is nothing to put the purchaser on inquiry.⁴ But specific performance will only be refused when the description of the property is ambiguous, and the purchaser swears he has made a mistake: if no ground for mistake appears on the particulars, it is not sufficient for the purchaser to swear that he made a mistake.⁵ So also it is not a ground for refusing specific performance that no solicitor acted for the vendor, and that the contract was executed under circumstances which might easily have led to fraud, if no fraud is proved against the plaintiff.⁶

If at the time a written contract has been entered into, a verbal contract has also been entered into which has been admitted by the defendant to be a separate contract, a defendant cannot resist a suit for specific performance of the written agreement on the ground that the verbal contract has not been executed by the plaintiff.⁷ Where the owner of a plot of ground agreed to grant a lease to A as soon as the latter had erected a villa thereon, but it was stipulated that if A should not perform the agreement on his part, the agreement for a lease was to be void, and that the owner might re-enter, and A was to insure in a particular office, and to have the option of purchasing the fee in two years, and A erected the villa, but insured in the wrong office; it was held that the contract for a lease was independent of the option to purchase, and that notwithstanding the forfeiture of the

Higginson, 1 V. & B. 524; Neap v. Abbott, C. P. Coop. 333. See the cases there collected.

¹ Callaghan v. Callaghan, 8 C. & F. 374.

² Baxendale v. Seale, 19 Beav. 601; Alvanley v. Kinnaird, 2 Mac. & G. 1.

³ Moxey v. Bigwood, 8 Jur. (N. S.) 803, affd. 10 Jur. (N. S.) 597.

⁴ Weston v. Bird, 2 W. R. 145; Swaisland v. Dearsley, 29 Beav. 430; Denny v. Hancock, L. R. 6 Ch. 1.

⁵ Swaisland v. Dearsley, 29 Beav. 430.

⁶ Lightfoot v. Heron, 3 Y. & C. 586.

⁷ Phipps v. Child, 3 Drew. 709.

first, the latter still subsisted, and a specific performance of the contract for sale was decreed.¹

Where a purchaser contracts under a natural mistake, which is not attributable to any negligence on his part, it is the duty of the vendor to relieve him from that mistake.²

Where a mortgagee with power of sale obtained a foreclosure decree, and then entered into an agreement to sell the estate, with a clause providing that as the vendor was mortgagee with power of sale, she would only enter into the usual covenant that she had not incumbered, the purchaser objected to the validity of the foreclosure decree, and insisted upon having the conveyance under the power of sale, and on the vendor declining to convey in that form, instituted a suit for specific performance, in which the vendor adduced evidence showing that the above-mentioned clause was inserted by inadvertence and that she never intended to incur the risk of opening the foreclosure by conveying under the power, it was held, that the misapprehension was a sufficient defence to the enforcement of a conveyance under the power, the court being satisfied that the agreement would not have been entered into, if its true effect had been known.³

SEC. 535. Mistake in Law.—It is a maxim of equity that parties making a mistake in matters of fact shall not be held bound by acts committed by them under such mistake. When, however, they make a mistake in law they cannot afterwards be heard to say that the contract shall on that account be set aside.⁴ In the maxim "*ignorantia juris haud excusat*" the word "*jus*" is used in the sense of denoting general law, the ordinary law of the country. But when the word "*jus*" is used in the sense of denoting a private right, that maxim has no application.⁵ The court has refused an injunction to restrain plaintiffs in an action-at-law from taking money out of court, which the defendants-at-law had paid into court in the action, in ignorance that upon such payment the plaintiffs-at-law were entitled to stay their

¹ Green v. Low, 22 Beav. 625.

² Moxey v. Bigwood, 8 Jur. (N. S.) 803; affd. 10 Jur. (N. S.) 597.

³ Watson v. Marston, 4 D. M. G. 230.

⁴ Mildmay v. Hungerford, 2 Vern. 243; Marshall v. Collett, 1 Y. & C. Exch. 232, 238.

⁵ Cooper v. Phibbs, L. R. 2 H. L. 149, 170, per LORD WESTBURY.

action, and take the sum so paid.¹ So where a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, and alleged that the agent had acted without authority, it was held that the lessee was entitled to have the agreement specifically performed, and to have a lease for fourteen years, determinable at his own option at the end of seven years.²

But where the heir-at-law of a shareholder in a company, the shares in which were personal estate, being ignorant of that circumstance, and supposing himself to be liable in respect of the ancestor's shares, executed a deed of indemnity to the trustees of the company, it was held that he was entitled in equity to have his execution of the deed cancelled, as having been obtained under a mistake of fact and law.³

SEC. 536. **Fact that Vendor cannot make Title.**—That a vendor has put himself in a position where he cannot make title is no defence against an action for specific performance. In such action the vendee is entitled to judgment that the vendor make reasonable efforts to reacquire the title and convey to him. In *Love v. Camp*, 6 Ired. (N. C.) Eq. 209, PEARSON, J., uses this language: "If the vendee does not know that the vendor has not the title, there is then no reason why he should not be decreed to perform his agreement, and if he is put to great inconvenience and expense to enable him to obey the decree, it will be the consequence of his own act, and he will not be allowed to offer such an excuse for not doing justice." "It is a defence that the vendor is unable to convey the title, for want of it in himself, after reasonable efforts to obtain it."⁴ The rule prevails when the vendor, after making his contract, sells to a *bona fide* purchaser without notice.⁵ If the conveyance after contract were made to one cognizant of its existence and provisions, and a person, *sui juris*, the reconveyance can be coerced from the purchaser.⁶ The party is not by such

¹ *Great Western Railway Co. v. Cripps*, 5 Hare, 91. ⁴⁹⁹; *Fry on Spec. Perf.*, § 658; *Pom. Cont.*, § 203.

² *Powell v. Smith*, L. R. 14 Eq. 85.

³ *Broughton v. Hutt*, 3 De G. & J.

501.

⁵ *Swepson v. Johnson*, *supra*; *Denton v. Stewart*, 1 Cox, 258.

⁶ *Laverty v. Mason*, 33 N. Y. 658;

⁴ *Swepson v. Johnson*, 84 N. C. *Foss v. Haynes*, 31 Me. 81.

means thrown back upon his action for compensatory damages for a breach of the obligation, but he has a remedy in its specific enforcement. "While on the one hand," remarks PEARSON, J., "the vendee is not obliged to take compensation in damages, but may insist on having the thing contracted for, so on the other, the vendor is not obliged to make compensation in damages, but may insist on the vendee's taking the thing contracted for."¹

¹ *Bryson v. Peak*, 8 Ired. (N. C.) Eq. 310; *Welborn v. Sechrist*, 88 N. C. 67.

CHAPTER XIX.

PLEADING.

SECTION.

537. Statute should be Plead.

538. Demurrer.

SECTION 537. Statute should be Plead.—Although not required in all the States, yet correct practice requires that if a party intends to rely upon the statute of frauds as a defence, he should set it up, either by plea or answer, and in most of the States he *must* do so, or he is treated as having waived the defect. Especially is this the case in those States where the contract is not declared to be void but only that no action shall be maintained thereon.¹ But this is the rule only in that class of actions where the declaration or com-

¹ *Boston v. Nicholls*, 47 Ill. 353; *Lear v. Chateau*, 23 id. 39; *Burke v. Haley*, 7 id. 614; *Thornton v. Vaughan*, 3 id. 218; *Patrick v. Ashcroft*, 20 N. J. Eq. 198; *Lawrence v. Chase*, 54 Me. 196; *Thayer v. Reeder*, 45 Iowa, 172; *Adams v. Patrick*, 30 Vt. 516; *Montgomery v. Edwards*, 46 id. 151; *Talbot v. Bowen*, 1 A. K. Mar. (Ky.) 436; *Gwynn v. McCauley*, 32 Ark. 97; *Newton v. Swazey*, 8 N. H. 9; *Harrison v. Harrison*, 1 Md. Ch. 331; *Huffman v. Ackley*, 34 Mo. 277; *Vaupell v. Woodward*, 2 Landf. Ch. (N. Y.) 143; *Clarke v. Callaw*, 46 L. J. Q. B. Div. 53; *Williams v. Leper*, 3 Burr. 1890; *Dappa v. Mayo*, 1 Wm. Saund. 380, n.; *Young v. Austin*, L. R. 4 C. P. 553; *Forth v. Stanton*, 1 Wm. Saund. 226, n.; *Myers v. Morse*, 15 John. (N. Y.) 425; *Rann v. Hughes*, 7 T. R. 350, n. That the statute of frauds must be pleaded in order to avail as a defence to an action, see *Rabsuhl v. Lack*, 35 Mo. 316; *Patterson v. Ware*, 10 Ala. 444; *Osborne v. Endicott*, 6 Cal. 149; *Tarleton v. Vietes*, 6 Ill. 470; *Warren v. Dickson*, 27 Ill. 115; *Lingan v. Henderson*, 1 Bland (Md.) 236; *Kinzie v. Penrose*, 3 Ill. 520; *Thornton v. Henry*, id. 218. To the contrary, *Amburger v. Marvin*, 4 E. D. S. (N. Y. C. P.) 393. If a contract is set up in a petition which is good at common law, the defence that it is not in writing, as required by the statute of frauds, etc., must be pleaded by him who would avoid it; and if not so pleaded, it is waived. *Gardner v. Armstrong*, 31 Mo. 535. When the statute of frauds is pleaded in defence, it is not sufficient to allege that the account stated is barred by the statute of frauds; the facts relied upon in defence under the statute should be set out. *Dinkel v. Gundelfinger*, 35 Mo. 172.

plaint sets forth the contract upon which the plaintiff seeks recovery, and has no application in actions of book account or general assumpsit where the nature of the claim is not set forth, and does not appear until the evidence is actually put in; and in this class of cases the statute may be relied upon in defence, although not raised by any pleadings.¹ So too it has been held that the statute may be relied upon under the general issue *which denies that any such contract as is set forth in the declaration was ever made*, because in such a case the plaintiff must, in cases where the statute requires it, produce a contract in writing, or show such a special state of facts as takes the case out of the statute if the contract is by parol,² and the same rule prevails as to an answer to a bill in equity which denies the making of such a contract as is set forth in the bill,³ unless the bill also sets up facts which, if true, avoid the statute, in which case, as well in the first instance as when the answer sets up the statute in defence, the answer must also traverse such allegations.⁴

¹ *Durant v. Rogers*, 71 Ill. 121; *Hunter v. Randall*, 61 Me. 423; *Boston Duck Co. v. Dewey*, 6 Gray (Mass.) 446; *Duffy v. O'Donovan*, 46 N. Y. 226. In *Alger v. Johnson*, 4 Hun (N. Y.) 412, it was held that it is only where a complaint sets forth a contract, and the answer admits that allegation, that the plaintiff must plead the statute of frauds. *Beard v. Converse*, 84 Ill. 512.

² *Hotchkiss v. Ladd*, 36 Vt. 593. In an action for goods sold and delivered to the defendant, the defendant may prove that the goods were sold and delivered to a third person, and that the defendant's promise to pay for them was merely collateral, without pleading the statute of frauds. *Boston Duck Co. v. Dewey*, 6 Gray (Mass.) 446. *Buttermere v. Hayes*, 5 M. & W. 456; *Reade v. Lamb*, 6 Exchq. 130; *Elliott v. Thomas*, 3 M. & W. 170; *Johnson v. Dodgson*, 2 M. & W. 653. But now, in England, under the new rules of pleading, the statute must be plead specially. When the defendant in his answer denies the agreement or contract

alleged in the bill, it is not necessary for him to insist in his answer upon the statute of frauds. *Trapnall v. Brown*, 19 Ark. 39; *Wynn v. Garland*, 19 id. 23; *Hacker v. Gentry*, 3 Met. (Ky.) 463.

³ *Cozine v. Graham*, 2 Paige Ch. (N. Y.) 181; *Gwins v. Calder*, 2 Dessau (S. C.) Eq. 171; *Small v. Owings*, 1 Md. Ch. 363; *Wynn v. Garland*, 19 Ark. 23; *Trapnall v. Brown*, 19 Ark. 39; *Fowler v. Lewis*, 3 A. K. Mar. (Ky.) 343; *Kay v. Curd*, 6 B. Mon. (Ky.) 100; *Myers v. Morse*, 15 John. (N. Y.) 425; *Ontario Bank v. Root*, 3 Paige Ch. (N. Y.) 478; *Chicago &c. Coal Co. v. Liddell*, 69 Ill. 639.

⁴ *Meach v. Stone*, 1 D. Chip. (Vt.) 182; *Hall v. Hall*, 1 Gitt. (Md.) 383; *Chambers v. Massey*, 7 Ired. (N. C.) Eq. 286; *Cooth v. Jackson*, 6 Ves. 12; *Taylor v. Beech*, 1 Ves. Sr. 297; *Rowe v. Leed*, 15 Ves. 378; *Bowers v. Cator*, 4 id. 91; *Tarleton v. Vietes*, 6 Ill. 470; *Champlin v. Parrish*, 11 Paige Ch. (N. Y.) 405; *Miller v. Cotten*, 5 Ga. 341; *Harris v. Knickerbocker*, 5 Wend. (N. Y.) 638.

SEC. 538. **Demurrer.**—If the declaration, complaint, or bill, expressly states that the contract was made by parol, as “entered into a parol contract with the plaintiff to sell and deliver to him . . . at and for the price of five hundred dollars,” advantage may be taken of the statute, by demurrer, because upon its face it appears that no cause of action exists;¹ but if the declaration, complaint, or bill, simply sets forth a contract, which if by parol would be within the statute, but omits to state whether it is by parol or in writing, the statute must be plead, and cannot be availed of by demurrers.² In England, prior to the Supreme Court of

¹ *Lawrence v. Chase*, 54 Me. 196; *Thomas v. Hammond*, 47 Tex. 42; *Sanborn v. Chamberlin*, 101 Mass. 417; *Richards v. Richards*, 9 Gray (Mass.) 313; *Randall v. Howard*, 2 Black (U. S.) 585; *Price v. Weaver*, 13 Gray (Mass.) 272; *Kibby v. Chetwood*, 4 T. B. Mon. (Ky.) 91.

² *Burkham v. Mastin*, 54 Ala. 122; *Dayton v. Williams*, 2 Doug. (Mich.) 31; *Elliott v. Jenness*, 111 Mass. 29; *Walker v. Richards*, 39 N. H. 259; *Walsh v. Kattenburgh*, 8 Minn. 127; *Ecker v. Bohn*, 45 Md. 278; *Brown v. Barnes*, 6 Ala. 694; *Cranston v. Smith*, 6 R. I. 231; *Mullaly v. Holden*, 123 Mass. 583; *Cross v. Everts*, 28 Tex. 523; *Carraway v. Anderson*, 1 Humph. (Tenn.) 61; *Perrine v. Leachman*, 10 Ala. 140; *Richards v. Richards*, 9 Gray (Mass.) 313; *Price v. Weaver*, 13 id. 272. But in those States where the plaintiff is required to set forth the fact whether the contract is in writing or not, a demurrer would be proper. *Babcock v. Meek*, 45 Iowa, 157. In *Langford v. Freeman*, 60 Ind. 46, it was held that, where a contract is not alleged to be in writing, it will be presumed to be by parol; see also *Walsh v. Kattenbaugh*, 8 Minn. 127. But in most of the States, if the contract is not stated to be in writing it sets forth a good cause of action, until the contrary appears from the proof. *Price v. Weaver*, *ante*; *Mullaly v. Holden*, 123 Mass. 583; *Elliott v. Jenness*, 111 id. 201. The rule generally adopted is that, in declaring

upon a contract within the statute of frauds, compliance with the statute need not be alleged. *Robinson v. Tipton*, 31 Ala. 595; *Miller v. Upton*, 6 Ind. 53; *Baker v. Jameson*, 2 J. J. Mar. (Ky.) 547. In *Cross v. Everts*, 28 Tex. 523, it was held that a contract for the sale of lands declared upon generally will be presumed to be in writing, and if the defendant would avail himself of the statute as a defence, he must plead it specially. *Gist v. Eubank*, 29 Mo. 248; *Daggett v. Patterson*, 18 Tex. 158; *Lear v. Choteau*, 23 Ill. 39; *Yourt v. Hopkins*, 24 id. 326. The rule of the common law, that it is not necessary, in declaring upon a contract which the statute of frauds requires to be in writing, to allege in terms that it was reduced to writing, is changed by the Code. Under the Code, if the contract is in writing, a copy of it must be filed with the complaint. If, therefore, the contract sued on is not alleged to be in writing, and no copy is filed with the complaint, the presumption arises that the contract is not a written one. If, then, the contract is such as is required by the statute of frauds to be in writing, the objection may be taken by demurrer. If, however, the contract is one which may or may not be valid without a writing, the demurrer will not be sustained. Thus, as a contract for the sale of goods, although not reduced to writing, may have been rendered valid by a part payment or by delivery,

Judicature Act,¹ the tendency was to hold that unless the contract was stated in the bill to be in writing to permit advantage to be taken of the statute by demurrers.² But now, the defence of the statute must be raised by pleading, and cannot be availed of by demurrer,³ and such also is the rule in this country unless the contract is expressly stated to be by parol, and no further facts are stated taking it out of the statute.⁴ The statute does not alter the rules of pleading. If the complainant, in his bill, states the making of a contract, without alleging that it was by parol, the court will presume that it was in writing, etc., if necessary; and defendant cannot demur. Where the agreement stated in the bill is denied by the answer of the defendant, the complainant must prove such an agreement as will be valid within the statute of frauds; although nothing is said in the answer on that subject. But if the making of the agreement is admitted by the answer, the defendant, in such answer, must insist that it was not in writing, and therefore not binding upon him.⁵ The mere fact that the defendant admits the making of the contract in his answer will not prevent him from insisting upon the benefit of the statute.⁶ The plea of

a complaint upon such a contract will be sustained on demurrer, notwithstanding it does not aver that the contract was reduced to writing. As the statute operates as a rule of evidence, and not upon the pleadings in this respect, it is not necessary to aver in the complaint the receipt by the purchaser of a part of the property, or the giving by him of something in earnest or in part payment. *Harper v. Miller*, 27 Ind. 277. When it appears from the petition that the promise is within the statute of frauds, the pleading of the statute in avoidance is not waived by failure to answer or demur in the court below, nor can judgment be rendered against the defendant in the court above. *Smith v. Fah*, 15 B. Mon. (Ky.) 443.

¹ 36 & 37 Vict. Chap. 66, and subsequent amendments thereto.

² Daniel's Ch. Prac. 306. In *Barkworth v. Young*, 26 L. J. N. S. Ch. 156, *KINDERSLEY, V. C.*, said: "A

verbal agreement is still an agreement. You cannot, from a mere allegation of an agreement, infer or presume that it was in writing; and as the fact that it was in writing is neither expressly alleged in the bill, nor necessarily to be inferred or presumed from what the bill does allege, the mere allegation of an agreement amounts to nothing more than the allegation of a verbal agreement, and then the defence was only demurrer." *Jerdm v. Bright*, 2 John. & H. 325; *Whitchurch v. Bevis*, 2 Bro. C. C. 566. But if a written agreement is alleged, the statute must be plead. *Spurrier v. Fitzgerald*, 6 Ves. 555.

³ *Cotting v. King*, 5 Ch. Div. 660; *Lawle v. Lapham*, 37 L. T. N. S. 309.

⁴ *Middlesex Co. v. Osgood*, 4 Gray (Mass.) 447.

⁵ *Lewin v. Stewart*, 10 How. (N. Y.) Pr. 509; *Coquillard v. Suydam*, 8 Blackf. (Ind.) 24; *Whiting v. Gould*, 2 Wis. 552.

⁶ *Ashmore v. Evans*, 11 N. J. Eq.

the statute is a personal privilege which the party may waive, and another cannot plead it for him, or compel *him* to plead it, as, if he chooses to do so, a party may voluntarily perform the contract.¹ It will not be advisable to discuss here the method of pleading the statute, or the allegations necessary to be set forth in the plea or answer, as those are matters belonging more properly to works upon pleadings. It is sufficient to say that the plea or answer should clearly set forth the fact, that the ground of action set forth by the plaintiff is within the statute, and the facts that make it so, and if the complaint or bill sets forth any facts which tend to take the case out of the statute, these also should be traversed.²

- 151; *Thompson v. Jameson*, 1 Cr. (U. S. C. C.) 295; *Thompson v. Ladd*, Pit. (U. S. C. C.) 380; *Winn v. Albert*, 2 Md. Ch. 169; *Stearns v. Hubbard*, 8 Me. 320; *Barnes v. League*, 3 Jones (N. C.) Eq. 277; *Argenbright v. Campbell*, 3 H. & M. (Va.) 144; *Hollingshead v. McKenzie*, 8 Ga. 457; *Lockett v. Williamson*, 37 Mo. 388; *Burt v. Wilson*, 28 Cal. 632; *Walters v. Morgan*, 2 Cox, 369; *Bladgen v. Bradbear*, 12 Ves. 466; *Kine v. Balfe*, 2 B. & B. 343; *Whitbred v. Brackhurst*, 1 Bro. C. C. 416; *Moore v. Edwards*, 4 Ves. 23; *Whitchurch v. Bevis*, 2 Bro. C. C. 559.
- ¹ *McCoy v. Williams*, 6 Ill. 584; *Rickand v. Cunningham*, 10 Neb. 417; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Crawford v. Woods*, 6 Bush. (Ky.) 200; *Godden v. Pierson*, 42 Ala. 370; *Aicarde v. Craig*, 42 id. 311.
- ² *Taylor v. Beech*, 1 Ves. Sr. 297; *Chambers v. Massey*, 7 Ired. (N. C.) Eq. 286; *Hall v. Hall*, 1 Gitt. (Md.) 383; *Miller v. Cotten*, 5 Ga. 341; *Champlin v. Parrish*, 11 Paige Ch. (N. Y.) 405.

APPENDIX.

STATUTE 29 CAR. II. CAP. 3. 1689.

An Act for Prevention of Frauds and Perjuries.

FOR prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords, spiritual and temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that from and after the four-and-twentieth day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of, any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parole and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol, leases or estates, or any former law or usage to the contrary notwithstanding.

II. Except, nevertheless, all leases not exceeding the term of three years from the making whereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised.

III. And, moreover, that no leases, estates or interests, either of freehold or terms of years, or any uncertain interest not being copyhold or customary interest of, in, to or out of, any messuages, manors, lands, tenements or hereditaments, shall, at any time after the said four-and-twentieth day of June, be assigned, granted or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing or by act and operation of law.

IV. And be it further enacted by the authority aforesaid that from and after the said four-and-twentieth day of June no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, [2] or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person, [3] or to charge any person upon any agreement made upon consideration of marriage, [4] or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, [5] or upon any agreement that is not to be performed within the space of one year from the making thereof, [6] unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

VII. And be it further enacted by the authority aforesaid that from and after the said four-and-twentieth day of June declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

VIII. Provided always that where any conveyance shall be made of lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding.

IX. And be it further enacted that all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning the same [or] by such last will or devise, or else shall likewise be utterly void and of none effect.

XVI. And be it further enacted by the authority aforesaid that from and after the said four-and-twentieth day of June no contract for the sale of any goods, wares or merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized.

STATUTE 9 GEO. IV. CAP. 14.

Lord Tenterden's Act.

V. And be it further enacted, that no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.

VI. And be it further enacted, that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith.

VII. “ And whereas, by an act passed in England in the twentieth year of the reign of King Charles the Second, entitled *An Act for the Prevention of Frauds and Perjuries*, it is, among other things, enacted that from and after the twenty-fourth day of June, one thousand six hundred and seventy-seven, no contract for the sale of any goods, wares and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized”: and “ whereas a similar enactment is contained in an act passed in Ireland in the seventh year of the reign of King William the Third: and whereas it has been held that the said recited enactments do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied; and it is expedient to extend the said enactments to such executory contracts”: be it enacted, that the said enactments shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

X. And be it further enacted that this act shall commence and take effect on the first day of January, one thousand eight hundred and twenty-nine.

MERCANTILE LAW AMENDMENT ACT, 19 & 20 VICT. CAP. 97.

III. No special promise to be made by any person after the passing of this act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding, to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

SUPREME COURT OF JUDICATURE ACT AMENDMENT, 1873.

38 & 39 Vict. Ch. 77.

23. When a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the statute of frauds or otherwise.

ALABAMA. REVISED CODE, 1876.

§ 2199. No trust concerning lands, except such as results by implication, or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney, lawfully authorized thereto in writing.

§ 2200. No such trusts, whether implied by law or created or declared by the parties, can defeat the title of creditors, or purchasers for a valuable consideration, without notice.

§ 2121. In the following cases every agreement is void, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing :

1. Every agreement which, by its terms, is not to be performed within one year from the making thereof.
2. Every special promise, by an executor or administrator, to answer damages out of his own estate.

3. Every special promise to answer for the debt, default, or miscarriage of another.

4. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry.

5. Every contract for the sale of lands, tenements, or hereditaments, or of any interest therein, except leases for a term not longer than one year, unless the purchase money, or a portion thereof, be paid, and the purchaser be put in possession of the land by the seller.

§ 2122. When lands, tenements, or hereditaments are sold or leased at public auction, and the auctioneer, his clerk or agent, makes a memorandum of the property, and price thereof at which it is sold or leased, the terms of sale, the name of the purchaser or lessee, and the name of the person on whose account the sale or lease is made, such memorandum is a note of the contract, within the meaning of the preceding section.

§ 2123. No action can be maintained to charge any person, by reason of any representation or assurance made, concerning the character, conduct, ability, trade, or dealings of any other person, when such action is brought by the person to whom such representation or assurance was made, unless the same is in writing, signed by the party sought to be charged.

§ 2948. A seal is not necessary to convey the legal title to land, to enable the grantee to sue at law. Any instrument in writing, signed by the grantor, or his agent having a written authority, is effectual to transfer the legal title to the grantee, if such was the intention of the grantor, to be collected from the entire instrument.

§ 2145. Conveyances for the alienation of lands must be written or printed, on parchment or paper, and must be signed at their foot by the contracting party, or his agent having a written authority; or if he is not able to sign his name, then his name must be written for him, with the words "his mark" written against the same or over it; the execution of such conveyance must be attested by one, or where the party cannot write, by two witnesses who are able to write, and who must write their names as witnesses.

ARKANSAS. GANTT'S DIGEST, 1874.

CHAPTER 72.

SEC. 2951. No action shall be brought:

First. To charge any executor or administrator, upon any special promise, to answer for any debt or damage out of his own estate.

Second. To charge any person, upon any special promise, to answer for the debt, default or miscarriage of another.

Third. To charge any person upon an agreement made in consideration of marriage.

Fourth. To charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them.

Fifth. To charge any person upon any lease of lands, tenements or hereditaments for a longer term than one year.

Sixth. To charge any person upon any contract, promise or agreement that is not to be performed within one year from the making thereof, unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized.

SEC. 2952. No contract for the sale of goods, wares and merchandise, for the price of thirty dollars or upward, shall be binding on the parties unless, first, there be some note or memorandum, signed by the party to be charged; or, second, the purchaser shall accept a part of the goods so sold, and actually receive the same; or, third, shall give something in earnest to bind the bargain, or in part payment thereof.

SEC. 2960. All leases, estates, interest of freeholds, or lease of years or any uncertain interest of, in, to or out of any messuages, lands or tenements, made or created by livery and seizin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater effect or force than as leases not exceeding the term of one year.

SEC. 2961. No leases, estates or interests, either of freehold or of term of years, in, to or out of any messuages, lands or tenements, except leases for a term not exceeding one year, shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or notice in writing, signed by the party so assigning, granting or surrendering the same, or by their agents lawfully authorized by writing, or by operation of law.

SEC. 2962. All declarations or creations of trusts or confidences of any lands or tenements shall be manifested and proven by some writing signed by the party who is or shall be by law enabled to declare such trusts, or by his last will in writing, or else they shall

be void ; and all grants or assignments of any trusts or confidences shall be in writing, signed by the party granting or assigning the same, or by his last will in writing, or else they shall be void.

SEC. 2963. When any conveyance shall be made of any lands or tenements, by which a trust or confidence may arise or result by implication of law, such trust or confidence shall not be affected by anything contained in this act.

CALIFORNIA. CIVIL CODE. 1875.

SEC. 852. No trust in relation to real property is valid unless created or declared :

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing ;

2. By the instrument under which the trustee claims the estate affected ; or

3. By operation of law.

SEC. 853. When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.

SEC. 856. No implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of real property for value and without notice of the trust.

SEC. 1058. Redelivering a grant of real property to the grantor, or cancelling it, does not operate to re-transfer the title.

SEC. 1091. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.

SEC. 1095. When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact.

SEC. 1624. The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or by his agent.

1. An agreement that by its terms is not to be performed within a year from the making thereof ;

2. A special promise to answer for the debt, default or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of this code ;

[SEC. 2794. A promise to answer for the obligation of another, "in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing :

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such a promise ; or by one who has received a discharge from an obligation in whole or in part, in consideration of such promise ;

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligation, in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made his surety ;

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor ; or upon the consideration that the party receiving it releases the property of another from a levy, or his person from imprisonment under an execution on a judgment obtained upon the antecedent obligation ; or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person ;

4. Where a factor undertakes, for a commission, to sell merchandise and guaranty the sale ;

5. Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer, enters into a promise respecting such instrument.]

3. An agreement made upon consideration of marriage, other than a mutual promise to marry ;

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept or receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase-money ; but when a sale is made by auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind of property sold, the terms of sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum ;

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein ; and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged.

COLORADO. REVISED STATUTES, 1868.

Statute substantially the same as Sub-Division 1 and 2 of Section 1624, and Sub-Division 4 of same Section of California Statute.

See page 339, Sections 12 and 13, except that, as to sales, the statute applies where the price, etc., is fifty dollars or more.

CONNECTICUT. REVISED STATUTES, 1875.

TITLE 18. CHAPTER 6.

SEC. 5. All conveyances of lands shall be in writing, sealed by the grantor, and subscribed with his own hand, or with his mark with his name thereto annexed, or by his attorney authorized for that purpose by a power executed and acknowledged in the manner provided for conveyances, and attested by two witnesses with their own hands, and acknowledged by the grantor or by such attorney to be his free act and deed, if in this State, before a judge of a court of record of this State or of the United States, justice of the peace, Commissioner of the School Fund, Commissioner of the Superior Court, notary public, either with or without his official seal, town clerk, or assistant town clerk; and if in any other State or Territory of the United States, before a commissioner appointed by the Governor of this State and residing therein, or any officer authorized to take the acknowledgment of deeds in such State or Territory; and if in a foreign country, before any consul of the United States, or notary public, or justice of the peace, in such foreign country; but no officer shall have power to take such acknowledgment, except within the territorial limits in which he may perform the proper duties of his office.

TITLE 19. CHAPTER 12.

SEC. 40. No civil action shall be maintained upon any agreement, whereby to charge any executor or administrator, upon a special promise, to answer damages out of his own estate, or any person upon any special promise, to answer for the debt, default, or miscarriage of another; or upon any agreement made upon consideration of marriage; or upon any agreement for the sale of real estate, or any interest in or concerning it; or upon any agreement that is not to be performed within one year from the making thereof, unless such agreement, or some memorandum thereof, be made in writing, and signed by the party to be charged therewith, or his agent; but this section shall not apply to parol agreements for hiring or leasing real estate, or any interest therein, for one

year or less, in pursuance of which the leased premises have been, or shall be, actually occupied by the lessee or any person claiming under him during any part of such term.

SEC. 41. No agreement for the sale of any personal property for fifty dollars or upwards, shall be good, unless the buyer shall accept and actually receive part of the property sold, or give something to bind the bargain, or in part-payment, or unless some memorandum in writing of such agreement shall be signed by the parties to be charged therewith or their agents.

DAKOTA.

Statute substantially same as in California.

DELAWARE. REVISED CODE, 1852.

CHAPTER 63.

SEC. 5. All promises and assumptions, whereby any person shall undertake to answer, or pay, for the default, debt, or miscarriage, of another, any sum under five dollars, being proved by the oath, or affirmation, of the persons to whom such promise and assumption shall be made, are good and available in law to charge the party making such promise or assumption.

SEC. 6. No action shall be brought, whereby to charge any executor, or administrator, upon any special promise to answer damages out of his own estate, or whereby to charge any defendant, upon any special promise, to answer for the debt, default, or miscarriage of another person, of the value of five dollars, and not exceeding twenty-five dollars, unless such promise and assumption shall be proved by the oath or affirmation, of one credible witness, or some memorandum, or note in writing, shall be signed by the party to be charged therewith.

SEC. 7. No action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, or to charge any person whereby to answer for the debt, default, or miscarriage, of another in any sum of the value of twenty-five dollars and upwards, unless the same shall be reduced to writing, or some memorandum, or note thereof, shall be signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized, except for goods, wares, and merchandise, sold and delivered, and other matters which are properly chargeable in an account, in which case the

oath or affirmation of the plaintiff, together with a book regularly and fairly kept, shall be allowed to be given in evidence, in order to charge the defendant with the sums therein contained.

CHAPTER 120.

SEC. 3. No demise, except it be by deed, shall be effectual for a longer term than one year.

FLORIDA. DIGEST OF LAWS, 1822-1881.

CHAPTER 32, p. 214.

SEC. 1. No estate or interest of freehold, or for a term of years of more than two years, or any uncertain interest of, in, or out of any messuages, lands, tenements, or hereditaments, shall be created, made, granted, conveyed, transferred, or released, in any other manner than by deed in writing, sealed and delivered in the presence of at least two witnesses, by the party or parties creating, making, granting, conveying, transferring, or releasing such estate, interest, or term of years, or by his, her, or their agent thereunto lawfully authorized, unless by last will and testament, or other testamentary appointment duly made according to law; and that from and after the day and year aforesaid, no estate or interest, either of freehold or term of years, other than terms of years for not more than two years, or any uncertain interest of, in, to, or out of any lands, tenements, messuages, or hereditaments, shall be assigned or surrendered, unless it be by deed sealed and delivered in the presence of at least two witnesses, by the party or parties so assigning or surrendering, or by his, her, or their agent thereto lawfully authorized, or by the act and operation of law.

2. All declarations and creations of trust and confidence of, or in, any messuages, lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party authorized by law to declare or create such trust or confidence, or by his or her last will and testament, or else they shall be utterly void and of none effect: *Provided, always*, that where any conveyance shall be made of any lands, messuages, or tenements, by which a trust or confidence shall, or may arise, or result, by the implication or construction of law, or be transferred or extinguished by the act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything herein contained to the contrary thereof in any wise notwithstanding.

3. All grants, conveyances, or assignments of trust or confidence of or in any lands, tenements, or hereditaments, or of any estate or interest therein, shall be by deed sealed and delivered in the presence of two witnesses, by the party granting, conveying, or assigning the same, or by his or her attorney or agent thereunto lawfully authorized, or by last will and testament duly made and executed, or else the same shall be void and of none effect.

CHAPTER 29, p. 208.

SEC. 1. No action shall be brought whereby to charge any executor or administrator upon any special promise to answer, or pay any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements, or hereditaments, or of any uncertain interest in, or concerning them, or for any lease thereof for a longer term than one year, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized.

SEC. 2. That no contract for the sale of any personal property, goods, wares, or merchandise, shall be good unless the buyer shall accept the goods or part of them so sold, and actually receive the same or give something in earnest to bind the bargain, or in part-payment, or some note or memorandum in writing of the said bargain or contract be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

GEORGIA. CODE, 1882. PART 2, TIT. 3, CHAP. 2, ART. 1.

§ 1950. To make the following obligations binding on the promisor, the promise must be in writing, signed by the party to be charged therewith, or by some person by him lawfully authorized, viz. :

First. A promise by an executor, administrator, guardian, or trustee, to answer damages out of his own estate.

Second. A promise to answer for the debt, default, or miscarriage of another.

Third. Any agreement upon consideration of marriage except marriage articles as hereinbefore provided.

Fourth. Any contract for the sale of lands or any interest in or concerning them.

Fifth. Any agreement (except contracts with overseers) that is not to be performed within one year from the making thereof.

Sixth. Any promise to waive a debt barred by the acts of limitation.

Seventh. Any contract for the sale of goods, wares, and merchandise *in existence or not in esse* to the amount of fifty dollars or more, except the buyer shall accept part of the goods sold, and actually receive the same or give something in earnest to bind the bargain or in part-payment.

Eighth. An acceptance of a bill of exchange.

§ 1951. The foregoing section does not extend to the following cases :—

First. When the contract has been fully executed.

Second. When there has been performance on one side accepted by the other in accordance with the contract.

Third. Where there has been such part performance of the contract as would render it a fraud of the party refusing to comply, if the court did not compel a performance.

ILLINOIS. REVISED STATUTES, 1883.

CHAPTER 59.

§ 1. No action shall be brought, whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

§ 2. No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or

some other person thereunto by him lawfully authorized in writing, signed by such party. This section shall not apply to sales upon execution or by any officer or person pursuant to a decree or order of any court of record in this State.

§ 3. The consideration of any such promise or agreement need not be set forth or expressed in the writing, but may be proved or disproved by parol or other legal evidence.

§ 9. All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of no effect: *Provided*, that resulting trust or trusts created by construction, implication or operation of law, need not be in writing, and the same may be proved by parol.

INDIANA. REVISED STATUTES, 1881.

CHAPTER 65.

SEC. 4904. No action shall be brought in any of the following cases: —

First. To charge an executor or administrator, upon any special promise, to answer damages out of his own estate; or

Second. To charge any person, upon any special promise, to answer for the debt, default, or miscarriage of another; or

Third. To charge any person upon any agreement or promise made in consideration of marriage; or

Fourth. Upon any contract for the sale of lands; or

Fifth. Upon any agreement that is not to be performed within one year from the making thereof: unless the promise, contract, or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized; excepting, however, leases not exceeding the term of three years.

SEC. 4905. The consideration of any such promise, contract, or agreement need not be set forth in such writing, but may be proved.

SEC. 4906. Every conveyance of any existing trust in lands, goods, or things in action, unless the same shall be in writing, signed by the party making the same, or his lawful agent, shall be void.

SEC. 4907. Nothing contained in any law in this State shall be construed to prevent any trust from arising, or being extinguished, by implication of law.

SEC. 4908. Nothing contained in any statute of this State shall be

construed to abridge the powers of courts to compel the specific performance of agreements in cases of part-performance of such agreements.

SEC. 4909. No action shall be maintained to charge any person by reason of any representation made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him legally authorized.

SEC. 4910. No contract for the sale of any goods for the price of fifty dollars or more shall be valid, unless the purchaser shall receive part of such property, or shall give something in earnest to bind the bargain, or in part-payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

SEC. 4925. All conveyances, bonds, and powers of attorney for the conveyance of real estate, or of any interest therein, shall be executed with a seal.

IOWA. CODE, 1880, PAGE 865.

SEC. 1934. Declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance, but this provision does not apply to trusts resulting from the operation of construction of law. (Page 524.)

SEC. 3663. Except when otherwise specially provided, no evidence of the contracts enumerated in the next succeeding section is competent, unless it be in writing and signed by the party charged or by his lawfully authorized agent.

SEC. 3664. Such contracts embrace,

1. Those in relation to the sale of personal property, when no part of the property is delivered, and no part of the price is paid ;
2. Those made in consideration of marriage ;
3. Those wherein one person promises to answer for the debt, default, or miscarriage of another, including promises by executors to pay the debt of their principal from their own estate ;
4. Those for the creation or transfer of any interest in lands, except leases for a term not exceeding one year ;
5. Those that are not to be performed within one year from the making thereof.

SEC. 3665. The provision of the first subdivision of the preceding section does not apply when the article of personal property sold is not at the time of the contract owned by the vendor and

ready for delivery, but labor, skill, or money are necessary to be expended in producing or procuring the same; nor do those of the fourth subdivision of said section apply where the purchase-money, or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract, or when there is any other circumstance, which, by the law heretofore in force, would have taken a case out of the Statute of Frauds.

SEC. 3666. The above regulations relating merely to the proof of contracts, do not prevent the enforcement of those which are not denied in the pleadings, unless in cases where the contract is sought to be enforced, or damages to be recovered for the breach thereof, against some person other than him who made it.

KANSAS. COMPILED LAWS, 1879.

CHAPTER 22.

SEC. 8. Declarations or creations of trust or powers, in relation of real estate, must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law.

CHAPTER 43.

SEC. 5. No leases, estates or interests, of, in or out of lands, exceeding one year in duration, shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the party so assigning or granting the same, or their agents thereunto lawfully authorized, by writing, or by act and operation of law.

SEC. 6. No action shall be brought whereby to charge a party upon any special promise to answer for the debt, default, or mis-carriage of another person, or to charge any executor or administrator upon any special promise to answer damages out of his own estate, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed, by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

KENTUCKY. GENERAL STATUTES, 1873.

CHAPTER 22.

§ 1. No action shall be brought to charge any person—

First, for a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, made with intent that such other may obtain thereby credit, money, or goods ; nor,

Secondly, upon a promise to pay a debt contracted during infancy, or a ratification of a contract or promise made during infancy ; nor,

Thirdly, upon a promise of a personal representative as such to answer any liability of his decedent out of his own estate ; nor,

Fourthly, upon a promise to answer for the debt, default, or misdoing of another ; nor,

Fifthly, upon any agreement made in consideration of marriage, except mutual promises to marry ; nor,

Sixthly, upon any contract for the sale of real estate, or any lease thereof for longer term than one year ; nor,

Seventhly, upon any agreement which is not to be performed within one year from the making thereof. Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent. But the consideration need not be expressed in the writing ; it may be proved when necessary, or disproved by parol or other evidence.

§ 2. A seal or scroll shall in no case be necessary to give effect to a deed or other writing. All unsealed writings shall stand upon the same footing with sealed writings, having the same force and effect, and upon which the same actions may be founded. But this section shall not apply nor shall it alter any law requiring the State or county seal, or the seal of a court, corporation, or notary to any writing.

§ 20. No person shall be bound as the surety of another, by the act of an agent, unless the authority of the agent is in writing signed by the principal ; or if the principal do not write his name, then by his sign or mark, made in the presence of at least one creditable attesting witness.

CHAPTER 24.

§ 2. No estate of inheritance, or freehold, or for a term of more than one year, in lands, shall be conveyed, unless by deed or will.

MAINE. REVISED STATUTES, 1871.

CHAPTER 73.

SEC. 10. There can be no estate created in lands greater than tenancy at will, and no estate in them can be granted, assigned, or surrendered, unless by some writing signed by the grantor, or maker, or his attorney.

SEC. 11. There can be no trust concerning lands, except trusts arising or resulting by implication of law, unless created or declared by some writing, signed by the party or his attorney.

SEC. 15. Deeds and contracts, executed by an authorized agent of an individual or corporation in the name of his principal, or in his own name for his principal, are to be regarded as the deeds and contracts of such principal.

SEC. 29. Pews and rights in houses of public worship are deemed to be real estate. Deeds of them, and levies by execution upon them, may be recorded by the town clerk of the town where the houses are situated, with the same effect as if recorded in the registry of deeds.

CHAPTER 111.

SEC. 1. No action shall be maintained in any of the following cases :

First. To charge an executor or administrator upon any special promise to answer damages out of his own estate.

Second. To charge any person upon any special promise to answer for the debt, default, or misdoings of another.

Third. To charge any person upon an agreement made in consideration of marriage.

Fourth. Upon any contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them.

Fifth. Upon any agreement that is not to be performed within one year from the making thereof.

Sixth. Upon any contract to pay a debt after a discharge therefrom under the bankrupt laws of the United States, or assignment laws of this State.

Unless the promise, contract, or agreement, on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto lawfully authorized; but the consideration thereof need not be expressed therein, but may be proved otherwise.

SEC. 3. No action shall be maintained to charge any person by

reason of any representation or assurance concerning the character, conduct, credit, ability, trade or dealings of another, unless made in writing, and signed by the party to be charged thereby or by some person by him legally authorized.

SEC. 4. No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent.

MASSACHUSETTS. PUBLIC STATUTES, 1882.

CHAPTER 78.

SEC. 2. Estates or interests in lands, created or conveyed without an instrument in writing signed by the grantor or his attorney, shall have the force and effect of estates at will only, and no estate or interest in lands shall be assigned, granted, or surrendered, unless by a writing signed as aforesaid, or by the operation of law.

CHAPTER 100.

SECT. 19. No trust concerning lands, except such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing signed by the party creating or declaring the same, or his attorney.

CHAPTER 78.

SECTION. 1. No action shall be brought in any of the following cases, that is to say :—

First. To charge an executor, administrator, or assignee under any insolvent law of this commonwealth, upon a special promise to answer damages out of his own estate :

Second. To charge a person upon a special promise to answer for the debt, default, or misdoings of another :

Third. Upon an agreement made upon consideration of marriage :

Fourth. Upon a contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them : or

Fifth. Upon an agreement that is not to be performed within one year from the making thereof :

Unless the promise, contract, or agreement, upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

SECT. 2. The consideration of such promise, contract, or agreement, need not be set forth or expressed in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence.

SECT. 3. No promise for the payment of any debt made by an insolvent debtor who has obtained his discharge from said debt under proceedings in bankruptcy or insolvency, shall be evidence of a new or continuing contract, whereby to deprive a party of the benefit of relying upon such discharge in bar of the recovery of a judgment upon such debt, unless such promise is made by or contained in some writing signed by the party sought to be charged, or by some person thereunto by him lawfully authorized.

SECT. 4. No action shall be brought to charge a person upon or by reason of any representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings, of any other person, unless such representation or assurance is made in writing and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

SECT. 5. No contract for the sale of goods, wares, or merchandise, for the price of fifty dollars or more, shall be good or valid, unless the purchaser accepts and receives part of the goods so sold, or gives something in earnest to bind the bargain, or in part-payment; or unless some note or memorandum in writing of the bargain is made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

SECT. 6. Every contract, written or oral, for the sale or transfer of a certificate or other evidence of debt due from the United States or from an individual State, or of stock or a share or interest in the stock of a bank company, city or village, incorporated under a law of the United States or of an individual State, shall be void, unless the party contracting to sell or transfer the same is, at the time of making the contract, the owner or assignee thereof, or his agent to sell or transfer the certificate or other evidence of debt, share or interest, as contracted for.

MICHIGAN. COMPILED LAWS, 1871.

CHAPTER 166.

SEC. 6. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, sub-

scribed by the party creating, granting, assigning, surrendering, or declaring the same, or by some person thereunto by him lawfully authorized by writing.

SEC. 7. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament; nor to prevent any trust from arising, or being extinguished, by implication or operation of law.

SEC. 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized by writing.

SEC. 9. The consideration of any contract or agreement, required by the provisions of this chapter to be in writing, need not be set forth in the contract or agreement, or in the note or memorandum thereof, but may be proved by any other legal evidence.

SEC. 10. Nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements, in cases of part performance of such agreements.

CHAPTER 167.

SEC. 2. In the following cases, specified in this section, every agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized, that is to say:

First. Every agreement that, by its terms, is not to be performed in one year from the making thereof;

Second. Every special promise to answer for the debt, default, or misdoings of another person;

Third. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry;

Fourth. Every special promise made by an executor, or administrator, to answer damages out of his own estate.

SEC. 3. No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods sold, or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum, in writing, of the

bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

SEC. 4. Whenever any goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a memorandum of the contract of sale, within the meaning of the last section.

SEC. 5. No action shall be brought to charge any person, upon or by reason of any favorable representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

SEC. 6. The consideration of any contract, agreement, or promise, required by this chapter to be in writing, need not be expressed in the written contract, agreement, or promise, or in any note or memorandum thereof, but may be proved by any other legal evidence.

CHAPTER 168.

SEC. 2. Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same shall be in writing and signed by the party making the same, or by his agent lawfully authorized, shall be void.

MINNESOTA. REVISED.

CHAPTER 41.

SEC. 6. No action shall be maintained in either of the following cases upon any agreement unless such agreement or some note or memorandum thereof expressing the consideration, is in writing, and subscribed by the party charged therewith :

First. Every agreement that by its terms is not to be performed within one year from the making thereof ;

Second. Every special promise to answer for the debt, default, or doings of another ;

Third. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promise to marry.

SEC. 7. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless,

First. A note or memorandum of such contract is made in writing and subscribed by the parties to be charged therewith; or,

Second. Unless the buyer accepts and receives part of such goods, or the evidences, or some of them, of such things in action; or,

Third. Unless the buyer at the time pays some part of the purchase-money.

SEC. 8. Whenever goods are sold at public auction, and the auctioneer, at the time of sale, enters into a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, name of the purchaser, and the name of the person on whose account the sale is made; such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.

SEC. 9. Every grant or assignment of any existing trust in goods, or things in action, unless the same is in writing, subscribed by the party making the same, or by his agent, lawfully authorized, shall be void.

SEC. 10. No estate or interest in lands other than leases for a term, not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the parties creating, granting, assigning, surrendering or declaring the same, or by their lawful agent thereunto authorized by writing.

SEC. 11. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament; nor to prevent any trust from arising or being extinguished by implication or operation of law.

SEC. 12. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party by whom the lease or sale is to be made, or by his authorized agent.

SEC. 13. Nothing in this chapter contained shall be construed to abridge the power of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements.

MISSISSIPPI. REVISED CODE, 1880.

CHAPTER 49.

§ 1292. No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer any debt or damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt or default, or miscarriage of another person, or to charge any person, upon any agreement, made upon consideration of marriage, or upon any contract for the sale of land, or the making any lease thereof, for a longer term than one year, or upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person by him or her thereunto lawfully authorized.

§ 1293. No contract, for the sale of any personal property, goods, wares and merchandise, for the price of fifty dollars or upwards, shall be allowed to be good and valid, unless the buyer shall receive part of the personal property, goods, wares, and merchandise, or shall actually pay or secure the purchase money, or part thereof, or unless some note or memorandum, in writing, of the bargain, be made and signed by the party to be charged by such contract, or his agent, thereunto lawfully authorized.

§ 1294. Hereafter, all declarations or creations of trusts or confidence, of or in any land, shall be made and manifested by writing, signed by the party who declares or creates such trust, or by his last will, or else they shall be utterly void; and every writing, declaring or creating a trust, shall be acknowledged or proved as other writings, and shall be lodged with the clerk of the chancery court of the proper county, to be recorded, and shall only take effect from the time it is so lodged for record: *provided*, that where any trust shall arise or result, by implication of law, out of a conveyance of land, such trust or confidence shall be of the like force and effect as the same would have been, if this article had not been passed.

§ 1295. All grants, assignments or transfers of any trust or confidence, shall likewise be in writing, signed by the party granting or assigning the same, or by last will and testament, or else they shall likewise be utterly void; and such grant or assignment shall also be acknowledged or proved and recorded, and shall only take effect from the time it is lodged with the clerk for record.

MISSOURI. REVISED STATUTES.

CHAPTER 35, PAGE 420.

SEC. 2509. All leases, estates, interests of freehold or term of years, or any uncertain interest of, in, to, or out of any messuages, lands, tenements or hereditaments, made or created by livery and seizin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force.

SEC. 2510. No leases, estates, interests, either of freehold or term of years, or any uncertain interest of, in, to, or out of any messuages, lands, tenements, or hereditaments, shall at any time hereafter be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents lawfully authorized by writing, or by operation of law.

SEC. 2511. All declarations or creations of trust or confidence of any lands, tenements or hereditaments shall be manifested and proved by some writing, signed by the party who is, or shall be, by law, enabled to declare such trusts, or by his last will in writing, or else they shall be void; and all grants and assignments of any trust or confidence shall be in writing, signed by the party granting or assigning the same, or by his or her last will in writing, or else they shall be void.

SEC. 2512. Where any conveyance shall be made of any lands, tenements or hereditaments, by which a trust or confidence may arise, or result by implication of law, such trust or confidence shall be of like force as the same would have been if the act had not been made.

SEC. 2513. No action shall be brought to charge any executor or administrator, upon any special promise, to answer for any debt or damages out of his own estate, or to charge any person upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made in consideration of marriage, or upon any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be

charged therewith, or some other person by him thereto lawfully authorized.

SEC. 2514. No contract for the sale of goods, wares, and merchandise, for the price of thirty dollars or upwards, shall be allowed to be good, unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum, in writing, be made of the bargain, and signed by the parties to be charged with such contract, or their agents lawfully authorized.

SEC. 2515. No action shall be brought to charge any person upon, or by reason of, any representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation or assurance be made in writing, and subscribed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

SEC. 2516. No action shall be maintained whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged thereby.

MONTANA. CODIFIED STATUTES, 1872.

CHAPTER XVI.

SEC. 6. No estate or interest in lands other than for leases for a term not exceeding one year, or any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance, in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

SEC. 7. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor prevent any trust arising or being extinguished by operation of law.

SEC. 8. Every contract for the leasing for a longer term than one year, or for the sale of any lands, or interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.

SEC. 9. Every instrument required to be subscribed by any person mentioned in the last preceding section may be subscribed by the agent of the party lawfully authorized.

SEC. 10. Nothing contained in this act shall be construed to abridge the power of the court to compel the specific performance of such agreements.

SEC. 12. In the following cases any agreement shall be void unless such agreement, or some note or memorandum thereof expressing the consideration, be in writing, and subscribed by the party charged thereunto: First. Every agreement that by the terms is not to be performed within one year from the making thereof. Second. Every special promise to answer for the debt or default or miscarriage of another. Third. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promise to marry.

SEC. 13. Every contract for the sale of any goods, chattels, or things in action, for the price of two hundred dollars and over shall be void, unless: First. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or second, unless they shall accept or receive a part of such goods or the evidences or some of them of such [things] in action. Third. Or unless the buyer shall at the time pay some part of the purchase-money.

SEC. 14. Whenever goods shall be sold at auction, and the auctioneer shall at the time of the sale enter in a sale-book a memorandum specifying the nature and the price of the property sold, the term of sale, the names of the purchasers, and name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale within the meaning of the last section.

SEC. 17. Every instrument of writing required by any of the provisions of this act to be subscribed by any party may be subscribed by the lawful agent of such party.

SEC. 23. The term "conveyance," as used in this act, shall be construed to embrace any instrument in writing except a last will and testament, whatever may be its form and by whatever name it may be known in law, by which any estate or interest in land is created, alienated, assigned, or surrendered.

CHAPTER XVII.

SEC. 34. The term "real estate," as used in this act, shall be construed as co-extensive in meaning with lands, tenements, hereditaments, and possessory titles to public lands in this territory.

SEC. 35. The term "conveyance," as used in this act, shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, alienated, mortgaged, or assigned, except wills, leases for a term not exceeding one year, and executory contracts for the sale or purchase of lands.

NEBRASKA. GENERAL STATUTES, 1873.

CHAPTER 25.

SEC. 3. No estate or interest in land, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same.

SEC. 4. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law.

SEC. 5. Every contract for the leasing, for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, be in writing, and be signed by the party by whom the lease or sale is to be made.

SEC. 6. Nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance.

SEC. 8. In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith:

First. Every agreement that, by its terms, is not to be performed within one year from the making thereof.

Second. Every special promise to answer for the debt, default or misdoings of another person.

Third. Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.

Fourth. Every special promise by an executor or administrator to answer damages out of his own estate.

SEC. 9. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless —

First. A note or memorandum of such contract be made in writing, and be subscribed by the party to be charged thereby; or,

Second. Unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action; or,

Third. Unless the buyer shall, at the time, pay some part of the purchase money.

SEC. 10. Whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale, enter in a sale book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section.

SEC. 18. Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same shall be in writing, subscribed by the party making the same, shall be void.

SEC. 22. The term "lands," as used in this chapter, shall be construed as co-extensive in meaning with "lands, tenements, and hereditaments," and the terms "estate and interest in lands," shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands, as above described.

SEC. 23. The term "conveyance," as used in this chapter, shall be construed to embrace every instrument in writing (except a last will and testament) whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered.

SEC. 24. The consideration of any contract or agreement, required by the provisions of this chapter to be in writing, need not be set forth in the contract or agreement, or in the note or memorandum thereof, but may be proved by any other legal evidence.

SEC. 25. Every instrument required by any of the provisions of this chapter to be subscribed by any party, may be subscribed by his agent, thereunto authorized by writing.

NEVADA. COMPILED LAWS, 1873.

CHAPTER 26.

SEC. 55. No estate, or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or

concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized in writing.

SEC. 56. The preceding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate, by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law.

SEC. 57. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made.

SEC. 58. Every instrument required to be subscribed by any person under the last preceding section, may be subscribed by the agent of such party lawfully authorized.

SEC. 59. Nothing contained in this act shall be construed to abridge the powers of courts to compel the specific performance of agreements in cases of part performance of such agreements.

SEC. 61. In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged therewith: First, every agreement that, by the terms, is not to be performed within one year from the making thereof; second, every special promise to answer for the debt, default, or miscarriage of another; third, every promise or undertaking made upon consideration of marriage, except mutual promises to marry.

SEC. 62. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or over, shall be void unless: First, a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or second, unless the buyer shall accept or receive part of such goods, or the evidences, or some of them, of such things in action; or third, unless the buyer shall at the time pay some part of the purchase-money.

SEC. 63. Whenever goods shall be sold at auction, and the auctioneer shall, at the time of sale, enter in a sale-book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of

the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section.

SEC. 70. Every grant or assignment, of any existing trust in land, goods, or things in action, unless the same shall be in writing, subscribed by the person making the same, or by his agent lawfully authorized, shall be void.

SEC. 74. The term "conveyance," as used in this act, shall be construed to embrace every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned, or surrendered.

SEC. 75. The term "lands," as used in this act, shall be construed as co-extensive in meaning with lands, tenements, and hereditaments, and shall include in its meaning all possessory right to the soil for mining and other purposes, and the term "estate and interest in lands" shall be construed and embrace every estate and interest, present and future, vested and contingent, in lands as above defined.

SEC. 78. No lands within this Territory shall hereafter be conveyed by lease, or otherwise, except in fee and perpetual succession, for a longer period than ten years; nor shall any town or city lots, or other real property, be so conveyed for a longer time than twenty years. All leases hereafter made, contrary to the provisions of this act, shall be void.

ACT OF DEC. 17, 1862.

Section 1. The signature of a party, when required to a written instrument, shall be equally valid if the party cannot write, provided the person make his mark, the name of the person making the mark being written near it, and the mark being witnessed by a person who writes his own name as a witness.

NEW HAMPSHIRE. GENERAL LAWS, 1878.

CHAPTER 135.

SEC. 12. Every estate or interest in lands, created or conveyed without an instrument in writing signed by the grantor or his attorney, shall be deemed an estate at will only; and no estate or interest in land shall be assigned, granted, or surrendered except by writing signed as aforesaid, or by operation of law.

SEC. 13. No trust concerning lands, excepting such as may arise or result by implication of law, shall be created or declared unless by an instrument signed by the party creating the same or by his attorney.

CHAPTER 220.

SEC. 14. No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought or some memorandum thereof is in writing, and signed by the party to be charged, or by some person thereto authorized by writing.

SEC. 15. No action shall be brought to charge an executor or administrator upon a special promise to answer damages out of his own estate, nor to charge any person upon a special promise to answer for the debt, default, or miscarriage of another, or upon any agreement made in consideration of marriage, or that is not to be performed within one year from the time of making it, unless such promise or agreement, or some note or memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereto authorized.

SEC. 16. No contract for the sale of goods, wares, or merchandise, for the price of thirty-three dollars, or more, is valid unless the buyer accepts and actually receives part of the property sold, or gives something in part payment or in earnest to bind the bargain, or unless some note or memorandum thereof is in writing, and signed by the party to be charged or by some person by him thereto authorized.

NEW JERSEY. REVISION OF 1877.

PAGE 444.

1. That all leases, estates, interests of freehold or term of years, or any uncertain interests of, in, to, or out of any messuages, lands, tenements or hereditaments, made or created, or hereafter to be made or created, by livery or seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto, lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making such parol leases or estates notwithstanding; except nevertheless all leases not exceeding the term of three years from the making thereof.

2. No lease, estate or interest, either of freehold or term of years, or any uncertain interest of, in, to, or out of any messuages, lands, tenements or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or his, her,

or their agent or agents thereunto, lawfully authorized by writing, or by act and operation of law.

3. All declarations and creations of trust or confidence of or in any lands, tenements or hereditaments shall be manifested and proved by some writing, signed by the party, who is or shall be by law enabled to declare such trust, or by his or her last will in writing, or else they shall be utterly void and of no effect; *provided always*, that where any conveyance hath been, or shall be made of any lands, tenements or hereditaments, by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, such trust or confidence shall be of the like force and effect, as the same would have been if this act had not been made.

4. All grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his or her last will in writing, or else shall be utterly void and of no effect.

5. No action shall be brought (1,) to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or (2,) to charge the defendant, upon any special promise, to answer for the debt, default or miscarriage of another person; or (3,) to charge any person upon any agreement made upon consideration of marriage; or (4,) upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or (5,) upon any agreement, that is not to be performed within one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

6. Every contract for the sale of goods, wares and merchandise, for the price of thirty dollars or upwards shall be void; unless (1,) a note or memorandum of such contract be made in writing, and signed by the party to be charged thereby or by his agent thereunto lawfully authorized; or (2,) unless the buyer shall accept part of the goods so sold, and actually receive the same; or (3,) unless the buyer shall give something in earnest to bind the bargain or pay some part of the purchase-money.

9. The consideration of any promise, contract or agreement, required by this act to be put in writing, need not be set forth or expressed in such writing, but may be proved by any other legal evidence.

NEW YORK. REVISED STATUTES, 1830. PART II.

CHAP. I. ARTICLE SECOND.

§ 51. Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.

§ 52. Every such conveyance shall be presumed fraudulent, as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands.

§ 53. The provisions of the preceding fifty-first section shall not extend to cases, where the alienee named in the conveyance, shall have taken the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or where such alienee, in violation of some trust, shall have purchased the lands so conveyed with monies belonging to another person.

CHAPTER 7. TITLE 1.

§ 6. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing.

§ 7. The preceding section shall not be construed to affect in any manner, the power of a testator in the disposition of his real estate, by a last will and testament; nor to prevent any trust from arising, or being extinguished, by implication or operation of law; [nor to prevent any declaration of trust from being proved by any writing subscribed by the party declaring the same;] nor to prevent, after a fine shall have been levied, the execution of a deed or other instrument, in writing, declaring the uses of such fine.

§ 8. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party, by whom the lease or sale is to be made.

§ 9. Every instrument required to be subscribed by any party, under the last preceding section, may be subscribed by the agent of such party lawfully authorized.

§ 10. Nothing in this title contained, shall be construed to abridge the powers of Courts of Equity, to compel the specific performance of agreements, in cases of part-performance of such agreements.

TITLE 2.

§ 2. In the following cases, every agreement shall be void unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged therewith.

1. Every agreement that, by its terms, is not to be performed within one year from the making thereof :

2. Every special promise to answer for the debt, default, or mis-carriage of another person :

3. Every agreement, promise, or undertaking, made upon consideration of marriage, except mutual promises to marry.

§ 3. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless,

1. A note or memorandum of such contract, be made in writing, and be subscribed by the parties to be charged thereby : or,

2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action : or,

3. Unless the buyer shall, at the time, pay some part of the purchase-money.

§ 4. Whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale, enter in a sale-book, a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person on whose account the sale is made, such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section.

TITLE 3.

§ 2. Every grant or assignment of any existing trust in lands, goods or things in action, unless the same shall be in writing, subscribed by the party making the same, or by his agent, lawfully authorized, shall be void.

NORTH CAROLINA. BATTLE'S REVISAL, 1873.

CHAPTER 50.

8. No action shall be brought whereby to charge an executor or administrator upon a special promise to answer damages out of his own estate, or to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

10. All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, shall be void and of no effect unless such contract, or some memorandum or note thereof, shall be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

OHIO. REVISED STATUTES, 1880.

TITLE IV. CHAPTER 4.

SEC. 4198. That no leases, estates or interests, either of freehold or terms for years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall at any time hereafter be assigned, or granted, unless it be by deed, or note in writing, signed by the party so assigning or granting the same; or their agents thereunto lawfully authorized, by writing, or by act and operation of law.

SEC. 4199. That no action shall be brought whereby to charge the defendant, upon any special promise, to answer for the debt, default or miscarriage, of another person; or to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements or hereditaments, or any interest in, or concerning of them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

OREGON. CIVIL CODE.

TITLE VIII. CHAPTER 8.

§ 771. No estate or interest in real property other than a lease for a term not exceeding one year, nor any trust or power concerning such property, can be created, transferred or declared otherwise than by operation of law, or by a conveyance or other instrument in writing subscribed by the party creating, transferring or declaring the same, or by his lawful agent, under written authority, and executed with such formalities as are required by law.

§ 772. The last section shall not be construed to affect the power of a testator, in the disposition of his real property by a last will and testament, nor to prevent a trust from arising, or being extinguished by implication or operation of law, nor to affect the power of a court to compel specific performance of an agreement in relation to such property.

§ 775. In the following cases the agreement is void, unless the same, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence therefore of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law :

1. An agreement that, by its terms, is not to be performed within a year from the making thereof ;

2. An agreement to answer for the debt, default or miscarriage of another ;

3. An agreement by an executor or administrator to pay the debts of his testator or intestate out of his own estate ;

4. An agreement made upon consideration of marriage, other than a mutual promise to marry ;

5. An agreement for the sale of personal property, at a price not less than fifty dollars, unless the buyer accept and receive some part of such personal property, or pay at the time some part of the purchase money ; but when the sale is made by auction, an entry by the auctioneer, in his sale-book, at the time of the sale, of the kind of property sold, the terms of the sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum ;

6. An agreement for the leasing, for a longer period than one year, or for the sale of real property, or of any interest therein ;

7. An agreement concerning real property, made by an agent

of the party sought to be charged, unless the authority of the agent be in writing.

§ 776. No evidence is admissible to charge a person upon a representation, as to the credit, skill or character of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the hand-writing of the party to be charged.

PENNSYLVANIA. BRIGHTLEY'S PURDON (10TH ED. 1872), 723.

1. All leases, estates, interest of freehold or term of years, or any uncertain interest of, in or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding; except, nevertheless, all leases not exceeding the term of three years from the making thereof.

2. And moreover, no leases, estates or interests, either of freehold or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents, thereto lawfully authorized by writing, or by act and operation of law.

3. All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, and all grants and assignments thereof shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void: *Provided*, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as if this act had not been passed.

4. No action shall be brought whereby to charge any executor or administrator, upon any promise to answer damages out of his own estate, or whereby to charge the defendant, upon any special promise, to answer for the debt or default of another, unless the

agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him authorized.

5. This act shall not go into effect until the first day of January next; or apply to or affect any contract made or responsibility incurred prior to that time; or for any contract the consideration of which shall be a less sum than twenty dollars.

RHODE ISLAND. PUBLIC STATUTES, 1882.

CHAPTER 173.

SEC. 3. No estate of inheritance or freehold, or for a term exceeding one year, in lands or tenements, shall be conveyed from one to another by deed, unless the same be in writing, signed, sealed, and delivered by the party making the same, and acknowledged before a senator, judge, justice of the peace, notary public, or town clerk, by the party or parties who shall have sealed or delivered it; . . . and recorded or lodged to be recorded in the office of town clerk of the town where the said lands or tenements do lie.

SEC. 4. All bargains, sales, and other conveyances whatsoever of any lands, tenements, or hereditaments, whether they be made for passing any estate of freehold or inheritance, or for term of years, exceeding the term of one year, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void unless they shall be acknowledged and recorded as aforesaid: *Provided*, that the same, between the parties and their heirs, shall be valid and binding.

CHAPTER 204.

SEC. 8. No action shall be brought, —

First. Whereby to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer time than one year.

Second. Whereby to charge any person upon any agreement made upon consideration of marriage.

Third. Whereby to charge any executor or administrator upon his special promise to answer any debt or damage out of his own estate.

Fourth. Whereby to charge any person upon his special promise to answer for the debt, default, or miscarriage of another person.

Fifth. Whereby to charge any person upon any agreement which is not to be performed within the space of one year from the making thereof.

Unless the promise or agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized.

TENNESSEE. COMPILED LAWS, 1871.

CHAPTER 2, ARTICLE 1.

1758. No action shall be brought—

1. Whereby to charge any executor or administrator upon any special promise, to answer any debt or damages out of his own estate ;

2. Whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person ;

3. Whereby to charge any person upon any agreement made upon consideration of marriage ;

4. Upon any contract for the sale of lands, tenements, or hereditaments, or the making any lease thereof for a longer term than one year ;

5. Upon any agreement or contract which is not to be performed within the space of one year from the making thereof ;

Unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized.

TEXAS. REVISED STATUTES, 1879.

TITLE XLVI.

ARTICLE 2464. No action shall be brought in any of the courts in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized :

1. To charge any executor or administrator upon any special promise to answer any debt or damages due from his testator or intestate, out of his own estate ; or,

2. To charge any person upon a promise to answer for the debt, default, or miscarriage of another ; or,

3. To charge any person upon any agreement made upon consideration of marriage ; or,

4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year ; or,

5. Upon any agreement which is not to be performed within the space of one year from the making thereof.

VERMONT. REVISED LAWS, 1880.

CHAPTER 97.

SECT. 1932. Estates or interests in lands, created or conveyed without an instrument in writing, signed by the grantor or by his attorney, shall have the force and effect of estates at will only ; and no estate or interest in land shall be assigned, granted, or surrendered, unless by a writing signed as aforesaid, or by operation of law.

SECT. 1933. No trust concerning lands, excepting such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing, signed by the party creating or declaring the same, or by his attorney.

SECT. 1934. The assignment of any lease of lands, if the lease shall be for a longer term than one year, shall be by deed, signed, sealed, and witnessed, acknowledged and recorded, as is provided in the case of deeds in the fourth section of this chapter ; and any assignment, otherwise executed, shall be void as against all persons but the assignor, his heirs or devisees.

SECT. 1935. No deed or other conveyance of any lands, or of any estate or interest therein, made by virtue of a power of attorney, shall be of any effect, or admissible in evidence, unless such power of attorney shall have been signed, sealed, attested, and acknowledged and recorded in the office where such deed shall be required to be recorded, as provided in this chapter.

CHAPTER 57.

SECTION 981. No action at law or in equity shall be brought in any of the following cases :

Upon a special promise by an executor or administrator upon any special promise to answer damages, out of his own estate.

Upon a special promise to answer for the debt, default or misdoings of another.

Upon an agreement made upon consideration of marriage.

Upon a contract for the sale of lands, tenements or hereditaments, or of an interest in or concerning them.

Upon an agreement not to be performed within one year from the making thereof;

Unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized; and if the contract or agreement relate to the sale of real estate, or to any interest therein, such authority shall be in writing.

SECT. 982. No contract, for the sale of any goods, wares, or merchandise, for the price of forty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods so sold, or shall give something in earnest to bind the bargain, or in part-payment, or unless some note or memorandum of the bargain be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

SECT. 983. No action shall be brought to charge any person upon, or by reason of any representation or assurance made, concerning the character, conduct, credit, ability, trade, or dealings of another person, unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized.

SECT. 984. Where the performance of a contract is secured by the obligation of a surety, no agreement made between the creditor and the principal debtor for the extension of the time of payment or the performance of the contract shall have at law, or in chancery, any binding effect, unless such agreement is made upon a valuable consideration, and is in writing, or some note or memorandum thereof is in writing, and signed by such creditor or person thereunto duly authorized reciting briefly the consideration upon which such contract is founded.

UTAH. COMPILED LAWS, 1876.

TITLE XV. ACT APPROVED FEBRUARY 18, 1876.

(1010.) SEC. 1. That no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

(1011.) SEC. 2. The foregoing provision shall not be construed

to affect the power of a testator in the disposition of his real estate by last will and testament; nor to prevent any trust from arising or being extinguished by implication or operation of law; nor to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

(1012.) SEC. 3. Every conveyance of any estate or interest in lands, or the rents or profits of lands, and every charge upon lands, or the rents and profits thereof made or created with intent to defraud prior or subsequent purchasers thereof, for a valuable consideration, shall be void as against such purchasers.

(1014.) SEC. 5. In the following cases every agreement shall be void, unless such agreement or some note or memorandum thereof, expressing the consideration be in writing and subscribed by the party, to be charged therewith.

First. — Every agreement that by its terms is not to be performed within one year from the making thereof.

Second. — Every promise to answer for the debt, default or miscarriage of another.

Third. — Every agreement, promise or undertaking, made upon consideration of marriage, except mutual promises to marry.

(1015.) SEC. 6. Every contract for the sale of any goods, chattels, or things in action, for the price of three hundred dollars, or over, shall be void, unless: 1st, a note or memorandum of such contract be made in writing and subscribed by the parties to be charged therewith; or 2d, Unless the buyer shall accept or receive part of such goods, or the evidences, or some of them, of such things in action; or 3d, Unless the buyer shall at the time pay some part of the purchase money.

(1019.) SEC. 10. Every instrument required by the provisions of this act to be subscribed by any party may be subscribed by the lawful agent of such party.

VIRGINIA. CODE, 1873.

CHAPTER CXL.

1. No action shall be brought in any of the following cases:

First. To charge any person upon or by reason of a representation or assurance concerning the character, conduct, credit, ability, trade, or dealings of another, to the intent or purpose that such other may obtain thereby credit, money, or goods; or,

Secondly. To charge any person upon a promise made, after full age, to pay a debt contracted during infancy, or upon a ratification after full age of a promise or simple contract made during infancy; or,

Thirdly. To charge a personal representative upon a promise to answer any debt or damages out of his own estate ; or,

Fourthly. To charge any person upon a promise to answer for the debt, default, or misdoings of another ; or,

Fifthly. Upon any agreement made upon consideration of marriage ; or,

Sixthly. Upon any contract for the sale of real estate, or the lease thereof for more than a year ; or,

Seventhly. Upon any agreement that is not to be performed within a year ;

Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent ; but the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence.

2. Any writing to which the person making it shall affix a scroll by way of seal, shall be of the same force as if it were actually sealed.

WEST VIRGINIA. REVISED STATUTES.

CHAPTER 95.

Same as in Virginia except that subdivision 2 as to seals is not embraced therein.

WISCONSIN. REVISED STATUTES, 1878.

TITLE 22. CHAPTER CIV.

SECTION 2302. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent, thereunto authorized by writing.

SECTION 2303. The preceding section shall not be construed to affect in any manner the power of a testator, in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law.

SECTION 2304. Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in

lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made, or by his lawfully authorized agent.

SECTION 2305. Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements, in cases of part performance of such agreements.

CHAPTER CV.

SECTION 2307. In the following case every agreement shall be void, unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged therewith :

1. Every agreement that by its terms is not to be performed within one year from the making thereof.

2. Every special promise to answer for the debt, default or mis-carriage of another person.

3. Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.

SECTION 2308. Every contract for the sale of any goods, chattels or things in action, for the price of fifty dollars or more, shall be void, unless :

1. A note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith ; or

2. Unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action ; or

3. Unless the buyer shall, at the time, pay some part of the purchase money.

SECTION 2309. Whenever goods shall be sold at public auction, and the auctioneer shall, at the time of sale, enter in a sale book a memorandum specifying the nature and price of the property sold, the terms of the sale, the name of the purchaser, and the name of the person for whose account the sale is made, such memorandum shall be deemed a note of the contract of sale, within the meaning of the last section.

CHAPTER CVI.

SECTION 2321. Every grant or assignment of any existing trust in lands, goods or things in action, unless the same shall be in writing, subscribed by the party making the same, or by his agent lawfully authorized, shall be void.

SECTION 2327. Every instrument required under any of the provisions of this title to be subscribed by any party, may be subscribed by the agent of such party lawfully authorized thereto.

WYOMING. COMPILED LAWS, 1876.

CHAP. 57.

SECTION 1. In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith :

First. Every agreement that by its terms is not to be performed within one year from the making thereof ;

Second. Every special promise to answer for the debt, default or miscarriage of another person ;

Third. Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry, and no action shall be brought to charge any person upon any breach of promise of marriage, either upon mutual promises or promise in writing, unless such action shall be brought within one year after the making of such promise ;

Fourth. Every special promise by an executor or administrator, to answer any demand out of his own estate ;

Fifth. Every agreement or contract for the sale of real estate, or the lease thereof, for more than one year.

SEC. 2. Every contract for the sale of any goods, chattels or things in action, for the price of fifty dollars or more, shall be void, unless :

First, a note or memorandum of such contract be made in writing, and be subscribed by the party to be charged thereby, or, *second*, unless the buyer shall accept and receive part of such goods, or the evidences or some of them, of such things in action or, *third*, unless the buyer shall, at the time, pay some part of the purchase money.

SEC. 3. To charge any person upon, or by reason of, a representation or assurance concerning the character, conduct, credit, ability, trade or dealings of another, to the intent or purpose that such other may obtain thereby credit, money, or goods.

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